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**A COMPARATIVE STUDY ON THE SELLER'S
LIABILITY FOR NON-CONFORMING GOODS
UNDER CISG, ENGLISH LAW, EUROPEAN LAW
AND KOREAN LAW**

by

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**SCHOOL OF LAW
UNIVERSITY OF WARWICK**

**A THESIS SUBMITTED IN FULFILMENT OF THE DEGREE OF DOCTOR
OF PHILOSOPHY REQUIREMENT OF THE UNIVERISTY OF WARWICK,
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DECLARATION

I, the undersigned, Byung-Mun Lee, hereby declare that the work contained in this thesis is my own original work and where other sources have been consulted, the same have been duly acknowledged.

It is being submitted for the degree of Doctor of Philosophy (Ph.D.) at the University of Warwick in Coventry, England. It has not been submitted before for any degree of examination in any other university.

Signature

Date

ABBREVIATIONS

A.C.; App. Cas.	Appeal Cases (Law Reports)
All. ER.	All England Law Reports
Am.J. Comp. L	American Journal of Comparative Law
Ariz.J. Int'l & Comp.L.	Arizona Journal of International and Comparative law
B. & C.	Barnewall and Cresswell King's Bench Reports
B. & S.	Best and Smith's Queen's Bench Reports
Build. L.R.; B.L.R.	Building Law Reports
CA	Cour d'appel (Court of Appeal: France)
C.B.	Common Bench Reports (by Manning)
C.C.L.R.	Consumer Credit Law Reports
C.de D.	Cahiers de Droit
Ch.; Ch.D.	Chancery Division (Law Reports)
Ch. App.	Chancery Appeal Cases (Law Reports)
CISG	U.N. Convention on Contracts for the International Sale of Goods (1980)
C.L.J.	Cambridge Law Journal
CLOUT	Case Laws on UNCITRAL Texts
C.L.R.	Commonwealth Law Reports
Colum.L.Rev.	Columbia Law Review
Com. Cas.	Commercial Cases
Const. L.R.	Construction Law Reports
C.P.D.	Common Pleas Division (Law Reports)
D.L.R.	Dominion Law Reports
Econ.J.	Economic Journal
Eng Rep; ER	English Reports
Eur.Rev.of Private Law	European Review of Private Law
Ex.	Exchequer Division (Law Reports)
Flor.D.	Florentinus Digesta
F.S.R.	Fleet Street Reports
Gai.D.	Gaius Digesta
Harv.L.Rev.	Harvard Law Review
Hofstra L.Rev.	Hofstra Law Review
HLC	House of Lords Cases (Clark)
HLP	House of Lords Paper

Insolv. L.	Insolvency Law
Int'l Bus.L J.	International Business Law Journal
I.C.C.L.R.	International Company and Commercial Law Review
Israel L.Rev.	Israel Law Review
J.B.L.	Journal of Business Law
J.L. & Com.	Journal of Law and Commerce
J. of Law and Economics	Journal of Law & Economics
J. Legal Stud.	Journal of Legal Studies
J.Marshall L.Rev,	John Marshall Law Review
KARST	Korean Act on Regulation of Standard Terms
K.B.	King's Bench Division (Law Reports)
KCC	Korean Civil Code
KCCP	Korean Code of Civil Procedure
KCmC	Korean Commercial Code
LG	Landgericht (Regional Court: Germany)
L.J.K.B.	Law Journal Reports, King's Bench
Lloyd's Rep; LILR	Lloyd's Law Reports
L.M.C.L.Q.	Lloyds Maritime and Commercial Law Quarterly
Lou. L. Rev.	Louisiana Law Review
Loy.L.A.L.Rev.	Loyola University of Los Angeles Law Review
L.Q.R.	Law Quarterly Review
L.R.C.P.	Common Pleas Cases (Law Reports)
L.R.H.L.	Law Reports, House of Lords, English & Irish Appeals
L.T.	Law Times Reports
Marci.D.	Marcianus Digesta
Maryland L. R.	Maryland Law Review
M. & W.	Meeson and Welsby's Exchequer Reports
M.L.R.	Modern Law Review
Mich. L. R.	Michigan Law Review
N.Irel.Leg.Q.	Northern Ireland Legal Quarterly
NLJ	New Law Journal
Nw.J.Int.Law & Bus.	Northwestern Journal of International Law and Business
Nw.U.L.Rev.	Northwestern University Law Review
O.J.L.S.	Oxford Journal of Legal Study
OLG	Oberlandesgericht (Court of Appeal: Germany)
P.C.C.	Palmer's Company Cases
Pomp.D.	Pomponius Digesta

Pr. Locarno-C.	Pretore della giurisdizione di Locarno Campagna
Pub. Interest.	The Public Interest
Q.B.; QBD	Queen's Bench Division (Law Reports)
Rand J.Econ.	The Rand Journal of Economics
Rb	Arrondissementsrechtbank (Regional Court: Netherlands)
Rev.Ghana L.	Review of Ghana law
R.T.R.	Road Traffic Reports
S.C.	Session Cases (Scotland)
SGA	Sale of Goods Act 1979
Sim. & St.	Simon and Stuart's Vice Chancellor's Reports
S.L.T.	Scots Law Times
Temple Int'l & Com.L.J.	Temple International and Comparative Law Journal
Tex. Int'l L.J.	Texas International Law Journal
T.L.R.	Trading Law Reports
Tr.Law.	Trading Law & Trading Law Reports
Tulane L.Rev.	Tulane Law Review
U.Chi L.Rev.	University of Chicago Law Review
U.Colo.L.Rev,	University of Colorado Law Review
UCTA	Unfair Contract Terms Act 1977
Ulp.D.	Ulpianus Digesta
U.Pitt.L.Rev.	University of Pittsburgh Law Review
U.Toronto L.J.	University of Toronto Law Journal
Va.L.Rev.	Virginia Law Review
Ves.	Vesey Junior's Chancery reports
W.&M. L.Rev.	William and Mary Law Review
W.L.R.	Weekly Law Reports
W.N.	Weekly Notes (1917-1953)
W.W.R.	Western Weekly Law Reports
Yale J.Int'l L.	The Yale Journal of International Law
Yale L.J.	Yale Law Journal

ABSTRACT

This thesis is a comparative and analytical study which comprises of an analysis of the rules of the seller's liability for non-conforming goods of four legal systems; Korean law, English law, the U.N. Convention on Contracts for the International Sale of Goods (1980) and the E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees.

The purpose of this study is to ask whether there is any need to introduce a unified liability system into Korean law and how to achieve the system under the existing law in order to overcome all the complexities caused by the separate existence of the general liability for non-performance and the seller's guarantee liability. A further purpose is to investigate how effectively the rules of the seller's liability for non-conforming goods protect the reasonable expectations of the parties; in particular, the interests of consumers and private sellers which are distinguished from those of commercial buyers and business sellers, respectively, and where the issue is not directly related to the particular interests of consumers or private sellers, the common interests of all the parties.

The study is conducted by an internal evaluation within the boundaries of law in a legal context and an external evaluation in light of 'efficiency' as used by economists. It shows, first, that Korean law needs a unified liability system which is based on a contract to resolve the problems originating in the distinction between the general liability as a contractual liability and the seller's guarantee liability as a legal liability. Second, achieving a genuine unified liability system requires one's interpretation that rescission and damages in the seller's guarantee liability should be as they are in the general liability. This would settle other problems inherent in the casuistic distinction between the general liability as a fault liability and the seller's guarantee liability as no-fault liability and its consequences in interpreting damages under the seller's guarantee liability. Finally, in what aspects of the seller's liability for non-conforming goods each jurisdiction fails to reflect the interests of consumers and private sellers, and the common interests of all the parties.

I. Introduction

1. The scope of study

This thesis is a comparative and analytical study which comprises of the analysis of the rules of four legal systems, namely, Korean law, English law, the U.N. Convention on Contracts for the International Sale of Goods (1980) (*hereinafter* CISG) and the E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees (*hereinafter* the Directive).¹ It is mainly concerned with the rules as to the seller's liability for the delivery of non-conforming goods. There are various aspects of non-conformity, for instance, non-conformity in quality, quantity and title. In addition, it may also broadly include the seller's non-conforming delivery in terms of time and place. Of the aspects of non-conformity, the seller's delivery of non-conforming goods in quality and quantity is given special emphasis in this thesis. In addition, the study deals with the rules as to the control of the exclusion or limitation clauses of the seller's liability for non-conforming goods in standard form contracts. The rules as to the seller's liability for non-conformity in quality and quantity will be examined in the order of: the liability system in general; the nature, requirements, and effects of the seller's liability; and the validity of exclusion or limitations of the seller's liability in standard form contracts.

2. The background and purpose of study

In general, the Korean Civil Code (*hereinafter* KCC) imposes on the seller two liabilities: a general liability for non-performance (*chae-moo-bul-e-haeng-chaek-im*) and the seller's guarantee liability for defective goods (*ha-ja-dam-bo-chaek-im*). First, the general liability for non-performance, which is applied to all the contracts including sales contracts, is based on the fault principle. This liability is divided into three categories according to the type of non-

performance: delay in performance (e-haeng-ji-chae),² impossibility of performance (e-haeng-bul-neung),³ or incomplete performance (positive breach of contract; bul-wan-jeon-e-haeng or Jeok-kuk-jeok-chae-kwon-chim-hae).⁴ Second, the seller's guarantee liability,⁵ which is applied to a defect in quality, quantity or title, can be raised irrespective of the fault principle. This liability exists separately from the general liability for non-performance. Therefore, it is said that the seller takes on dual liability, comprising of the general liability for non-performance and the seller's guarantee liability.

The dual liability system in Korea, on the one hand, has benefits in that this system controls efficiently various legal problems arising from sales contracts. This is due to the role of the seller's guarantee liability for defective goods which is applied only to sales contracts, complementing the general liability for non-performance which is applied to all other contracts. On the other hand, this dual liability system causes some complexities owing to the separate regimes, raising the problems of application as to which liability arises. On some occasions, the complexities involve the problem of co-existence of two liabilities in one breach of contract. In addition, in relation to the substance of the liability system, the complexities occur not only in the requirements of the seller's guarantee liability, but also in the effects of the seller's guarantee liability when one tries to distinguish it from the general liability for non-performance. For instance, the provisions applicable to damages or rescission as an effect of a breach of the seller's guarantee liability apply *mutatis mutandis* to the provisions for the effects of breach of the general liability for non-performance. There are many difficulties in applying them correspondingly since the general liability for non-performance is quite different from the seller's guarantee liability for defective goods in its nature and contents; for instance, the

¹ 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 (1999) O.J.L171/12, 7 July 1999.

² KCC Arts. 387, 392, 395, 544.

³ KCC Arts. 390, 546.

⁴ This category is recognised by cases and scholars.

⁵ KCC Arts. 570 ff.

requirement of fault, the rationale of liability and *etc.* Academic theories have tried to solve the problems caused by the complexities, producing different results in practice. However, the fact that there has been no satisfactory theory which most people can agree on for 43 years since the legislation of KCC draws our attention to the question of whether this liability system is still plausible or not. Besides, one must note that a proposal for a further step forward to a unified liability system in Germany, which is representative of the civil law systems which influenced Korean law in many aspects, was affected by CISG.⁶ It is also noticeable that, like CISG, other developed legal frame works such as in English law take the unified liability system which is based on the use of the unitary concept of breach of contract.⁷

Furthermore, the fact that the previous studies in this area have been limited to the study of theory for its own sake is enough for us to re-examine the seller's guarantee liability system in light of its practical purpose in contract law.⁸ That is, it is time to investigate whether the law has served the purpose of properly accommodating the different interests of the parties, for example, of consumer and commercial buyers and of private and business sellers, in the area of the seller's guarantee liability, thus overcoming the limitation of the previous studies. The different interests are varied in that, for example, the interests of a consumer in using⁹ one particular remedy as opposed to another may be different from those of a commercial buyer,¹⁰

⁶ *Abschlußbericht der Kommission zur überarbeitung des Schuldrechts, hrsg. von Bundesminister der Justiz* (1992).

⁷ The unified contractual approach to the parties' duties is implemented by the unified system of remedies for breach without the requirement of fault. The unified set of remedies applies when one party fails to deliver goods that are not in conformity with the contract of sale. Therefore, regarding the seller's guarantee liability for defective goods under KCC, CISG, English law and the Directive embrace the concept of the seller's guarantee liability into a unified contractual liability by providing the seller's duty to deliver the goods conforming to the contract.

⁸ The studies have mainly focused on the theories on the nature and the effects of the seller's guarantee liability for defective goods.

⁹ Or the interest of consumer in resisting the use of a particular remedy.

¹⁰ That is, *e.g.*, while a commercial buyer may prefer damages or repair to rescission, a consumer may often insist to claim rescission or replacement rather than damages or repair remedies because his expectation in most cases is to get defect free goods in his actual hands.

and the interests of a private seller in the extent of liability for non-conforming goods may not be treated same as those of a commercial seller. In addition, even if the issue is not directly related to the particular interests of consumers or private sellers as opposed to those of commercial buyers or sellers, it should be generally examined whether the law effectively reflects the common interests of all the parties. Therefore, one is overall required to examine whether the existing law properly complies with its underlying policy of protecting the reasonable expectations of the parties¹¹ in the matters of the liability system, the requirements and the effects of the seller's guarantee liability, in particular, in the context of consumer transactions. In addition, as to the exclusion or limitation clauses of the seller's guarantee liability in contracts to adhesion, there is a need to examine whether Korean law has effectively responded to the demand of fairness, protecting the reasonable expectations of consumers. The reason for that is that the policy of freedom of contract under KCC¹² is often used as a free ticket for unscrupulous business sellers to take unfair advantage of consumers who can be hardly equal to commercial buyers in terms of knowledge or sophistication. The necessity of this study becomes more apparent when one looks at other developed laws; particularly, in English law which currently provides rules which distinguish consumer sales and commercial sales,¹³ and the Directive which introduces the seller's legal guarantee for the delivery of conforming goods.

Having set out the background of this study, the purposes underlying the thesis are twofold. The first is to ask whether there is any need to introduce the unified liability system into Korean law and, if there is such a need, to show how to achieve the unified liability system under the existing law in order to overcome all the complexities caused by the separate existence of the general liability for non-performance and the seller's guarantee liability. The second is to

¹¹ There is no specific provision under KCC for this policy, but it is generally assumed by scholars and cases without doubt.

¹² KCC Art. 105.

¹³ The Sale and Supply of Goods Act 1994; The Unfair Contract Terms Act 1977; The Unfair Terms in Consumer Contracts Regulations 1999.

investigate how effectively the relevant rules as to the seller's liability for non-conforming goods protect the reasonable expectations of the parties; it asks in particular whether they reflect the different interests of consumer and commercial buyers as well as those of private and business sellers. If an issue is not related to the particular interests of consumers or private sellers, there still remains a general question of if they reflect the common interests of all the parties.

3. The sources of law and a brief sketch of KCC

It can be safely said that Korea is a Civil Law jurisdiction, in that the enacted statutes are recognized as the primary source of the law by which Korean courts are bound. In addition, Korean courts are conscious of interpretations of codes and statutes by law scholars and jurists and in some cases resort to scholarly interpretations as a source of law.¹⁴ Judicial decisions *per se* do not have legal authority as precedents to a later case of similar nature.¹⁵ The law in Korea is rather articulated and codified so that, at least in the abstract, the doctrine of '*stare decisis*' is not recognized with respect to judicial decisions. However, it does not seem necessarily true that the judicial decisions do not play any role in Korea. The reason for that is not only because *de facto* influence of a higher court upon a lower court seems considerable,¹⁶ but also because where the codes are not clear, case law sometimes provides an opportunity to evaluate the merits of different views and contributes to the assessment of the strengths and weaknesses of competing visions of the law.¹⁷

KCC was enacted in 1958 and took effect on January 1, 1960. It is usually said that KCC was

¹⁴ Schlesinger *et al.*, *Comparative Law*, (1987), at 644.

¹⁵ Korean Supreme Court, *Judicial System of Korea*, (1991), at 20.

¹⁶ One must note that where a decision of a lower court in a subsequent case is not consistent with that of a higher court, it is very likely to be reversed on appeal. An interpretation of law in the supreme court in a particular case is treated as the source of binding authority by the lower courts when that case is remanded to them. Jae-yeol Kwon, "An Isolation in Systems of Law: Differences Between the Commercial Codes of the United States and Korea", (1996) *Loy.L.A.L.Rev.* 1095, at 1100.

¹⁷ *Id.*

influenced in its enactment by the French Civil Code and the German Civil Code whose origins can be traced to Roman law. In addition, the influence of the Japanese Civil Code¹⁸ seemed to be inevitable since Korea was forcibly annexed into Japan's growing colonial empire from 1910 to 1945.¹⁹ It consists of five books, following the German or pandectist model: "general principles", "law of property", "law of obligation", "law of family", and "law of succession". Of the five books, Book III on "law of obligation" is our main concern. In addition, the concern is also extended to the Korean Commercial Code (*hereinafter* KCmC), which was enacted in 1962, and which deals with commercial sales because this code as a special law prevails over KCC insofar as it overlaps with the latter. KCmC is also composed of five books. Book II, which deals with various commercial transactions, has a chapter on sales, and we must consider this in relation to the rules of the seller's liability for non-conforming goods.

4. The tasks to be undertaken and the methods for the evaluation of the rules as to the seller's liability for non-conforming goods

4.1. The tasks to be undertaken

In order to achieve the purposes of the study, the thesis sets two tasks. The first task is to execute a comparative study, in detail, of the rules as to the seller's liability for non-conforming goods of four legal systems; Korean law, English law, CISG and the Directive. In the comparative study, an attempt will be made to highlight differences and similarities between the four jurisdictions and to identify if there is any gap in one jurisdiction compared to another. The second task is to evaluate the significance of any similarities, differences and gaps found in the first stage. In this task, two questions are posed as to which jurisdiction is better where the study finds differences and whether a gap in the provisions of one system can be usefully filled by a rule from one of the other systems. The evaluations are carried out in light of the ultimate

¹⁸ For the history of Japanese law, see Oda, *Japanese Law*, (1999), at 12 ff.

¹⁹ Ki-baik Lee, (Eng. trans. by Wagner & Schultz), *A New History of Korea*, (1984), at 290 ff.

purpose of the study to decide whether it is necessary to introduce the unified liability system in Korean law and to what extent the rules of each jurisdiction as to the seller's liability for non-conforming goods and those as to the control of the exclusion and limitation clause of the liability in standard form contracts has responded to protect the reasonable expectations of the parties.

4.2. The evaluation methods

4.2.1. Internal evaluation

This is an evaluation that is conducted within the boundary of law in a sense that it is not intended to be connected with any other disciplines and it is executed in a legal context. It is, in particular, an evaluation in terms of the discipline of comparative law which asks whether a solution from another jurisdiction would facilitate the systematic development and reform of one's own jurisdiction.²⁰ The evaluation is brought in, first, where a comparison shows a gap in a jurisdiction in a particular topic which is covered in another jurisdiction, second, where it finds that the position in a jurisdiction for a legal matter is unclear, and third, where it reveals that the position in a jurisdiction for a legal issue is clear, but is different to that in another jurisdiction.

In relation to the first case, an attempt at evaluation will be made in terms of whether a rule in a jurisdiction governing a legal matter could be utilised as a guideline to fill the gap in another jurisdiction that does not cover the matter in light of the practicability and appropriateness of the rule to control the matter. As to the second case, an evaluation of the issues of unclearness in a jurisdiction may be carried out on the basis of whether the clear position in another jurisdiction would provide any aid for the former to clarify its unclearness. The matter of

²⁰ Cf. For the functions, aims and methods of comparative law, see De Cruz, *Comparative Law in a Changing World*, (1999), at 18 ff, 213 ff.; Zweigert and Kötz, *An Introduction to Comparative Law*, 2nd ed. (Eng. Trans by Tony Weir), (1992), at 13 ff., 28 ff. For a further study of the methodology, see

dissimilarity in the third case can be evaluated by inquiring how the problems inherent in a jurisdiction are exposed in light of another jurisdiction and whether the problems are properly resolved in the latter jurisdiction, and *vice versa*. Thus, an evaluation will begin with highlighting what problems a jurisdiction has suffered by not following an approach taken in another jurisdiction and then it will attempt to see if the approach can provide some idea as a suggestion of how to settle these problems. We must bear in mind that when we attempt to evaluate the position in one jurisdiction as against another, the primary purpose of this thesis is to decide whether it is desirable to introduce the unified liability system in Korean law and how effectively each jurisdiction protects the reasonable expectations of the parties.

In addition, an evaluation will be also made in light of the reasonable expectations of the parties in some cases where a comparison shows similarities because the finding of similarities does not necessarily mean that the expectations are properly protected.

4.2.2. External evaluation

4.2.2.1. Efficiency in general

This is an evaluation of the law in terms of ‘efficiency’ in the specialised sense in which that term is used by economists. Efficiency in the economics context is used to mean the allocation of resources that maximises value, where value is human satisfaction as measured by the aggregate willingness of the party to pay for goods or services.²¹ Through the process of voluntary exchange, any exchange of goods or resources which create mutually advantageous transactions will continue to occur between buyers and sellers in an existing or hypothetical

Markesinis, *Foreign Law and Comparative Methodology: a Subject and a Thesis*, (1997).

²¹ Posner, *The Economics of Justice*, (1981), at 60 ff. He then concludes that efficiency demands the maximization of value as measured in dollar amounts by the process of exchange through an existing or hypothetical market system. Value is synonymous with wealth, and value maximization refers to wealth maximization. The wealth of society includes not only the market value in the sense of price times quantity of all goods and services produced in it, but also the total consumer and producer surplus

competitive market system as long as transactions increase the wealth of at least one party without reducing the wealth of another party or until potential gains from the transactions are no higher than costs.²² All contracting parties are basically said to be the best judges of their own interests and to act rationally, maximizing their utility or satisfaction within the constraints of their economic resources.²³ One must note that one of the fundamental conditions for the optimal operation of a competitive market is that all the parties in the market, as the best judge of their self-interest, have perfect information about the nature and value of the goods traded.²⁴ As each transaction will leave each party better off, there will be an overall increase in the wealth of society as a whole,²⁵ which conveniently disregards possible third parties effects.²⁶

generated by those goods and services. *Id.*

²² When a position has been reached in which it is impossible to exchange goods further without lowering the wealth of one party, the resulting allocation of goods is called the ‘Pareto-efficient allocation’, named after the Italian economist Vifredo Pareto. See Polinsky, *An Introduction to Law and Economics*, (1983), at 7.

²³ Posner, *Economic Analysis of Law*, (1998), at 3 f.

²⁴ In addition to all the parties having perfect information, there are 4 more conditions for the optimal operation of the market as follows; first, all the costs of producing goods are borne by the producer and all the benefits of goods accrue to the consumer, that is to say, there are no externalities, second, there are numerous buyers and sellers in the market, so that the activities of any one contracting party will have only minimal impact on the output or price in the market, third, there is free entry into and exit from the market, fourth, the goods sold in the market is homogeneous, that is, essentially the same product is sold by each seller in the particular market. Ramsay, United Kingdom Office of Fair Trading, *Rationales for Intervention in the Consumer Marketplace*, (1984), at 15 f.

²⁵ Posner, *supra* n. 21, at 88 ff.; Beale, *Remedies for Breach of Contract*, (1980), at 11. To this normative judgment that society is better off, there can be at least two objections. First, this view does not say anything about the existing distribution of wealth and income. The distribution of wealth and income is crucial in a sense that if the distribution is a very unequal, demand price does not reflect the relative urgency of the needs of different persons, and the allocation of resources determined by the demand price offered for consumers’ goods is far from attaining the maximum of social welfare for while some are starving others are allowed to indulge in luxury. See Thurow, “Toward a Definition of Economic Justice”, (1973) 31 *Pub. Interest* 56, at 57. See also Posner, *supra* n. 23, at 15 (admitting the limitation of efficiency analysis in economics terms, which does not answer the question whether the existing distribution of income and wealth is good or bad and whether an efficient allocation of resources would be socially or ethically desirable). Second, this view assumes that interpersonal comparisons of

The optimal operation of a competitive market may continue by its own control without any legal enforcement, but the law is necessary to make the parties' voluntary agreements, which are not to be completed instantaneously, to be more reliable because it may reduce the danger that one party will default to the cost of the other.²⁷ Thus, the reliability produced by the legal enforcement of agreements may make exchanges less risky so that it may encourage exchange and cooperation among people in an optimal way of enhancing economic efficiency.²⁸ Suppose that A offers to sell a pair of shoes for \$50 and his competitor, B, offers one for \$55 with a

welfare are possible, with individuals' welfare functions being assigned numerical weight and aggregated, in which wealth is being substituted for the traditional notion of utility. It is, however, difficult to compare the values and desires of different human beings. It is inherently impossible to measure individual welfare or utility unless one makes an essentially ethical judgment in selecting wealth as the measure of utility. See Mansfield, *Microeconomics*, (1982), at 439 f. Even if an ethical judgment has been made, there remain some problems in those situations in which wealth maximization cannot be established with reasonable certainty or in which the utility of a contract cannot be measured solely in dollar terms; for instance, there is no market place to be used for awarding damages, and it is difficult to quantify the utility of a contract in dollar terms if the utility arises from a sense of victory or if the contract serves to promote qualities like trust or honesty.

²⁶ However, in the real world most transactions have effects on third parties. Therefore, as an alternative, 'Kaldor-Hicks efficiency' has been devised in a sense that a change from one situation to another is efficient if it is possible afterwards for those who gain from the change to be better off even after they fully compensate the third parties, regardless of whether any actual compensation takes place. See Kaldor, "Welfare Propositions of Economics and Interpersonal Comparisons of Utility", (1939) 49 *Econ. J.* 549, at 550; Hicks, "The Foundations of Welfare Economics", (1939) 49 *Econ. J.* 696, at 711; Posner, "The Ethical and Political Basis of Efficiency Norm in Common Law Adjudication", (1980) 8 *Hofstra L. Rev.* 487, at 491 ff. This analysis of efficiency reduces to a cost-benefit analysis that compares changes in situations. It asks, in a separate and isolated event basis, whether a change increases value measured in dollar terms rather than whether it maximizes value. By proving the increase of value in individual cases, it is said that efficient changes have been generated in society as a whole. Seita, "Uncertainty and Contract Law", (1984) 46 *U. Pitt. L. Rev.* 75, at 99 ff.

²⁷ Posner, *supra* n. 23, at 101 ff.; Beale, *supra* n. 25, at 11 f.; Harris, *Remedies in Contract and Tort*, (1988), at 8 f.; Cooter & Ulen, *Law and Economics*, (1997), at 167 ff.

²⁸ It does not necessarily mean that without any legal enforcement the optimal operation of market would break down completely because there are contracts in societies that have no formal legal enforcement machinery, for instance, commercial reputation will threaten the party in breach by the loss of customers in the future. Posner, *id.*, at 102 f.; Beale, *id.*, at 12.

genuine guarantee that they will last three times as long as B's shoes. The difference in durability is not apparent on the consumer's casual inspection. Consumers may be willing to pay B extra for the guarantee if they can recover compensation where the shoes do not last as guaranteed. However, even if economic efficiency requires B's shoes with the guarantee to be purchased, consumers may be reluctant to purchase B's shoes if the law fails to provide the compensation because they may doubt the honesty of the guarantee.

In addition to a function of the law to make contracts more reliable, it may assist the parties to minimise transaction costs through providing a set of standard terms to cover the contingencies for which the parties have made no provision and through imposing the solution that they would have reached without the need to negotiate where a dispute about the contract arises between them.²⁹ The reason is that, unlike economists' assumption of the ideal world of contracts, in reality there is hardly ever a wholly complete contingent contract which exhaustively specifies all the parties' rights and obligations in every possible situation and provides a set of procedures and penalties to deal with every possible default of contract. The barriers to the ideally made complete contingent contract are, for instance, that it would be too costly to negotiate an agreement on how it should be dealt with and enforced because the parties are constrained by time and may have insufficient information, that is, there are always positive transaction costs.³⁰ The same is also true in their attempts to negotiate a settlement where a dispute about the contract arises.

On the assumption of the parties being rational maximizers of their self-interest, the efficiency of the law as to the seller's liability for non-conforming goods may be measured by analysing the extent to which the rules serve the goal of reducing the negotiation costs through providing a set of default terms, and through imposing an efficient solution which may assist value maximising exchange where disputes arise.³¹

²⁹ Posner, *id.*, at 104 ff.; Beale, *id.*, at 12 ff. Cf. Cooter & Ulen, *supra* n. 27, at 172 ff.

³⁰ Cooter & Ulen, *id.*, at 180 ff.; Beale, *id.*, at 12 f.; Harris, *supra* n. 27, at 9 f.

³¹ Cooter & Ulen, *id.*, at 167 ff.; Beale, *id.*, at 11 ff.; Posner, *supra* n. 23, at 101 ff.; Priest, "Breach and

In relation to the primary function of the law of providing a set of default terms to cover the contingencies for which the contracting parties have not made provisions,³² it may be measured by the question of whether the rules regarding the seller's liability for non-conforming goods which allocate various risks reflect the preferences of the contracting parties, *i.e.*, what would have been mutually agreed between the contracting parties had they decided to negotiate for the contingency.³³ The closer the default terms for the seller's liability for non-conforming goods provided by the law are to the preferences of the contracting parties, the more the transaction costs should be reduced because if the default terms do not correspond to the preferences of the parties, the parties may incur more costs to contract out of the terms.³⁴

Another question to be asked is closely related to the above question about the reflection of the parties' preference. It concerns unforeseen risks. The question is whether the rules as to the seller's liability for non-conforming goods effectively allocate the unforeseen risks to the party who is the better risk bearer, that is, the party who could better prevent the risk from occurring,

Remedy for the Tender of Non-Conforming Goods under the Uniform Commercial Code: An Economic Approach", (1978) 91 *Harv. L. Rev.* 960, at 961 f.

³² There are two types of contingency closely related, which are unforeseen and unprovided for contingencies. See Posner, *id.*, at 105; Cooter & Ulen, *id.*, at 180 f.

³³ Posner, *id.*, at 104 f.; Priest, *supra* n. 31, at 962; Cooter & Ulen, *id.*, at 181 ff.; Posner & Rosenfield, "Impossibility and Related Doctrines in Contract Law: An Economic Analysis", (1977) 6 *J. Legal Stud.* 83, at 89 ff.; Harris, *supra* n. 27, at 9 f. However, a contrary view has been presented in a way that even if the parties have not failed to reach agreement on the contingency due to shortage of time or resources, there is possibility that they simply do not wish to enter into such detailed specification for fear of failure to reach agreement. See Johnston, "Strategic Bargaining and the Economic Theory of Contract Default Rules", (1990) 100 *Yale L. J.* 615; Collins, *The Law of Contract*, (1997), at 223.

³⁴ In addition, if the law precludes a contrary agreement, the parties may adjust other contractual terms to compensate for their inability to minimize costs. Such adjustments may require negotiation and consequently raise the cost of making a contract. See Posner, *supra* n. 23, at 108; Beale, *supra* n. 25, at 12. Cf. Collins, *id.*, at 227; Beale, *id.*, at 14. (arguing that it is far from clear that the parties in the market deliberately avail themselves of the opportunity to save transaction costs). Yet, it can be argued that even if the parties would not avail themselves of the opportunity, transaction costs can be saved one day by the role of the law to routinise its rules in contract.

or who could better insure against a realized risk.³⁵ As rational maximizers of their self interest, the contracting parties have mutual interest in minimizing the cost of performance because the larger the joint profit is, the more each party is likely to gain.³⁶

A further question is whether the rules of the seller's liability for non-conforming goods are clear to the parties since clarity is very important in the following aspects.³⁷ First, it will prevent inefficiencies caused by the uncertainty of liability.³⁸ Second, it will reduce the need for the contracting parties to incur transaction costs in an attempt to reduce uncertainty.³⁹ Third, it will reduce the likelihood that litigation will occur as a result of uncertainty about the possible outcome at trial.⁴⁰

As to another function of the rules to assist value maximising exchange by providing an efficient solution where disputes arise, it is generally said that the law affects the costs of dispute settlements arising after the contract is concluded.⁴¹ The measurement of the efficiency of the rules of dispute settlement in the event of the seller's delivery of non-conforming goods is to ask the question of how the rules encourage the most efficient result by imposing the solution which minimizes joint costs in a way that the contracting parties, as rational maximizers of their interests, would have resolved it had they negotiated between them.⁴² In turn the minimizing of the costs of negotiating a resolution to the dispute will increase the joint value of the contract.

Lastly, a question in respect of this function is whether the legal resolution of the dispute helps

³⁵ Posner, *supra* n. 23, at 105 ff.; Harris, *supra* n. 27, at 11 f.; Cooter & Ulen, *supra* n. 27, at 184; Posner & Rosenfield, *supra* n. 33, at 90 f.

³⁶ Posner, *supra* n. 23, at 105.

³⁷ Note, "Risk of Loss in Commercial Transactions: Efficiency Thrown into the Breach", (1979) 65 *Va. L. Rev.* 557, at 558 f.

³⁸ *Id.* For instance, there is the possibility that both parties will carry insurance against the same event at the same time due to the unclarity of the law.

³⁹ *Id.*

⁴⁰ *Id.* See also Priest, *supra* n. 31, at 967 (maintaining that the parties' expenditure in attempts to gain distributional benefits will be reduced by making the rules certain in application)

⁴¹ Priest, *id.*, at 962. See generally Posner, "An Economic Approach to Legal Procedure and Judicial Administration", (1973) 2 *J. Legal Stud.* 399, at 419.

to provide clarity since, for the same reasons as above in relation to the primary function of the law of providing a set of default terms, uncertain rules will increase the costs of negotiating a settlement.⁴³

4.2.2.2. Efficiency in consumer context

All the above tests rendered in terms of efficiency could be correspondingly applicable to consumer sales under the conditions for the optimal operation of a competitive market,⁴⁴ in particular, ‘all the parties in the market have perfect information about the nature and value of the goods traded’. However, there are additional points to be examined in consumer contexts. That is, a number of potential market failures exist in a way of deterring the optimal operation of a competitive market in consumer markets.⁴⁵ Among other things,⁴⁶ two kinds of market failure which may cause economic loss to consumers need to be taken into account.⁴⁷ First, compared to merchant sellers, consumers may often lack adequate information on the reliability, durability and running costs of the goods, and consumers may often be ignorant of the exact nature of their post-purchase rights, the relative rights and responsibilities of buyer and seller, and other terms of contract including the exclusion or limitation clauses of the seller’s

⁴² Priest, *id.*; Beale, *supra* n. 25, at 13.

⁴³ Priest, *id.*

⁴⁴ See *supra* n. 24 and accompanying texts.

⁴⁵ The economic rationale for regulating contracts resembles the economic rationale for regulating markets. It begins with a description of a perfectly competitive market, which requires no regulation. Next the theory describes the ways that actual markets depart from this ideal and then show suggestions to remove barriers to a competitive market. The ensuing discussion depends on this approach. The assumptions of market failure analysis are as follows; first, an unregulated perfectly competitive market will achieve an efficient allocation of resources, second, market intervention by government is only justified to remove barriers to the smooth operation of markets or to achieve important public objectives. Ramsay, *supra* n. 24, at 22.

⁴⁶ First, there may be a lack of competition (monopoly, oligopoly), second, there may be barriers to entry, third, there may be problems with product differentiation where there are qualitative differences within a product market (and thus a lack of product homogeneity), fourth, there may be third party effects which are not costed in the market price, *i.e.*, externalities. Ramsay, *id.*, at 15 f.

liability.⁴⁸ Second, there is the market failure resulting from the high enforcement costs of using the private-law system.⁴⁹ As to the first point, it is mainly attributed to inequality of information gaining power between parties, which do not conform to the conditions for the optimal operation of market, *i.e.*, the perfect information possession by all the parties. Information in relation to price, quality and other terms generally leads buyers to efficient result in their transaction. Without adequate information, consumers may misjudge the costs or benefits of transaction they are contemplating, in turn which may cause inefficient results.⁵⁰ Therefore the efficiency of the law as to the seller's liability for non-conforming goods in consumer sales should be dealt with by the fundamental question of how the law redresses the market failures caused by the information gap between merchant seller and consumer.⁵¹

The first test which analyses the efficiency of the rules as to the seller's liability for non-conforming goods in consumer sales is whether the rules make clear the seller's liability for non-conforming goods and spell out more clearly the situation as to remedies in the event of the

⁴⁷ Ramsay, *id.*, at 22.

⁴⁸ *Id.*

⁴⁹ *Id.* For example, the high costs of the existing legal system, the need for technical expertise, the uncertainty of legal terms in application and *etc.* The problem of the high costs of the existing legal system is not the main concern in this thesis insofar as we are dealing with the substantives of the rules as to the seller's liability for non-conforming goods. It will be rather the need for technical expertise and the uncertainty of legal terms in application which are mainly caused by unequal information.

⁵⁰ For more details about how inequality of information between parties leads to market failure, see generally Ramsay, *supra* n. 24, at para. 4.3. ff. (Imperfect consumer information might result in the following market failures. First, it will lead to misallocation of consumer resources. Second, inferior informational market power will be created to consumer against even small sellers in unconcentrated market. Third, there will be problems of artificial product differentiation due to inequality of the information market power. Fourth, it will lead to informational inefficiency, that is, the inability of consumers to observe product quality characteristics may channel competition in a market towards more easily observed attributes (*e.g.* price), leading a general depression of quality below the level which would operate in a perfectly functioning market). See also Cooter & Ulen, *supra* n. 27, at 188 ff.

⁵¹ There are various ways to redress the information gap as to quality or quantity problems; *e.g.*, labelling, grading systems or information standards (*i.e.* disclosure duty in certain aspects). However, these examples are not our main concern in this thesis mainly dealing with post-purchase information because they are related to pre-purchase information.

delivery of non-conforming goods.⁵² Most consumer cases do not normally proceed to courts and, even if they do, consumers are not certain about the result in court due to their ignorance.⁵³ This fact seems to suggest the importance to consumers of low-cost, routinised redress procedure.⁵⁴ Therefore, it is plausible to say that the clearer the rules are, the more routinized redress procedures are encouraged out of court, lowering the cost of using the private-law system.⁵⁵

The second test is how effectively the law regarding the seller's liability for non-conforming goods protects its efficient default terms from the informed merchant's attempts to exclude those terms.⁵⁶ The efficiency of the rules formulated under the assumption of the parties being fully informed, which allocate risks to superior risk bearer, may be easily undermined when only the superior risk bearer (the merchant seller) is knowledgeable about contract risks because the seller's response to the efficient default terms may well be to undo the terms.⁵⁷ This inefficient situation is caused by the facts that first, information costs may discourage the ignorant consumer from obtaining information about the terms and possible risks in the transaction because their value of a single transaction is relatively small. Second, the information costs to educate all ignorant consumers may also prevent the informed merchant from charging a higher price for assuming a risk. Third, even if the merchant charges more for the risk assuming, the ignorant consumer may fail to understand the reason for the higher price and they will naturally seek a less expensive contract elsewhere.⁵⁸ It may, thus, result in that

⁵² Board of Trade, *Final Report of the Committee on Consumer Protection* (The Molony Committee), Cmnd. 1781/1962, paras. 254, 256.

⁵³ *Id.*

⁵⁴ Ramsay, *Consumer Protection*, (1989), at 420.

⁵⁵ However, market forces such as reputational effects in long-run relations also play an important role to secure the parties' performance as informal devices rather than enforceable rules. Beale, *supra* n. 25, at 12. See also Cooter & Ulen, *supra* n. 27, at 193 ff. (explaining how enduring relationships, as opposed to enforceable contracts, affect parties' behaviour by using the example of the agency game).

⁵⁶ Seita, *supra* n. 26, at 121 f.

⁵⁷ *Id.*

⁵⁸ *Id.*, at 122 f. See also for the reasons why business tends to use harsh terms in standard term contract,

the informed merchant is likely to find it more profitable if he shifts the risk expressly to the ignorant consumer by rewriting the contract, even though the run of ignorant consumers would be better off in paying a premium to avoid bearing the risk.

II. The Liability System in General and The Nature of the Seller's Liability for Non-conforming Goods

1. General remarks

A buyer who enters a sales contract expects a seller to perform as he promised. The buyer may be disappointed because the goods may not be delivered, delivery may be delayed or even if the goods are delivered, they may be defective in terms of quality, quantity or title. The question then arises what forms of relief each legal system will offer the innocent buyer who has been deceived in his expectation that the contract will be properly performed.

The following sections provides a comparative overview of the way the different legal systems address the problems raised in the event the sales contract is not properly performed as expected by the parties in their program. Two fundamental questions are asked; in what way does each legal system generally deal with the cases where the seller does not perform as expected by the buyer (in particular, the seller's delivery of non-conforming goods)? and what is the nature of the seller's liability for non-conforming goods?

2. Comparative accounts

2.1. The dual liability system in Korean law

2.1.1. Dual liabilities

2.1.1.1. General

Traditionally under Korean law, like the other civil laws, the seller's liabilities are provided in a dual manner, *i.e.* the general liability for non-performance and the seller's guarantee liability for defective goods.

The general liability that is applicable to all kinds of contract is divided into three categories:

delay in performance,⁵⁹ impossibility of performance,⁶⁰ and incomplete performance.⁶¹ The categories of non-performance depend on what has happened to the goods rather than on whether the obligation has been broken. Korean law has no comprehensive concept such as ‘breach of contract’ in Anglo-American law, and it does not deal with non-performance in a unitary manner. That is, even though the concept of non-performance is generally applicable where the sales contract is not properly performed as agreed by the parties in their program, the specific independent rules of each category exclusively govern the case.⁶² Therefore, the first question one must ask in the event of non-performance is what kind of non-performance it is, and then under the categorization of non-performance, whether the requirements for the appropriate remedy are satisfied. One of the unique features of Korean law compared to other civil law countries is that while the remedy of damages is specified in one provision which can be applied in any type of non-performance,⁶³ other remedies are separately provided according to the type of non-performance.⁶⁴

In addition the seller is liable under the special regime for the seller’s guarantee liability for

⁵⁹ KCC Arts. 387-389, 392, 395, 544.

⁶⁰ KCC Arts. 390, 546.

⁶¹ This category is not specified in KCC, but recognized by scholars’ theory and cases. See the Korean Supreme Court Case, 28/1/1994, 93 Da 43590.

⁶² Yun-jik Kwak, *Chae-kwon-chong-ron (General Rules in Obligatory Law)*, (1999), at 127 ff. This is a majority view at present in Korea, which is mainly influenced by German law. For the German approach to non-performance, see generally, Markesinis, Lorenz, and Dannemann, *The German Law of Obligations, Volume I: The Law of Contracts and Restitution: A Comparative Introduction*, (1997), at 398 ff., and see also Zweigert and Kötz, *supra* n. 20, at 524 ff.; Horn, Kötz, and Leser, *German Private and Commercial Law: An Introduction*, (1982), at 93 ff. In German law, impossibility of performance is provided under BGB §§280-283 and delay in performance is under BGB §284.

⁶³ KCC Art. 390 (Non-performance of Obligations and Claim for Damages) “If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may claim damages; but this shall not...”. Cf. Notwithstanding the overwhelming influence of German law, this provision is rather similar to French law (Code Civil Arts. 1142, 1146, 1147).

⁶⁴ *E.g.*, KCC Arts. 544 (Delay and Rescission), 546 (Impossibility and Rescission), 389 (Specific performance), and *etc.*

defective goods.⁶⁵ This does not only deal with defects in title of the goods but also defects in quality and quantity.

2.1.1.2. Non-performance

2.1.1.2.1. Impossibility of performance

Impossibility of performance can be defined as when the seller cannot perform after the contract was concluded because the performance of the seller has become permanently impossible by the seller's fault or intention.⁶⁶

The prerequisites of impossibility of performance in the legal sense are as follows; first, performance has become impossible after the contract was concluded, second, the impossibility of performance must be due to the seller's fault or intention,⁶⁷ third, there must be unjustified impossibility.⁶⁸ One must note that impossibility of performance here means only subsequent impossibility since initial impossibility is a matter of validity of contract.⁶⁹

⁶⁵ KCC Arts. 570 ff.

⁶⁶ Hyung-bae Kim, *Chae-kwon-chong-ron (General Rules of Obligatory Law)*, (1998), at 189 ff.

⁶⁷ KCC Art. 390. The scope of the seller's fault or intention is extended to contractual assistants so that the seller is liable not only for his own shortcomings, but also, for those of the people whose services he uses in the execution of his obligation. See KCC Art. 391. The burden of proof is generally on the seller to prove his lack of fault or intention. If a situation of impossibility happens without the seller's fault, the impossibility does not in principle raise the liability for non-performance. Notwithstanding this principle, there is a minority view contending that fault or intention is not required in the case of claiming rescission. Hyung-bae Kim, *Chae-kwon-gak-ron (Particulars in Obligatory Law)*, (1997), at 218 ff.

⁶⁸ 'Lack of justification' (*Unrechtmäßig* in German terms) as a requirement has been broadly admitted in Korea and it is a majority view; it means when a performance of one party is not in accordance with his obligation or the other party's right. Therefore, an objective fact of non-performance in accordance with the contract is deemed to include lack of justification under the law as to non-performance. See Yun-jik Kwak, *supra* n. 62, at 131 ff., 158 and Prof. Ki-sun Kim, Seok-woo Kim, Joo-soo Kim, Jeung-han Kim, Hyun-tae Kim, Seung-jong Hyun are in favour of this view; *Contra* see Eun-young Lee, *Min-bup-hak-gang-eoi (Lectures in Civil Law Study)*, (1996), at 587, 589 ff., and 605; Hyung-bae Kim, *supra* n. 66, at 173 ff.

⁶⁹ Unlike German law (BGB §306), there is no provision in KCC about invalidity in the case of initial

The effects of impossibility of performance are basically rescission⁷⁰ and/or damages.⁷¹ A claim for damages is a substitutionary compensation in money in lieu of performance (damages for non-performance). In any event of impossibility the buyer cannot claim for specific performance due to the nature of impossibility of performance. Unlike a claim for delay there is no need of a notice of default and *nachfrist* (notice setting an extra performance period).⁷² When the performance has become partially impossible, the buyer may claim damages as to the part and specific performance as to the balance of what was originally promised. However, if the objective of the contract is not obtainable by the seller's performance of the balance, he may reject the performance of the balance and claim damages for non-performance of the entire contract,⁷³ or he may be entitled to declare the contract rescinded in its entirety.⁷⁴ If it is obtainable, his right of rescission or damages will be restricted to the part which has become

impossibility. In addition there is no provision in KCC to distinguish subjective or objective impossibility, whereas German law has one to make the contract valid in the case of subjective impossibility so that the debtor is still responsible for subjective initial impossibility (BGB §275 II). The principle of *Culpa in Contrahendo* can be applicable in the case of objective initial impossibility (KCC Art. 535).

⁷⁰ KCC Art. 546.

⁷¹ KCC Art. 390. By the provision of art. 551 KCC has abandoned the German rule that rescission and damages cannot be claimed together (BGB §§325-326). In addition to rescission and damages, even though KCC does not specifically provide it, the buyer has a right to claim for a surrogate benefit which the seller may have such as the proceeds of an insurance policy received by the seller in lieu of the goods. In German law, *stellvertretendes commodum* (surrogate benefit) is specified in BGB §281, whereas in Korean law it is admitted by case (the Korean Supreme Court Cases, 12/5/1992, 92 Da 4581; 22/12/1995, 95 Da 38080). For the view of scholars, see Yun-jik Kwak, *supra* n. 62, at 159 f.; *Contra* Eun-young Lee, *supra* n. 68, at 531.

⁷² KCC Art. 546. For the definition of *nachfrist* and how it works in the creditor's claim for delay, see *infra* n. 85-89 and accompanying texts.

⁷³ No specific provision in KCC, but generally admitted. See Yun-jik Kwak, *supra* n. 62, at 158 ff.; Hyung-bae Kim, *supra* n. 66, at 196 ff. Cf. BGB §280 II.

⁷⁴ Hyung-bae Kim, *supra* n. 67, at 218 f.; Eun-young Lee, *supra* n. 68, at 764; Yun-jik Kwak, *Chae-kwon-gak-ron (Particulars in Obligatory Law)*, (1998), at 154. See also the Korean Supreme Court Cases, 7/7/1987, 86 DaKa 2943; 14/4/1992, Da 43527; 9/2/1996, Da 57817.

partially impossible.⁷⁵

2.1.1.2.2. Delay

Delay as the second type of non-performance may be defined if the seller is capable of performance but has not performed within the time allowed by the contract due to his fault or intention.⁷⁶

The prerequisites to satisfy delay in performance in legal sense are as follows; first, time for performance must be due,⁷⁷ second, the promise is capable of performance, third, delay in performance has been due to the seller's fault or intention,⁷⁸ fourth, there must be unjustified

⁷⁵ Eun-young Lee, *id.*; Yun-jik Kwak, *id.*

⁷⁶ Hyung-bae Kim, *supra* n. 66, at 175.

⁷⁷ The time when the debtor is put in delay is decided as follows. First, where a definite time for performance is fixed, the debtor will be responsible for delay from the commencement of such time. In this case, the debtor does not need to be put on notice by means of a warning (*Mahnung* in German terms) (KCC Art. 387(1)). Second, if an indefinite time for performance is fixed (*i.e.*, performance is due on a specified event), the debtor will be liable for any delay as from the time when he has become aware of the arrival of the time for performance (*e.g.*, in an agreement on the debtor's payment only when A dies, the debtor will be liable as from the time when he is aware of the death of A) (KCC Art. 387(1)). In this case, there is no need to give a warning to the debtor. Nevertheless, if the debtor is put on the notice of warning, he will be responsible for delay as from the time of the arrival of the notice to the debtor. See Hyung-bae Kim, *supra* n. 66, at 177 f. Third, if a time for performance is not fixed, the debtor will be responsible for the delay as from the time when a notice of warning has been made upon him (KCC Art. 387(2)). This notice need not be in any particular form provided that it makes clear to the debtor that he is required to perform, but it needs to be communicated to the debtor.

⁷⁸ While impossibility of performance specifically requires the seller's fault or intention by code (KCC Arts. 390, 546), there is no requirement of fault in delay in performance. The requirement is, however, generally recognized on the ground of, first, the principle of 'liability for fault' as a basic principle of KCC, second, there being no logical reason to distinguish between impossibility and delay in terms of fault requirement, third, analogical interpretation of KCC Arts. 391 and 392. See Yun-jik Kwak, *supra* n. 62, at 141 ff. On the other hand, one scholar argues there is no need to require fault or intention in the case of claiming rescission or specific performance for delay in performance. See Hyung-bae Kim, *supra* n. 66, at 183; Hyung-bae Kim, *supra* n. 67, at 208 ff.; the Korean Supreme Court case 24/8/1993, 93 Da 7204. For the scope of the seller's fault or intention and burden of proof, see *supra* n. 67.

delay.⁷⁹

In fulfilling of the above requirements, the buyer may claim specific performance,⁸⁰ rescission,⁸¹ and/or damages.⁸² In addition, the seller who is in delay becomes more liable for additional risks: although the accidental impossibility of his performance would not generally render him liable under the rules as to impossibility, the seller will be liable if he is in delay when impossibility arises.⁸³ A claim for damages is in principle a compensation for delay, which is to compensate for all disadvantages caused by the delay. The buyer may exceptionally claim damages for non-performance⁸⁴ when the seller fails to perform within a time set by a reasonable notice from the buyer (*nachfrist*)⁸⁵ or there is no longer interest in performance after delay for the buyer.⁸⁶ Instead of claiming damages for non-performance the buyer may rescind the contract on the condition of *nachfrist*.⁸⁷ The buyer may, however, even do so without *nachfrist* in the case of the seller's advance declaration of intention not to perform within the extra time,⁸⁸ or where the contract fixed a specific day for performance.⁸⁹ It must be noted that where the performance has been partially delayed, the buyer's right of rescission in its entirety is limited to the cases where the objective of the contract cannot be achieved by the seller's delivered part and the seller fails to deliver the part in delay after *nachfrist*.⁹⁰ However, if it can

⁷⁹ For the meaning of 'lack of justification', see *supra* n. 68.

⁸⁰ KCC Art. 389.

⁸¹ KCC Arts. 544, 545.

⁸² KCC Art. 390.

⁸³ KCC Art. 392.

⁸⁴ This claim for damages is same as a damages claim in impossibility which is a substitutionary compensation in money in lieu of performance.

⁸⁵ A German term, *Nachfrist*, is a period given by the creditor to the debtor with a further warning that he will refuse the debtor's performance after that period expires.

⁸⁶ KCC Art. 395.

⁸⁷ KCC Art. 544.

⁸⁸ *Id.*

⁸⁹ KCC Art. 545. *Fixgeschäft* in German.

⁹⁰ Hyung-bae Kim, *supra* n. 67, at 209 f.; Eun-young Lee, *supra* n. 68, at 762 f.; Yun-jik Kwak, *supra* n. 74, at 145 f.

be achieved, his right of rescission is restricted to the part in delay.⁹¹

2.1.1.2.3. Incomplete performance

Incomplete performance or positive breach of contract as the third category of non-performance covers the situation where the seller appears to have performed his contractual duty,⁹² but causes some harm to the buyer due to the incompleteness in his performance of contractual duty.⁹³ There are serious arguments as to the definition of the concepts of incomplete performance and positive breach of contract and their interrelationship, and as to what amounts to incomplete performance and its effects.⁹⁴ The legal authority for this category

⁹¹ *Id.* Cf. The Korean Supreme Court case 28/7/1981, 80 Da 2400.

⁹² In this sense it cannot fall within the category of impossibility or delay in performance.

⁹³ Yun-jik Kwak, *supra* n. 62, at 161 ff.; Eun-young Lee, *supra* n. 68, at 601; Sang-yong Kim, *Chae-kwon-chong-ron (General Rules in Obligatory Law)*, (1996), at 166.

⁹⁴ For two distinguishing views with regard to the definition of the concepts of incomplete performance or positive breach of contract and their interrelationship, see Hyung-bae Kim, *Min-bup-hak-yeon-koo (Civil Law Study)*, (1989), at 161 ff.; Hyung-bae Kim, *supra* n. 66, at 218 ff. The first view which is a minority view in Korea argues that incomplete performance should be divided into 3 concepts; incomplete performance in a broad sense, incomplete performance in a narrow sense, and positive breach of contract. The first includes all the cases which the performance of the seller has been simply executed incompletely. Among these cases, some cases belong to the second where the incomplete performance does not cause the buyer material harm beyond the normal contractual field or non-performance (namely, consequential loss), and the third where it causes such harm. See Yong-Han Kim, *Chae-kwon-bup-chong-ron (General Rules in Obligatory Law)*, (1988), at 159; Joo-soo Kim, *Chae-kwon-chong-ron (General Rules in Obligatory Law)*, (1988), at 120; Seoung-jong Hyun, *Chae-kwon-chong-ron (General Rules in Obligatory Law)*, (1982), at 129; Jeong-pyoung Im, *Chae-kwon-chong-ron (General Rules in Obligatory Law)*, (1989), at 161. The second view as a dominant view in Korea understands that incomplete performance and positive breach of contract is synonymous. It insists that incomplete performance (or positive breach of contract) arises when the performance itself is incomplete or the incomplete performance causes a material harm to the buyer beyond non-performance. There is, therefore, no need to distinguish the cases of extra harm beyond non-performance and non-extra harm. For the scholars in favour of this dominant view, see *supra* n. 93. Prof. Eun-young Lee places her emphasis on the incompleteness of performance as the essence of incomplete performance rather than the extra harm.

In addition there are 4 different views as to the grounds in substance of incomplete performance in terms

is found in KCC Art. 390 that may include impossibility, delay and all the other types of non-performance.⁹⁵

The prerequisites for incomplete performance are as follows; first, there must have been the act of performance as opposed to non-performance, second, the performance is incomplete, third, incomplete performance has been due to the seller's fault or intention,⁹⁶ and fourth, there must be unjustified incomplete performance.⁹⁷

As regards the consequences of incomplete performance, if complete performance is possible, the buyer may claim specific performance and at the same time claim damages, if any, for delay and additional damages for any consequential loss to the buyer.⁹⁸ If the seller fails to perform

of a network of duties. The first view is to argue that the substance of incomplete performance is not only the breach of the main duties such as the duty to deliver the goods or pay the price, but also the breach of the duties of care and protection of the other party's life, health or property. See Yong-han Kim, *id.*, at 155; Jeong-pyoung Im, *id.*, at 161. The second view says it is the breach of the duties ancillary to the main duties or the further conduct duty (*Weitere verhaltenspflicht* in German), *e.g.*, the duty not to give non-conforming tenders. This view is a majority view in Korea at present. See Yun-jik Kwak, *supra* n. 62, at 167 ff.; Seoung-jong Hyun, *id.*, at 128. The third view contends that incomplete performance is only related to the main duties but not to the duties of care and protection so that the breach of care and protection is governed by the law as to the unlawful act (the liability for unlawful act is a special term comparable to tortious liability in common law). It is also argued that distinguishing between the main duties and the ancillary duties is meaningless because the breach of the latter duties will fall into the category of the breach of the former duties at the end in light of the consequence of breach. See Eun-young Lee, *supra* n. 68, at 591 ff., 601 ff.; Eun-young Lee, "Woo-ri-min-bup-ae-man-nun Chae-moo-bul-e-haeng-chaek-im-eoi Cahe-gae (An Liability System for Non-performance Suitable to Korean Civil Law)", (1990) 39(12) *Bup-jo* 3, at 6 ff., 19 ff. The fourth view insists that it is the breach of the main duties, the ancillary duties and the duties of care and protection. In this view the ancillary duties are distinguished from the second view in that the seller takes the duties of care or diligence to properly perform the main duties, *e.g.*, the duty of proper preparation for delivery, the duty of safe custody and etc. See Hyung-bae Kim, *supra* n. 66, at 32 ff., 219 ff.

⁹⁵ Yun-jik Kwak, *supra* n. 62, at 166 ff.; Eun-young Lee, *supra* n. 68, at 589 ff.; Hyung-bae Kim, *supra* n. 66, at 221 ff.

⁹⁶ For the scope of the seller's fault or intention and burden of proof, see *supra* n. 67.

⁹⁷ For the meaning of 'lack of justification', see *supra* n. 68.

⁹⁸ 'Special circumstances' in KCC Art. 393(2) may be applied in this case of the additional damages. The additional damages may include consequential loss to the buyer's other property or body.

within a reasonable extra fixed time for which the buyer has given notice (*nachfrist*),⁹⁹ the buyer may rescind the contract. On the other hand, if complete performance is not possible, or if there is no interest in complete performance for the buyer even if complete performance is possible, the buyer may claim damages for non-performance and, additional damages, if any. In the case of no interest in complete performance, the buyer may rescind the contract without *nachfrist*.¹⁰⁰

2.1.1.3. The special regime for defective goods

If the goods delivered by the seller are not of the quality or quantity specified in the contract, the contractual program has not been fulfilled. In this case although there has been delivery and transfer of title, the buyer's expectations have not been answered, and the balance between price and value has been upset. For this case, the general liability for non-performance does not apply here,¹⁰¹ but KCC imposes a special liability for defective goods on the seller, so called, the seller's guarantee liability for defective goods.¹⁰² Therefore, as soon as the risk in the goods has passed,¹⁰³ the rules as to defects take precedence over the general rules as to non-performance. This is due to the special nature of the rules on defects.

A distinction must be drawn between the matters of *aliud* (another thing in nature) and a defect in quality. In the first instance the buyer is entitled to demand either specific performance or to claim rescission and/or damages in accordance with the rules under the general liability.¹⁰⁴ In

⁹⁹ For the definition of *nachfrist* and how it works in the creditor's claim for delay, see *supra* n. 85-89 and accompanying texts.

¹⁰⁰ It should be noted that rescission is allowed only in the case of the breach of the main duties. On the other hand, the breach of the duties subordinate to the main duties, *e.g.*, the duty to deliver a manual or a letter, the breach of the ancillary duties or the breach of the duties of care and protection *per se* do not, in principle, allow rescission.

¹⁰¹ See *supra* n. 66-100 and accompanying text.

¹⁰² KCC Arts. 580-584.

¹⁰³ It may generally coincide with delivery.

¹⁰⁴ Dong-seok Kim, "Mae-soo-in-eoi Ha-ja-tong-ji-eoi-moo-eoi Seong-lip-yo-keon (The Requirements for the Buyer's Duty to Notify the Seller of the Defects)", (1988) 33(12) *Ko-shi-gae* 95, at 99 ff. Cf. Jeong-pyoung Im, *supra* n. 94, at 165; Jeung-han Kim and Hak-dong Kim, *Chae-kwon-chong-ron*

the second the buyer is limited to the remedies under the seller's guarantee liability.¹⁰⁵

Having said that, the starting point to explain the seller's guarantee liability in Korean law is in understanding its nature because the different understanding may yield the different results in practice.¹⁰⁶ There are two opposing views in the understanding of its nature; the legal liability theory (bup-jeong-chaek-im-seol)¹⁰⁷ and the contractual liability theory (chae-moo-bul-e-haeng-chaek-im-seol).¹⁰⁸ The former theory maintains that the nature of the seller's guarantee liability is not a contractual liability but 'a liability specially recognized by the law' for the purpose of protecting the buyer irrespective of the seller's fault. Thus the seller's guarantee liability exists separately from the general liability for non-performance. On the other hand, the latter theory contends that the seller's guarantee liability is 'in the nature of contractual liability' in a sense that KCC presumes 'a contractual obligation' to deliver the goods free from defects. The rules on the seller's guarantee liability exist as the special rules within the general rules for non-performance, being categorized as incomplete performance.¹⁰⁹

The prerequisites to raise the seller's guarantee liability can be generalized as follows.¹¹⁰ First, there exists a defect in the goods. One must note that whether or not the defect exists depends upon which theory one adopts because the concept of a defect and the time when a defect must exist are interpreted differently.¹¹¹ Second, the buyer was not aware of the existence of the defect in quality and quantity¹¹² and he was not negligent in failing to discover the defect in

(*General Rules in Obligatory Law*), (1998), at 111 (they argue that it may be governed by the rules on incomplete performance).

¹⁰⁵ *Id.*

¹⁰⁶ For the practical differences in general, see *infra* n. 208-216 and accompanying texts.

¹⁰⁷ This theory is a prevailing view at present in Korea. The scholars in favour of this view are Profs. Yun-jik Kwak, Ki-sun Kim, Jeung-han Kim, Hyun-tae Kim, Tae-jae Lee, etc. See *infra* n. 135.

¹⁰⁸ The scholars in favour of this theory are Profs. Joo-soo Kim, Hyung-bae Kim, Jeok-in Kim, Eun-young Lee, etc. See *infra* n. 167.

¹⁰⁹ For more details about two opposing views, see *infra* n. 134-207 and accompanying texts.

¹¹⁰ For more details, see Chap. III.

¹¹¹ See *infra* n. 208-213 and accompanying texts.

¹¹² KCC Arts. 572(3), 580(1).

quality at the time of the conclusion of the contract.¹¹³ Third, the buyer must exercise his rights on the ground of the seller's delivery of defective goods within the following periods from the time when he was aware of the defect; six months and one year in the cases of qualitative and quantitative defects, respectively.¹¹⁴ Fourth, the buyer must examine the goods without delay and immediately notify the defect to the seller.¹¹⁵ In any event, the notice must be given within six months from the time when the buyer takes delivery of the goods where the defect could not be discovered by due examination.¹¹⁶ This requirement is only required in commercial sales, not in consumer sales.¹¹⁷

The effects of the seller's guarantee liability are generalized as follows.¹¹⁸ In the case of the sale of specific goods, the buyer may rescind the contract and concurrently claim damages only if the buyer would not be able to achieve the object of the contract due to the defect in quality of the goods, or if he would not have entered into the contract had he known of the defect in quantity at the time of contract.¹¹⁹ Otherwise, only a claim in damages or a price reduction is available.¹²⁰ One must note that there is no specific provision on the price reduction where the goods are defective in quality, but where they are defective in quantity.¹²¹ In the case of the defect in quality in the sale of generic goods, the buyer may rescind the contract and/or claim damages in accordance with the same principle as above in the case of the sale of specific goods.¹²² It should be noted that a claim for damages does not necessarily mean full damages

¹¹³ KCC Art. 580(1).

¹¹⁴ KCC Arts. 573, 582.

¹¹⁵ KCmC Art. 69(1).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ For more details, see Chap. IV.

¹¹⁹ KCC Arts. 572(2), 575(1), 580(1).

¹²⁰ *Id.*

¹²¹ KCC Art. 572(3).

¹²² KCC Arts. 575(1), 581(1). One must note that the matters of a defect in quantity in the sale of generic goods are not dealt with under the seller's guarantee liability, but under the general liability.

because it is differently interpreted by adopting either theory as to its nature.¹²³ Instead of rescission and/or damages, the buyer has a right to claim replacement of the defective goods as well.¹²⁴ There is no specific provision for the buyer's right to claim the seller's repair as a remedy for the seller's guarantee liability.

2.1.1.4. The differences between two liabilities

First, the seller's guarantee liability is a strict liability which does not require the seller's fault or intention,¹²⁵ whereas the general liability is a liability based on the principle of fault.¹²⁶

Second, while the seller's guarantee liability requires the buyer's lack of knowledge about the existence of a defect and (as the case may be) absence of negligence in failing to discover the existence of a defect at the time of contract,¹²⁷ the general liability does not.

Third, the scope of damages is based on the buyer's expectation interests in the case of a claim under the general liability, whereas it is variously interpreted under the seller's guarantee liability by adopting either the legal liability theory or the contractual liability theory. However, both theories have generally attempted to distinguish the scope of damages under the seller's guarantee liability from that under the general liability in a way that limits the former to something narrower than the latter.¹²⁸ This seems to be based on the idea that the remedy of damages under the seller's guarantee liability which exists regardless of the fault principle cannot be treated in the same way as under the general liability which is governed by the fault principle.

¹²³ See *infra* n. 214-216 and accompanying texts.

¹²⁴ KCC Art. 581(2).

¹²⁵ However, only one scholar insists that fault is required to raise the seller's guarantee liability. See Joo-soo Kim, *Chae-kwon-gak-ron (Particulars in Obligatory Law)*, (1995), at 214.

¹²⁶ KCC Arts. 390 f.

¹²⁷ KCC Arts. 572(3), 580(1).

¹²⁸ *E.g.*, it is limited to the compensation based on the buyer's reliance interests or it is even understood to mean mere price reduction, which seem to exclude the buyer's consequential losses. For more details, see *infra* n. 1021-1042 and accompanying texts.

Fourth, the availability of the buyer's right of rescission by virtue of the rules of the seller's guarantee liability is always dependent upon the questions of whether he is able to achieve the object of the contract in the case of defects in quality,¹²⁹ or if he would have entered into the contract had he known of defects in quantity at the time of contract,¹³⁰ whereas in the general liability for non-performance the right of rescission does not necessarily rely on these questions.¹³¹

Fifth, the limitation period for claims arising out of defects is extremely short: one year or six months from the time when the buyer was aware of the defect.¹³² This contrasts strikingly with ten years, which is the general limitation period for the general liability.¹³³

2.1.2. The nature of the seller's guarantee liability for defective goods

2.1.2.1. The legal liability theory

2.1.2.1.1. General

This theory maintains that the seller's guarantee liability for defective goods is an effect of a non-juristic act¹³⁴ rather than a juristic act by the intention of a contractual party. The liability is imposed on the seller by the law regardless of the contractual party's intention on the basis of

¹²⁹ KCC Arts. 575(1), 580(1).

¹³⁰ KCC Art. 572(2).

¹³¹ For instance, the buyer's right of rescission for delay does not depend on the possibility to achieve the object of the contract even though the seller's failure to perform within the added time given by *nachfrist* may make it negative. KCC Art. 544 (Delay and rescission). On the other hand, the right of rescission for impossibility is closely related to the matter of the possibility in a sense that impossibility is in its essence a typical case of non-achievable object even though it is not expressly provided in KCC Art. 546 (Impossibility and rescission).

¹³² KCC Arts. 573, 582.

¹³³ KCC Art. 162.

¹³⁴ A juristic act has its legal effects on the condition of a party's declaration of intention to do the act or the conduct, whereas non-juristic act lacks the intention.

the unique nature of contract made for a consideration.¹³⁵ That is, it is the legal liability intended to protect the buyer who paid the price in reliance on the goods being free from defects. Even though there seems to be no unified opinion as to its background and nature among the scholars in favour of this theory, it can be generalized as below.

2.1.2.1.2. Background for the legal liability theory

2.1.2.1.2.1. Historical background: Roman law background (*Aedilis curulis edictum*)

The seller's guarantee liability basically originated in the jurisdiction of the *aediles curules* over slaves market transactions at the time of *Salvius Iulianus*.¹³⁶ The *aediles curules*

¹³⁵ For the scholars' view in favour of this theory, see Tae-jae Lee, *Chae-kwon-gak-ron (Particulars in Obligatory Law)*, (1982), at 173; Ki-sun Kim, *Han-kook-chae-kwon-bup-gak-ron (Particulars in Korean Obligatory Law)*, (1988), at 133; Seok-woo Kim, *Chae-kwon-bup-gak-ron (Particulars in Obligatory Law)*, (1978), at 182; Young-hwan Lee, "Jong-ryu-mae-mae-wa Ha-ja-dam-bo-chaek-im (Generic Goods Sales and the Guarantee Liability for Defective Goods)", (1977) 7(6) *Bup-jeong* 115; Young-hwan Lee, "Ha-ja-dam-bo-chaek-im-eoi Bon-jil-ae-kwan-han E-ron-eoi Jae-gum-toe (Re-examination of the theories as to the Nature of the Seller's Guarantee Liability)", (1989) 16(12) *Ko-shi-yoen-koo* 109; Jeung-han Kim, *Chae-kwon-gak-ron (Particulars in Obligatory Law)*, (1989), at 146; Hyun-chae Kim, *Joo-seok-chae-kwon-gak-chik (Commentary on Particulars in Obligatory Law)*, Book I, (1989), at 541; Hyun-tae Kim, *Shin-go-chae-kwon-bup-gak-ron (New Edition of Particulars in Obligatory Law)*, (1975), at 117 f.; Won-lim Jee, "Chae-moo-bul-e-haeng-eoi Yu-hyung-ae-kwan-han Yeon-koo (A Study as to the Categories of Non-performance)", (1997) 15 *Min-sa-bup-hak* 374, at 400 ff.; Yeon-eoi Eo, "Ha-ja-dam-bo-chaek-im-eoi Bon-jil (The Nature of the Guarantee Liability for Defective Goods)", (1989) 226 *Pan-rae-wol-bo* 19, at 21 ff.; Yun-jik Kwak, *supra* n. 74, at 227 ff. (He argues that the seller's guarantee liability is regulated under the name of legal liability due to its historical development, even though it is generally admitted that the nature of the seller's guarantee liability is a contractual one). For the cases in favour of this theory, see *e.g.*, the Korean Supreme Court Cases, 30/10/1957, 4290 Min-Sang 552; 21/4/1960, 4292 Min-Sang 385.

¹³⁶ Kyu-chang Cho, "Mool-kun-eoi Ha-ja-dam-bo-chaek-im (The Guarantee Liability for Defective Goods)", (1983) 21 *Bup-hak-non-jip (The Institute of Legal Study of Korea University)* 221, at 224 ff.; Dae-jeong Kim, "A Study on the Seller's Guarantee Liability", *The Graduate School of Sung Kyun Kwan University*, (1990), PhD Thesis, at 12 ff. For the references to Roman law in general, see Zimmermann, *The Law of Obligations; Roman Foundations of the Civilian Tradition*, (1996), at 293 ff.; Watson, *The Law of Obligations in the Later Roman Republic*, (1965), at 86 ff. Cf. Rogerson, "Implied Warranty

introduced the edicts which established what have become known as the *aedilitian* remedies,¹³⁷ which is to protect the buyer from the notoriously ill-reputed slave-traders in the market.¹³⁸ Under these edicts the seller was obliged to declare at the time of contract all non-apparent physical defects or diseases and defects of character which impaired the slave's fitness for use.¹³⁹ The parties were also allowed to extend the scope of the seller's guarantee beyond the specified defects in the *aedilitian* edicts; an affirmation that the slave was free from further defects or that he possessed special qualities was sufficient.¹⁴⁰ If the slave turned out to have one of specified defects in the edicts, without the seller having declared it, if a quality that had been affirmed was absent, or if the seller acted fraudulently, the buyer was granted two alternative rights; the *actio redhibitoria*¹⁴¹ and the *actio quanti minoris*.¹⁴² These liabilities were imposed on the seller as an objective liability, namely, he was liable regardless of whether he

against Latent Defects in Roman and English law", in: Daube (ed.), *Studies in the Roman Law of Sale*, (1959), at 112 ff.; Honoré, "The History of the *Aedilitian* Actions", in: Daube (ed.), *id.*, at 132 ff.

¹³⁷ Ulp.D. 21.1.1.1. For English translation, see Mommsen, Kruger, and Watson, (Eng. trans. edited by Watson), *The Digest of Justinian*, Vol. II, (1985).

¹³⁸ It should be noted that the *aedilitian* remedies were applied not only for slaves sales but also for livestock sales. Ulp.D. 21.1.38.

¹³⁹ Note that the *aedilitian* remedies applied only to latent defects. Ulp.D. 21.1.1.6. Therefore, if the buyer did not notice an apparent defect, *e.g.*, female or male, knocked out eyes, big scar, and *etc.*, he was precluded from taking recourse against the seller under the *aedilitian* remedies. See Zimmermann, *id.*, at 311 f. Cf. For the details as to the contents of defects to be declared, see Zimmermann, *supra* n. 136, at 311 ff.

¹⁴⁰ Ulp.D. 21.1.17.20, Gai.D. 21.1.18-19.4.

¹⁴¹ Ulp.D. 21.1.1.1. By this right the buyer could return the slave and obtain restitution of the purchase price. Both parties had to be restored to the position they would have been had the sale not been concluded (Ulp.D. 21.1.23.7). The limitation period for the action *redhibitoria* was six months of the defect having become apparent (Ulp.D. 21.1.19.6). For further details regarding the requirements and the effects of the *aedilitian* remedies in general, see Zimmermann, *supra* n. 136, at 317 ff.

¹⁴² There is no specific provision for the *actio quanti minoris* in Ulp.D. 21.1.1.1. Nevertheless, this remedy was already available in early classical law. See Zimmermann, *id.*, at 318. The action *quanti minoris* was for the difference in the purchase price between what the slave was worth with the defect and what he would have been worth without it. The limitation period was twelve months of the defect having become apparent (Ulp.D. 21.1.38).

was at fault or whether he had made special affirmations.¹⁴³ They were rather relied upon the kinds or the nature of the subject matter, or the circumstances of the transactions.

Having said that, as the legal liability theory maintains, the *aedilitian* edicts were focused on the objective nature of liability, which were imposed on the seller by the law as a means to protect the buyer's reliance on there being no defect.¹⁴⁴ The legal liability theory argues that the *aedilitian* edicts under Roman law have been succeeded in modern civil code provisions and become the seller's guarantee liability at present.¹⁴⁵ The seller's guarantee liability is, therefore, in the nature of legal liability.

2.1.2.1.2.2. Theoretical background: *Impossibilium nulla obligatio* and Specific goods dogma

The basis of the theory relies on its unique view of *impossibilium nulla obligatio* and *specific goods dogma* in specific goods sales. The view points out that if there was an initial defect in the specific goods at the time of contract and the contract requires the seller to deliver non-defective goods, it is treated as an initial impossibility related case due to the unique nature of the specific goods and nullified by the principle of *impossibilium nulla obligatio*.¹⁴⁶ On this basis the legal liability theory argues that the contract nullified by the principle cannot be compatible with the seller's guarantee liability which presumes the validity of the contract.¹⁴⁷ It means that, insofar as the specific goods are concerned and an initial defect exists at the time of contract, one's treatment of the seller's guarantee liability as imposing on the seller a contractual duty to deliver non-defective goods would contradict the seller's guarantee liability

¹⁴³ Ulp.D. 21.1.1.2.

¹⁴⁴ Kaoru Yuzuki, *Kekkanhin-ni-okeru Urite-no Sekininhosyou-ni-tuiteno Kenkyu (Study on the Seller's Guarantee Liability for Defective Goods)*, (1963), at 15 ff.

¹⁴⁵ *Id.*

¹⁴⁶ Hyun-chae Kim, *supra* n. 135, at 543; Sik Choi, "Mae-joo-eoi Dam-bo-chaek-im-kwa Bool-wan-jeon-e-haeng-kwa-eoi Kwan-kae (The Relationship between the Seller's Guarantee Liability and Incomplete Performance)", (Nov., 1961) 16(11) *Bup-jeong* 49.

¹⁴⁷ *Id.*

standing on the assumption of the validity of the contract because the contract must be void by virtue of the principle of *impossibilium nulla obligatio*. Therefore, where the contract concerns specific goods and there exists an initial defect at the time of contract, the seller's contractual duty to deliver non-defective goods should be denied under the rules as to the seller's guarantee liability and his duty must be limited to deliver the goods in *status quo* at the time when the contract was made (so called, the *specific goods dogma*).¹⁴⁸ That is, if the seller delivers specific goods in the condition in which it exists at the time of the conclusion of contract, it amounts to complete performance of the seller's duty to deliver and does not raise the seller's contractual liability at all for any defect the parties have not expected. All in all, the seller's contractual duty to deliver non-defective goods under the seller's guarantee liability would not be recognized in the sale of specific goods and the seller's guarantee liability is not in the nature of contractual liability but in the nature of legal liability.

Regarding the generic goods sales, the theory justifies its reasoning for the question of how the principle of *impossibilium nulla obligatio* and *specific goods dogma* can be understood in the sale of generic goods sales by saying that once the generic goods are specified, the goods are to be treated as specific goods, making another room for the application of the seller's guarantee liability in generic goods sales.¹⁴⁹

2.1.2.1.2.3. Positive law background: Relationship with other provisions

The theory analyses the legal nature of the seller's guarantee liability by the analogical

¹⁴⁸ *Id.*

¹⁴⁹ That is, as long as the principles of *impossibilium nulla obligatio* and *specific goods dogma* are presumed for the seller's guarantee liability, there is no room for the application of the seller's guarantee liability in the case of generic goods sales which always concerns a matter of subsequent defects. Therefore the theory solves the problem of its theoretical basis of *impossibilium nulla obligatio* and *specific goods dogma* by deriving the idea that the generic goods are treated as specific goods when the goods are thereafter specified. See Young-hwan Lee, *supra* n. 135, at 124 f. According to the theory, the reasoning is even clearer when KCC Art. 581(1) is read: "Even where the subject-matter of a sale has been specified in kind, if there exists any defects in the *specified* subject-matter, the provisions of the

interpretation of the other provisions. The positive law backgrounds are as follows. First, it presents KCC Art. 462 as a proof of the *specific goods dogma*, which reads:

“If the delivery of a specific thing is the subject of the obligation, the obligor must deliver the thing in the condition in which it exists at the time when the delivery thereof is due.”¹⁵⁰

Insofar as the seller’s delivery of the specific goods in *status quo* at the time of delivery amounts to complete performance of his duty on the basis of art. 462, it raises the necessity to protect the buyer in terms of law where the seller delivers defective goods which are not value for the money the buyer paid because the buyer may not be able to rely on the contract for the remedies.¹⁵¹ Second, a claim for damages under the general liability for non-performance may be allowed regardless of the matters of whether the buyer was aware of the existence of a defect in quality or quantity and whether he was negligent in failing to discover the defect in quality at the time of contract, whereas awarding damages under the seller’s guarantee liability may depend upon those matters.¹⁵² In this sense, the seller’s guarantee liability should be distinguished from the general liability. Third, in the case of the specific goods sales with fixed quantity, a contractual liability can not take effect in principle for the partial shortage which existed in fact at the time of contract because it will amount to initial impossibility in part and make the contract void for the shortage. Nevertheless, KCC¹⁵³ provides that the guarantee liability for the shortage is imposed on the seller.¹⁵⁴ Fourth, KCC does not make the donor liable in principle when a gift is defective.¹⁵⁵ It should have been allowed if KCC had presumed that the guarantee liability is a contractual one.¹⁵⁶ Fifth, the seller’s guarantee liability does not require fault in the seller’s part, whereas the general liability for non-performance requires

preceding Article shall apply *mutatis mutandis*.”

¹⁵⁰ Young-hwan Lee, *supra* n. 135, at 116.

¹⁵¹ *Id.*

¹⁵² KCC Arts. 572(3), 580(1); Seok-woo Kim, *supra* n. 135, at 182; Tae-jae Lee, *supra* n. 135, at 174.

¹⁵³ KCC Art. 574.

¹⁵⁴ Seok-woo Kim, *supra* n. 135, at 182; Tae-jae Lee, *supra* n. 135, at 174.

¹⁵⁵ KCC Art. 559(1).

¹⁵⁶ Seok-woo Kim, *supra* n. 135, at 182; Tae-jae Lee, *supra* n. 135, at 174.

fault.¹⁵⁷

2.1.2.1.3. The nature of the seller's guarantee liability

2.1.2.1.3.1. Non-fault based liability

The theory maintains that the seller's guarantee liability is the liability especially imposed by the law regardless of the seller's fault for the purpose of protecting the buyer's reliance on the transaction made for consideration and for the purpose of striking a balance in terms of value for money in the event of the seller's delivery of defective goods.¹⁵⁸ This view of non-fault based liability is in general the same as the one for the contractual liability theory.

2.1.2.1.3.2. Liability for initial impossibility in part

As discussed above in the theoretical background, the seller's guarantee liability is closely related to initial impossibility in part (or initial defect). The seller's guarantee liability is imposed on the seller by the law on the presumption of the validity of the contract where there is initial impossibility in part because the initial impossibility may result in the contract becoming partially invalid and the law needs to strike a balance in terms of value for money.¹⁵⁹ There are opposing views whether the liability for initial impossibility as a nature of the seller's guarantee liability is admitted as a whole or part; the real question here is whether the seller's

¹⁵⁷ *Id.*

¹⁵⁸ Tae-jae Lee, *supra* n. 135, at 173 f.; Ki-sun Kim, *supra* n. 135, at 134; Seok-woo Kim, *supra* n. 135, at 182; Jeung-han Kim, *supra* n. 135, at 146; Hyun-chae Kim, *supra* n. 135, at 542; Hyun-tae Kim, *supra* n. 135, at 117 f.; Yun-jik Kwak, *supra* n. 74, at 22.

¹⁵⁹ In relation to subsequent impossibility, it can be a matter of non-performance and burden of risk. The seller's responsibility for non-performance depends upon the existence of his fault in the subsequent impossibility. If he is not in fault, it leaves the case to the burden of risk (KCC Art. 537). However, insofar as the generic goods sales are concerned, the matter of a subsequent defect can be also dealt with the seller's guarantee liability (KCC Art. 581). Cf. Tae-jae Lee, "Chae-moo-bool-e-haeng-chaek-im-kwa Dam-bo-chaek-im (Non-performance and the Guarantee Liability)", (Jan., 1983) 108 *Wol-kan-ko-shi* 38, at 43 f.

guarantee liability is in its nature the liability only for the cases of initial impossibility or the liability for the cases of initial impossibility and some other cases as well, *e.g.*, a defect in generic goods sales or a defective title in the sale of goods belonging to another.¹⁶⁰

2.1.2.1.3.3. Relationship with the general liability for non-performance: Concurrence with incomplete performance ?

When the seller tenders defective goods and the defective tender is attributable to the seller's fault, it may satisfy the requirements of both the seller's guarantee liability and the general liability for incomplete performance. It may raise the question of whether the buyer can claim on the basis of non-performance or the seller's guarantee liability (or maybe both).

2.1.2.1.3.3.1. Concurrence with incomplete performance

Among the scholars in favour of the legal liability theory, there are some scholars arguing that concurrence with the general liability should be allowed.¹⁶¹ Their view is based on the idea that there should not be any problem whichever liability the buyer is to claim because the seller's guarantee liability and the general liability are completely different in their natures.¹⁶²

2.1.2.1.3.3.2. No concurrence with incomplete performance

There are other scholars who are against the view that concurrence with the general liability

¹⁶⁰ For the former view, see Ki-sun Kim, *supra* n. 135, at 133; Hyun-tae Kim, *supra* n. 135, at 117; Tae-jae Lee, *supra* n. 135, at 174. For the contra view, see Yun-jik Kwak, *supra* n. 74, at 229 f.; Seok-woo Kim, *supra* n. 135, at 182 f.; Jeung-han Kim, *supra* n. 135, at 147; Hyun-chae Kim, *supra* n. 135, at 542; Yeon-eoi Eo, *supra* n. 135, at 26.

¹⁶¹ For the scholars allowing the concurrence in the sale of specific goods, see Ki-sun Kim, *supra* n. 135, at 134; Hyun-tae Kim, *supra* n. 135, at 117. For the scholars allowing the concurrence in the sale of generic goods, see Young-hwan Lee, *supra* n. 135, at 115 ff.; Yeon-eoi Eo, *supra* n. 135, at 26.

¹⁶² Ki-sun Kim, *supra* n. 135, at 134; Hyun-tae Kim, *supra* n. 135, at 117; Young-hwan Lee, *supra* n. 135, at 115 ff.

for incomplete performance should be allowed.¹⁶³ They contend that, insofar as the legal liability theory is based on *impossibilium nulla obligatio* and *specific goods dogma*, there is no room for non-performance because once the seller delivers the goods in *status quo* at the time of tender, his contractual obligation is extinguished because he fulfils the contractual obligation.¹⁶⁴ In relation to generic goods, it is argued that the provision for the seller's guarantee liability for such generic goods¹⁶⁵ are especially stipulated for the purpose of excluding the application of the rules as to the general liability for incomplete performance.¹⁶⁶

2.1.2.2. The contractual liability theory

2.1.2.2.1. General

The contractual liability theory has been presented only in the 1980's with raising the question of whether the legal liability theory as a majority view is logical and suitable for the modern contract world as represented by mass production.¹⁶⁷ It denies the theoretical basis of

¹⁶³ Hyun-chae Kim, *supra* n. 135, at 543; Tae-jae Lee, *supra* n. 159, at 43 f.; Jeong-pyoung Im, *supra* n. 94, at 165; Yun-jik Kwak, *supra* n. 74, at 247 f.; Yun-jik Kwak, *supra* n. 62, at 169 ff.; Won-lim Jee, *supra* n. 135, at 402 f.; Jeung-han Kim and Hak-dong Kim, *supra* n. 104, at 111 f.; Yong-han Kim, "Bool-wan-jeon-e-haeng-eoi Bon-jil-kwa Yo-kun (The Nature and Requirements of Incomplete Performance)", (1980) 25(5) *Ko-shi-gae* 23, at 33 ff.

¹⁶⁴ Hyun-chae Kim, *supra* n. 135, at 543; Yun-jik Kwak, *supra* n. 62, at 169 ff.

¹⁶⁵ KCC Art. 581.

¹⁶⁶ Yun-jik Kwak, *supra* n. 74, at 247 f.; Yun-jik Kwak, *supra* n. 62, at 170 f.; Yong-han Kim, *supra* n. 163, at 34 f.; Jeung-han Kim and Hak-dong Kim, *supra* n. 104, at 112. Cf. For the importance of art. 581, see Tae-jae Lee, *supra* n. 159, at 43 f.

¹⁶⁷ For the scholars in favour of this theory, see Hyung-bae Kim, *supra* n. 67, at 309 ff.; Hyung-bae Kim, *supra* n. 66, at 224 ff.; Eun-Young Lee, *Chae-kwon-gak-ron (Particulars in Obligatory Law)*, (1997), at 206 ff.; Juk-in Hwang, "Ha-ja-dam-bo-chaek-im-eoi Bup-jeok-seong-jil (The Legal Nature of the Guarantee Liability)", (Mar., 1979) 24(3) *Ko-shi-gae* 81; Kyu-chang Cho, *supra* n. 136, at 221 ff.; Joo-soo Kim, *supra* n. 125, at 198 ff.; Sang-hoon Kim, "Ha-ja-dam-bo-chaek-im-eoi Bon-jil-ron (The Nature of the Guarantee Liability for Defective goods)", (1984) 24 *Bup-jeong-non-chong (The College of Law, Choong Ang University)* 75; Dae-jeong Kim, *supra* n. 136, at 199 ff.; Bup-young Ahn, "Mae-mae-mok-jeok-mool-eoi Ha-ja-ro-in-han Son-hae-bae-sang (Damages for Defective Goods)", (1995) 11, 12 *Min-sa-*

impossibilium nulla obligatio and *specific goods dogma* in the legal liability theory and instead it provides its theoretical basis that there is a contractual obligation to tender non-defective goods. The seller's guarantee liability is, thus, understood as a contractual liability for the breach of the contractual obligation which may be categorized as incomplete performance. According to the contractual liability theory, the rules as to the seller's guarantee liability are generally interpreted as the special rules of the general liability. The following accounts are to attempt to generalize the various views of the scholars in favour of this theory as to its background and nature.

2.1.2.2.2. Background for the contractual liability theory

2.1.2.2.2.1. Historical background: Justinian law background (the *ius civil*)

Before Justinian's time two sets of remedies governed the cases where the seller delivered defective goods; the *actio empti*¹⁶⁸ and the *aedilitian* edicts.¹⁶⁹ These remedies were devised to improve the position regarding the buyer against the principle of *caveat emptor*, which governed early Roman law. However, the problem in light of the buyer's protection was that

bup-hak 194.; Choon-soo Ahn, "Ha-ja-dam-bo-bup-sang-eoi Jae-moon-jae (Problems under the Guarantee Liability Law)", (1995) 11 *Min-sa-bup-hak* 419; Sang-kwang Lee, "Ha-ja-dam-bo-chaek-im-eoi Ki-bon-moon-jae (The Basic Matters in the Seller's Guarantee liability)", (1998) 5(1) *Bee-kyo-sa-bup* 283, at 283 ff. For the cases in favour of this theory, see *e.g.*, the Korean Supreme Court Cases, 14/11/1989, 89 DaKa 15298; 14/4/1992, 91 Da 17146.17153; 30/6/1995, 94 Da 23920.

¹⁶⁸ With the development of the consensual contracts of good faith the seller was responsible under the *actio empti* for fraud which included the fraudulent concealment of a defect known to him but not to the buyer and which was not apparent (Liability for *dolus*). Flor.D. 18.1.43.2; Ulp. 21.1.4.4. In addition the seller was responsible under the *actio empti* if he had stated during negotiation that the goods sold possessed a particular quality which it later transpired that it did not, or were free from a defect, which in fact it did possess (Liability for *dicta in venditione*). Pomp.D. 19.1.6.4. By the *actio empti* the buyer could claim for *quod actoris* interest so that the seller is liable not only for the reduced value of the goods themselves but also for consequential loss. Ulp.D. 19.1.13 pr.; Pomp.D. 19.1.6.4; Ulp.D. 19.1.13.2; Marci.D. 18.1.45.

¹⁶⁹ See *supra* n. 136-143 and accompanying texts.

the two sets of remedies were far from perfect and thus the principle of *caveat emptor* still prevailed to a large extent. That is, the problem as to the *aedilitian* remedies was that the buyer was limited not only to the sale of slaves and livestock, but also to market transactions only. The problem as to the *actio empti* was in that it was only available to the cases of the seller's *dolus* although it covered all kinds of sales. If the buyer wanted the seller to be responsible for a particular quality under the *actio empti*, he had to ask the seller's affirmation about the quality.¹⁷⁰ Therefore, in the absence of the affirmation, the problem of the *actio empti* from the point of view of the buyer was that it required proof by the buyer of the seller's knowledge of the defect since it was based on the bad faith of the seller.¹⁷¹

In Justinian's time, with the growing complexity of Roman economic life and further development of the consensual contract of good faith inherent therein the principles laid down in the *aedilitian* edicts were gradually assimilated into the *ius civile*.¹⁷² The *aedilitian* remedies which were originally applied to slaves and livestock sales were extended to all sales but not to other contracts.¹⁷³ In addition the *actio empti* was also extended to cover cases in which the seller did not know of the defect and had not given an affirmation against defects. Therefore, the seller was liable under the *actio empti* for a defect even though he did not know of the defect as long as he did not disclaim liability for the defect, which amounted to an implied guarantee against latent defects.¹⁷⁴ This guarantee which was implied by law was based on a generalization of the *aedilitian* remedies and was effected by means of a more refined interpretation of what was owed in good faith principle, under the *actio empti*.¹⁷⁵

Regarding the buyer's remedies in such cases of implied guarantee, it depended upon whether

¹⁷⁰ Liability for *dicta in venditione*.

¹⁷¹ Ulp.D. 19.1.13.1.

¹⁷² Zimmermann, *supra*. n. 136, at 321.

¹⁷³ Ulp.D. 21.1.63.

¹⁷⁴ Ulp.D. 19.1.13.

¹⁷⁵ Zimmermann, *supra*. n. 136, at 321.

the seller was aware of the defect or not.¹⁷⁶ In the case where the seller knew of and concealed the defect the law allowed the buyer to claim his full damages, *quod interest*.¹⁷⁷ On the other hand, in the case of the seller's ignorance of the defect, the buyer was only allowed to claim the *aedilitian* remedies of either *redhibitoria* or *quantum minoris*.¹⁷⁸ One of the unique features of the buyer's remedies at that time was that the nature of the objective liability in the *aedilitian* remedies was transformed into the nature of the subjective liability in *ius civile* which depended upon the seller's good or bad faith.¹⁷⁹

Having said that, the contractual liability theory maintains that there is no doubt in that the historical origin of the seller's guarantee liability is directly related to the *aedilitian* edicts.¹⁸⁰ The institution that modern civil law inherited from Roman law is, however, the *ius civile* in Justinian's time, which assimilated the *aedilitian* remedies.¹⁸¹ That is, it is the implied guarantee, which was inherently part of the contract in line with the principle of good faith. Their reasoning for this assertion is as follows. First, there remain some doubts whether the inheritance of the *aedilitian* edicts necessarily results in deciding the nature of the seller's guarantee liability under modern civil law.¹⁸² The doubts exist because the use of the *aedilitian* edicts is quite different from modern civil law insofar as one admits that the interrelationship with other legal institutions and complexity of economic life in modern society are different

¹⁷⁶ Ulp.D. 19.1.13.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* In relation to the limitation period, it was six months and one year in the cases of the claims of *redhibitoria* and *quantum minoris*, respectively. For the *actio empti*, based on the bad faith of the seller, to which was assimilated knowledge of the hidden defect, and which alone of the three actions carried the right to damages, it was the traditional one of 30 years. See generally Zimmermann, *supra* n. 136, at 322 ff.

¹⁷⁹ In view of these remedies it seems to be redundant to keep the *aedilitian* remedies if we consider the office and jurisdiction of the *aediles* had been abolished. However their existence explained evidence of the traditionalism of both the East Roman school jurisprudence and Justinian. *Id.*

¹⁸⁰ Dae-jeong Kim, *supra* n. 136, at 12, 13.

¹⁸¹ Dae-jeong Kim, *id.*, at 25, 37.

¹⁸² *Id.*

from the time when the *aedilitian* edicts were used.¹⁸³ Namely, the *aedilitian* edicts had been created under their own historical background of ancient commerce of slaves and livestock sales and under the institutional need of legal supplementation caused by the insufficiency of the *actio empti* to protect the buyer from notorious slave traders.¹⁸⁴ Thus, the nature of the seller's guarantee liability under modern civil law should be distinguished from the *aedilitian* edicts insofar as the status of other legal institutions in light of the buyer's protection and complexity of economic life are quite different from those at the time of the *aedilitian* edicts. Second, it should be noted that the seller's liability under the *aedilitian* edicts was based on 'the breach of the seller's duty to declare all non-apparent defects' as a contractual duty.¹⁸⁵

2.1.2.2.2. Theoretical background: Denying the principles of *Impossibilium nulla obligatio*, *Specific goods dogma*

The contractual liability theory denies the principles of *impossibilium nulla obligatio* and *specific goods dogma* and contends that the seller takes the responsibility for incomplete performance if he delivers defective goods.¹⁸⁶ This theory assumes the seller is under a contractual obligation to tender non-defective goods in specific goods sales as well as in generic goods sales.¹⁸⁷ Consequently, denying the principles of *impossibilium nulla obligatio* and *specific goods dogma*, the seller in specific goods sales must deliver the goods in the same condition 'as it should be' rather than 'as it is' (in *status quo*).¹⁸⁸

The grounds for this argument are as follows. First, the proposition of the *specific goods dogma* that the delivery in *status quo* is deemed to be a fulfilment of his contractual obligation

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Kyu-chang Cho, *supra* n. 136, at 228 ff.

¹⁸⁶ Hyung-bae Kim, *supra* n. 67, at 311 ff.; Hyung-bae Kim, *supra* n. 66, at 224 ff.; Eun-Young Lee, *supra* n. 167, at 208 ff.; Juk-in Hwang, *supra* n. 167, at 83 ff.

¹⁸⁷ *Id.*

¹⁸⁸ Eun-Young Lee, *supra* n. 167, at 209. Undoubtedly, there is a 'as it should be' obligation in generic goods sales (KCC Art. 375(1)).

of tender may turn out at variance with one's ordinary expectation.¹⁸⁹ Second, there is a contradiction between KCC Arts. 462 and 374. The former provision explains the *specific goods dogma* as the legal liability theory maintains.¹⁹⁰ In contrast, the latter provides:

“If the delivery of a specific thing is the subject of a claim the obligor is bound to preserve such thing with the care of a good manager until it is delivered.”¹⁹¹

Third, KCC Art. 462 must be excluded in the sale of goods due to the principle of *lex specialis derogat legem generalem*.¹⁹² Fourth, the partial invalidity of the contract due to initial impossibility in part can be plausible only in the case of defects in quantity, not in the case of defects in quality.¹⁹³

2.1.2.2.2.3. Positive law background: Relationship with other provisions

The theory concludes its finding of the contractual nature of the seller's guarantee liability by the analogical interpretation of the other provisions. The positive law backgrounds are as follows. First, it is argued that a contractual obligation to deliver non-defective goods could be drawn from KCC Art. 580 which imposes on the seller the liability in the sale of specific goods where the seller delivers defective goods.¹⁹⁴ This is based on the idea that the liability cannot be

¹⁸⁹ Juk-in Hwang, *supra* n. 167, at 83 ff. Cf. Eun-young Lee, *supra* n. 167, at 211.

¹⁹⁰ For the texts of art. 462, see *supra* n. 150 and accompanying texts.

¹⁹¹ That is, in the event of a subsequent defect by the seller's or his employee's fault in preserving the specific goods, the law does not answer properly the question of whether the buyer must take the delivery in *status quo* on the basis of KCC Art. 462 or reject the delivery and rescind the contract on the basis of KCC Art. 374 as is possible in some cases of the buyer's claim for incomplete performance.

¹⁹² *Id.* One must note that this argument is based on the idea of there being the seller's duty to deliver non-defective goods even in specific goods sales by virtue of the rules as to the seller's guarantee liability. See Eun-young Lee, *supra* n. 68, at 787. Therefore, KCC Art. 462 as a general rule is in conflict with the rules as to the seller's guarantee liability and the conflict leads to the exclusion of KCC Art. 462 by the principle of a *lex specialis derogat legem generalem*.

¹⁹³ Kwang-min Seo, “Mae-do-in-eoi Ha-ja-dam-bo-chaek-im-eu-ro-seo-eoi Son-hae-bae-sang-chaek-im-eoi Nae-yong-kwa Yo-gun (The Contents and Requirements of Damage Claim in the Seller's Guarantee Liability)”, (1994) 21(3) *Ko-shi-yeon-goo* 25, at 36.

¹⁹⁴ Eun-Young Lee, *supra* n. 167, at 210 f.

made without an obligation.¹⁹⁵ Second, KCC provides the seller's guarantee liability not only for the sale of specific goods but also for the sale of generic goods¹⁹⁶ and the buyer is allowed to claim for replacement in the sale of generic goods.¹⁹⁷ This provision for replacement can be explained only on the assumption that the seller's guarantee liability is a contractual one.¹⁹⁸

2.1.2.2.3. The nature of the seller's guarantee liability

2.1.2.2.3.1. Non-fault based liability

Like the legal liability theory, the contractual liability theory understands that there is no requirement of the seller's fault,¹⁹⁹ even though it is plausible to say in logical terms that it needs the seller's fault as long as the theory insists on the contractual nature of the seller's guarantee liability and there is no specific provision for non-fault based liability.²⁰⁰

2.1.2.2.3.2. Liability for the breach of the seller's contractual obligation to deliver non-defective goods

While the legal liability theory insists that the seller's guarantee liability is imposed on the seller by the law on the basis of *impossibilia nulla obligatio* and *specific goods dogma*, the contractual liability theory contends that the seller's guarantee liability is a contractual one in its nature imposing on the seller a contractual obligation to tender non-defective goods in generic

¹⁹⁵ *Id.* In contrast, the legal liability theory understands that art. 580 provides a legal obligation which may raise a legal liability.

¹⁹⁶ KCC Art. 581(1).

¹⁹⁷ KCC Art. 581(2).

¹⁹⁸ Sik Choi, *Shin-chae-kwon-bup-gak-ron (New Particulars in Obligatory Law)*, (1961), at 99; Juk-in Hwang, *supra* n. 167, at 83 ff.; Hyung-bae Kim, *supra* n. 67, at 336 f.; *Contra*, for the view of Prof. Tae-jae Lee, see *supra* n. 159.

¹⁹⁹ Hyung-bae Kim, *supra* n. 67, at 310 f.; Eun-Young Lee, *supra* n. 167, at 206; Juk-in Hwang, *supra* n. 167, at 84; Kyu-chang Cho, *supra* n. 136, at 262; *Contra*, Joo-soo Kim, *supra* n. 125, at 214.

²⁰⁰ Juk-in Hwang, *Hyun-dae-min-bup-ron IV: Chae-kwon-gak-ron (Modern Civil Law IV: Particulars in Obligatory Law)*, (1987), at 232; Kyu-chang Cho, *supra* n. 136, at 260 ff.

goods sales as well as in specific goods sales.²⁰¹ Therefore, the seller's guarantee liability is said to be a responsibility of the seller for the breach of the contractual obligation to tender non-defective goods, which may fall within the category of incomplete performance.²⁰²

2.1.2.2.3.3. Relationship with the general liability for non-performance: Concurrence with the general liability ?

This theory understands that the seller's guarantee liability falls within a category of non-performance, *i.e.*, 'incomplete performance'. The interrelationship between the general liability and the seller's guarantee liability is a relationship of general *versus* special rules, which may result in, at least in principle, no concurrence with the general liability. There are two opposing views; no concurrence theory and concurrence theory.

2.1.2.2.3.3.1. Concurrence with incomplete performance

This view²⁰³ maintains that concurrence should be allowed because although the seller's guarantee liability is somewhat similar to incomplete performance in its nature, the 'general' incomplete performance must be distinguished from the 'special' incomplete performance in that the special incomplete performance regarding the seller's guarantee liability is quite different in terms of its requirements to raise incomplete performance; fault, limitation period, and *etc.*²⁰⁴ The rationale for this view is to protect the buyer by the means of allowing

²⁰¹ For its theoretical background, see *supra* n. 186-193 and accompanying texts.

²⁰² For the case the court recognized the seller's guarantee liability as incomplete performance although it was not the case dealing with the seller's guarantee liability, see the Korean Supreme Court Case, 14/4/1992, Da 17146·17153.

²⁰³ Hyung-bae Kim, *supra* n. 67, at 313 ff.; Sang-yong Kim, "Bool-wan-jeon-e-haeng (Incomplete Performance)", (July, 1994) 246 *Wol-kan-ko-shi* 76, at 80 f.; Bup-young Ahn, *supra* n. 167, at 225 f.; Sang-kwang Lee, *supra* n. 167, at 306 ff.

²⁰⁴ Hyung-bae Kim, *supra* n. 66, at 224 ff. The reasoning for the concurrence theory seems to be quite odd in the light of a simple principle that special rules preclude general rules (*lex specialis derogat legem generalem*), but currently it has given another explanation to support its view on the basis of negation of the principle of *lex specialis derogat legem generalem*. See Hyung-bae Kim, *supra* n. 67, at 314 f.

concurrence with incomplete performance where there are additional damages which cannot be recovered by the rules of the seller's guarantee liability.²⁰⁵ As far as the concurrence is allowed, to raise the general liability the requirement of fault is essential.

2.1.2.2.3.3.2. No concurrence with incomplete performance

This view denies concurrence with incomplete performance on the basis of the general principle of *lex specialis derogat legem generalem*.²⁰⁶ That is, the seller's guarantee liability is only applied in the cases where the seller's delivery of defective goods fulfils the requirements of both the seller's guarantee liability and the general liability for incomplete performance because of the nature of the special rules against the general rules.²⁰⁷

2.1.2.3. Practical differences in general in adopting either theory

The differences in understanding as to the nature of the seller's guarantee liability are not only of academic interest as to a matter of theoretical framework, but also extend to the practical matters in relation to the requirements to invoke the seller's guarantee liability and the remedies, in particular, damages. The ensuing discussions are to give important differences in its substances when it is understood as either a legal one or a contractual one in its nature.

Of the requirements to raise the seller's guarantee liability,²⁰⁸ the question of whether there exists a defect is of importance in its practical differences. First, the concept of a defect is differently defined by each theory so that the different definition may have an effect on the decision of whether there exists a defect. According to the legal liability theory, it is defined

²⁰⁵ Hyung-bae Kim, *supra* n. 66, at 225 f. For further discussions of this view, see *infra* n. 1057-1060 and accompanying texts.

²⁰⁶ Eun-Young Lee, *supra* n. 167, at 211 f.; Kyu-chang Cho, *supra* n. 136, at 260 ff.; Dae-jeong Kim, "Chae-moo-bul-e-haeng-chaek-im-seol-ae-eoi-han Ha-ja-dam-bo-chaek-im-eoi Jae-koo-seong (Reconstruction of the Guarantee Liability for Defective Goods by the Contractual Liability Theory)", (1993) 9 *Min-sa-bup-hak* 242, at 264 ff.

²⁰⁷ For further discussions of this view, see *infra* n. 1061-1066 and accompanying texts.

²⁰⁸ For the requirements in general, see *supra* n. 110-115 and accompanying texts.

when there is a lack of the reasonable (and general) quality or nature in the goods, which are expected by a reasonable person.²⁰⁹ In other words it should be decided objectively so that if the goods delivered are not conformed to the general purpose of the concerned goods, there is a defect in the goods.²¹⁰ In contrast the contractual liability theory maintains that a defect should be decided subjectively by the test of whether the goods delivered are conformed to the purposes agreed by the contract between the parties.²¹¹ Second, the time when a defect must exist is also related to the matter of the understanding of its nature so that it may cause different results in the question of the existence of a defect. On the one hand, the legal liability theory insists that the seller's guarantee liability in the sale of specific goods is raised where a defect existed at the time of contract because the principle of *impossibilium nulla obligatio* and *specific goods dogma* is concerned only with the matter of the defect at that time.²¹² On the other hand the contractual liability theory maintains that the existence of a defect in either specific goods or generic goods must be decided at the time of the transfer of risk.²¹³

In addition, the issue as to the nature affects the practical matter of remedies, in particular, the measure of damages. The legal liability theory insists that the extent of damages should be limited to compensation for expenses or other losses incurred in reliance on the validity of the contract owing to its theoretical background derived from the principle of *impossibilium nulla obligatio* and *specific goods dogma* in which a part of the contract becomes invalid due to there

²⁰⁹ For more detail, see *infra* n. 389-391 and accompanying texts.

²¹⁰ This is so called 'the objective criterion theory'. Thus, there can exist a defect even if no defect is found by the contractual agreements.

²¹¹ This is so called 'the subjective criterion theory'. For more detail, see *infra* n. 392-393 and accompanying texts.

²¹² For more detail, see *infra* n. 511 and accompanying texts. In the cases of the sale of generic goods the legal liability theory argues that the seller may be responsible for defective goods from the time when the goods are subsequently specified after the conclusion of contract. See *supra* n. 149 and accompanying texts.

²¹³ It might be at the time of delivery. Therefore, the seller will be responsible whether the defect before the transfer of risk are caused by initial or subsequent impossibility, or the seller's breach of duty of due care as a good manager. For more detail, see *infra* n. 512-513 and accompanying texts.

being initial impossibility in the goods.²¹⁴ Contrary to that, the contractual liability theory should argue in principle that damages are compensation for the buyer's expectation interest because the seller's guarantee liability is in the same nature as the general liability.²¹⁵ Notwithstanding the principle, the damages under the seller's guarantee liability are variously interpreted among the scholars in favour of this theory in a way that limits the scope of damages to something lesser than the buyer's expectation losses. The basis of their idea is that the remedy of damages under the seller's guarantee liability which exists regardless of the fault principle cannot be treated in the same way as under the general liability which is governed by the fault principle.²¹⁶

2.1.3. Summary

The seller's liabilities under Korean law are provided in dual manner, *i.e.* the general liability and the seller's guarantee liability. Depending upon what has happened to the goods, the general liability has been divided into 3 categories; delay in performance, impossibility of performance and incomplete performance. The seller is liable under the general liability only if he can be blamed for performing otherwise than agreed in the contract. In addition, the seller is also liable under the special regime for the seller's guarantee liability for defective goods. Unlike the general liability, the seller's guarantee liability is a strict one to ensure their freedom from any defect so that all the remedies under the seller's guarantee liability exists irrespective of the fault principle.

As to the nature of the seller's guarantee liability, scholars in Korea have been divided into two groups; the legal liability theory group and the contractual liability theory group. The major difference between the two theories is that the former does not admit a contractual duty to

²¹⁴ Namely, the damages are for the buyer's reliance interest. For more detail, see *infra* n. 1021-1025 and accompanying texts.

²¹⁵ Prof. Eun-young Lee seems to stand with this view. See *infra* n. 1029-1030 and accompanying texts.

²¹⁶ *E.g.*, it is limited to the buyer's reliance loss or mere price reduction, which seem to exclude the buyer's consequential losses. For more details, see *infra* n. 1026-1042 and accompanying texts.

deliver non-defective goods in the sale of specific goods, whereas the latter assumes the duty.²¹⁷

One must note that adopting either theory may produce substantial differences in practice as to the matters of the existence of a defect and the scope of damages.

2.2. The unified liability system in English law, CISG, and the Directive

2.2.1. The unified liability

2.2.1.1. General

As discussed above, two different liabilities are imposed on the seller in the event that the sales contract is not properly performed as expected by the parties under Korean law; the general liability and the seller's guarantee liability. The ensuing discussions are to examine the way the different legal systems address the problems raised in that event by asking under what liability system the cases where the seller does not perform as expected by the buyer are dealt with and what is the nature of the seller's liability for non-conforming goods.

2.2.1.2. The unified liability under the name of 'breach of contract'

Unlike Korean law, the underlying doctrine under both CISG and English law as a theoretical starting point is that they treat all contracts as promises leading to a claim for damages for 'breach of contract', *i.e.*, the contractual liability, if the promised result is not produced by the debtor.²¹⁸ This being the principle, several distinctive points can be found compared to the

²¹⁷ For the background of each theory, see *supra* n. 136-157, 168-198 and accompanying texts.

²¹⁸ For the doctrine in English law, see Zweigert and Kötz, *supra* n. 20, at 540. For the doctrine in CISG, see Honnold, *Uniform Law for International Sales*, (1999, 3rd ed.), at 301 f.; Huber, Schlechtriem (ed.), (Eng. trans. by Thomas), *Commentary on the UN Convention on the International Sale of Goods*, (2nd ed., 1997), at 368. However, one must note that the breach of contract in English law parlance is seen as there being a breach of contract only when the creditor has a right to damages, whereas it is not tied to the remedy of damages under CISG, in other words, there is a breach of contract where the creditor has at least one of remedies among specific performance, avoidance, reduction of the debtor's own

general liability and the seller's guarantee liability under Korean law as follows.

In comparison with the general liability of Korean law, first, English law and CISG does not need to separate and categorize the various types of non-performance as Korean law does; it does not matter if the seller has wholly failed to deliver as agreed in the contract or has delivered very late or has delivered the goods but failed to perform in one way or another required by the contract. Furthermore, it does not matter whether the obligation is one of principal obligations²¹⁹ or some lesser obligations.²²⁰ This is due to their use of the unified concept of 'breach of contract' which may include all kinds of non-performance in Korean law.²²¹ All in all, once the agreed result has not been achieved, the guarantee undertaken has not been observed and it is said that there has been a 'breach of contract'. Second, in contrast with Korean law, it is irrelevant whether the debtor or his employee was to blame for non-performance. What really matters under both CISG and English law is whether or not the agreed result has been in fact procured.²²²

performance, and damages. See Lando, "Non-Performance (Breach) of Contract", in: Hartkamp *et al.* (ed.), *Towards a European Civil Code*, (1998), at 341 ff. One of the practical differences seems to be that even in case of an excused non-performance (*e.g. force majeure*) CISG may allow the creditor to terminate the contract under the name of breach of contract, even if the debtor is exempted from damages by CISG Art. 79.

²¹⁹ *E.g.*, the seller's obligation to deliver the goods and the buyer's obligation to pay. See CISG Arts. 30, 53, the SGA s. 27.

²²⁰ *E.g.*, ancillary obligations.

²²¹ In this case CISG uses both the concept of 'failure to perform' (as in art. 45(1)) and 'breach of contract' (as in art. 25 and in the heading to Section III for the buyer's remedies). Both concepts are in essence precisely same in their meaning. See Will, Bianca/Bonell (ed.), *Commentary on the International Sales Law: the 1980 Vienna Sales Convention*, (1987), at 331.

²²² For the reference of English law see *Paradine v. Jane* [1647] Aleyn 26, 82 Eng Rep 897; *Nicolene Ltd. v. Simmonds* [1952] 2 Lloyd's Rep 419, 425, *per* Sellers J.; *aff'd* [1953] 1 QB 543 (CA); *Rainieri v. Miles* [1981] AC 1050, 1086, *per* Lord Edmund-Davies. For CISG reference, see arts. 45 and 61. Under those provisions the buyer (or seller) may invoke a single set of remedies when the seller (or buyer) fails to perform any of his obligation under the contract or CISG. See also Huber, Schlechtriem (ed.), *supra* n. 218, at 358 f.; Honnold, *supra* n. 218, at 301 f. Admittedly, English law sometimes releases a debtor from liability when he has been prevented from performing. This is not because he and his employee are free from blame as regards non-performance, but because on a proper view of the contract he is not liable

Compared to the seller's guarantee liability of Korean law, both CISG and English law treats the seller's guarantee liability as part of the general system of 'breach of contract' rather than as an independent regime dealing with only defects in goods since the breach of guarantees in contracts of sale are just like all other breaches of contract which themselves arise from broken promises. That is, the buyer's claim with regard to defective goods is dealt with under the paradigm of contractual liability. The assimilation of the seller's guarantee liability into the paradigm of contractual liability by breach of contract seems to explain why the seller is strictly liable for the harm caused to the buyer by the defect.²²³ Therefore, as long as liability for defective goods is removed from its special regime, it is possible for the buyer who receives defective goods to invoke the full range of remedies for breach of contract in the paradigm of contractual liability without being restricted by the fault principle.

Insofar as the Directive is concerned, it is not necessary to discuss the liability system in general. This is because it only deals with certain aspects of the sale of consumer goods and associated guarantees in respect of the non-conformity of goods with the contract and it does not however impinge on provisions and principles of national law relating to contractual and non-contractual liability.²²⁴ Therefore, it seems impossible to explore in general the liability

for performance in all circumstances and his guarantee does not cover certain obstacles to performance. For the case relieving the debtor where the continent lawyer would speak of 'initial impossibility', see *Couturier v. Hastie* [1856] 5 HLC 673, 10 Eng Rep 1065. (Subsequent English cases have treated analogous cases as instances of error and have held that a contract based on a 'common mistake' of the parties is not valid) For the leading cases covering subsequent impossibility in perspective of continent lawyers, see *Taylor v. Caldwell* [1863] 3 B&S 826, 122 Eng Rep 309; *Howell v. Coupland* [1874] LR 9 QB 462. CISG also releases the debtor from his damage liability when his failure to perform any of his obligations results from an impediment beyond his control (cf. *force majeure*), which he could not reasonably be expected to have taken the impediment into account at the time of contract or to have avoided or overcome it or its consequences. See CISG Art. 79(1). However, the creditor retains all other remedies available to him under CISG except for his claim to damages. See CISG Art. 79(5). One must note that it is far from clear if the sphere of the application of art. 79 extends to the case of the seller's delivery of defective goods. See *infra* n. 1094 and accompanying texts.

²²³ Zweigert and Kötz, *supra* n. 20, at 540.

²²⁴ Directive(99/44) Art. 8.1.; Recital 6.

system of the Directive as long as each Member State's own liability system remains unchanged and the Directive supplants only their own corresponding rules pertaining to the non-conformity of the goods with the contract.²²⁵

2.2.1.3. The seller's liability for defective goods

2.2.1.3.1. English law

The law with regard to the seller's liability for defective goods is embodied mainly in the SGA. The SGA confers on the buyer the right to a guarantee based on the notion of the existence in the sales contract of implied terms, according to which the goods delivered must be of certain standard and quality.²²⁶ Of the implied terms the interesting terms in particular comparable with the seller's guarantee liability of Korean law are specified in the SGA s. 13 (Sale by description), s. 14 (Implied terms about quality and fitness), s. 15 (Sale by sample) and s. 30 (Delivery of wrong quantity).²²⁷

Under the SGA the following terms will be implied. First, where the goods are sold by

²²⁵ For instance, it does not change at all the dual liability system in Germany and also does not influence on their general liability based on the types of non-performance and the fault principle. The only thing it seems to be influenced is that it is to clarify that the nature of the seller's guarantee liability in consumer sales is a contractual liability. This is because German law will incorporate the rules of the Directive as to non-conformity of the goods into their existing rules of the seller's guarantee liability in consumer sales, in particular, the seller's duty to deliver the goods in conformity with the contract of sale, which requires, *e.g.*, normal quality in goods of the same type and meets with the consumer's reasonable expectation even in the sale of specific goods. See Directive(99/44) Arts. 2.1., 2.2.

²²⁶ Like the other laws, the SGA also regulates the matter of defective title separately from the matter of defective quality. See the SGA s. 12 (Implied terms about title).

²²⁷ Note that in English law terms can be implied not only by statute, but also by custom and common law. However, the SGA s. 14(1) says that 'Except as provided by this section and section 15 and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale'. Therefore our discussion on the seller's guarantee liability should focus on the statutory implied terms, although cases are very much related to understand the provisions of the SGA and further terms may be annexed to a contract by custom or usage (s. 14(4)).

The basic requirement for the buyer's action on a guarantee when one of the implied terms in the sale of goods has been broken is that there must be a defect in some way in the goods in light of the above implied terms.²⁴⁰ Further requirement for the buyer's action on the ground of the seller's breach of the implied term of satisfactory quality is that the existence of the unsatisfactory quality must not be specifically drawn to the buyer's attention before the contract is made,²⁴¹ or where the buyer examines the goods before the contract is made, it must not be one that examination ought to reveal,²⁴² or in the case of a contract of sale by sample, it must not be one which would have been apparent on a reasonable examination of the sample.²⁴³ In the buyer's action for the seller's breach of the implied term that the goods will be free from any defect, making their quality unsatisfactory, the buyer is also required to show that it would not be apparent on a reasonable examination of the sample.²⁴⁴

The effects of the breach of the implicit terms are basically as follows.²⁴⁵ First, the buyer has the right to reject the goods and terminate the contract because they are either expressly or in substance classified as conditions.²⁴⁶ However, in non-consumer cases, the right of the non-

²⁴⁰ For more details, see Chap. III.

²⁴¹ The SGA s. 14(2C)(a).

²⁴² The SGA s. 14(2C)(b).

²⁴³ The SGA s. 14(2C)(c).

²⁴⁴ The SGA s. 15(2)(c). There seems to be no requirement to notify the defect in English law, although it is very much related to the buyer's right to reject and terminate the contract. See *infra* n. 623-625 and accompanying texts.

²⁴⁵ For more details, see Chap. IV. In English law, the first step to examine the effects of the breach of contractual term is to distinguish condition, warranty or innominate term. This is because the remedy of rejection is only available to the buyer when the seller's breach of contract goes to the root of the agreement, *i.e.*, either because it is a breach of condition or because of the nature or consequences of a breach of an innominate term, whereas if the term broken by the seller is merely a warranty, the buyer will only have a remedy in damages. Their thought that a contractual term must be either a condition or a warranty is due to the wording of statute in the SGA s. 11(3). For the authority there being an innominate term as the third category notwithstanding the SGA s. 11(3), see *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *The Hansa Nord* [1976] QB 44.

²⁴⁶ The SGA ss. 11(3), 13(1A), 14(6), 15(3). For the relationship between rejection and termination, see *infra* n. 782-788, 841-853 and accompanying texts.

consumer buyer may be restricted where the breach of the implied conditions of ss. 13, 14 and 15 is so slight that it would be unreasonable of him to reject.²⁴⁷ Similarly, the non-consumer buyer cannot exercise his right to reject the whole of the goods delivered where the shortfall or excess in quantity is so slight that it would be unreasonable to reject the whole.²⁴⁸ The buyer is precluded from rejecting and terminating the contract when he is considered as having accepted the goods in accordance with the provisions on acceptance in the SGA.²⁴⁹ Second, the buyer has the right to claim for damages. The buyer is entitled to claim damages as for breach of warranty where the buyer has decided not to invoke his right to reject and terminate the contract based on the breach of one of the implied conditions of ss. 13, 14 and 15,²⁵⁰ or he has lost the right to reject and terminate the contract as above.²⁵¹ In addition, damages may be also awarded for non-delivery where he rejects and terminates the contract because it is treated as if the seller has not delivered.²⁵² Similarly, in the case of short delivery, if the buyer elects to accept the short delivery and not to take the remaining goods, he can recover the price paid for them and is entitled to damages for any further loss suffered through non-delivery at the proper time. Third, the buyer can apply for a decree of specific performance by the court. The court by its judgment and decree is allowed to make an order of specific performance against the seller only on the conditions that, first, the goods to be delivered are “specific or ascertained”, and second, the court must “think fit” the grant of an order.²⁵³ However, English law does not seem to arrange for replacement or repair of the goods in general as a buyer’s remedy.²⁵⁴

²⁴⁷ The SGA s. 15A.

²⁴⁸ The SGA s. 30(2A).

²⁴⁹ The SGA s. 35(1) and (4).

²⁵⁰ The SGA s. 11(2).

²⁵¹ The SGA s. 53.

²⁵² The SGA s. 51.

²⁵³ The SGA s. 52(1). However, it is submitted that the statutory formula is much wider than the practice. See *infra* n. 1214.

²⁵⁴ In addition, the buyer may have the right to claim interest, or to recover money paid in the event of a

description, they must correspond with the description.²²⁸ This term will not be implied unless the statement made about the goods forms part of the description by reference to which the goods were sold.²²⁹ Second, the goods must be of satisfactory quality.²³⁰ This term will be implied provided that the seller sells the goods in the course of a business,²³¹ which includes ‘a profession and activities of any government department or local or public authority’.²³² Third, the goods must be reasonably fit for the buyer’s purpose where he, expressly or by implication, makes that known to the seller, whether or not that is a purpose for which goods of that type are commonly supplied.²³³ Like the implied term of satisfactory quality, this term will not be implied unless he sells the goods in the course of a business.²³⁴ Furthermore, this term will not be implied if the buyer does not rely on the seller’s skill and judgment, or it was unreasonable for him to do so.²³⁵ Fourth, where the goods are sold by sample, the bulk must correspond with the sample in quality²³⁶ or the goods must be free from any hidden defect making the quality of the goods unsatisfactory.²³⁷ All the above terms are treated as conditions.²³⁸

As to the matter of defects in quantity, although the SGA does not deal with it under the heading of implied terms as either conditions or warranties, the SGA imposes, in substance, an implied condition that the seller must deliver goods which are of the quantity required by the contract.²³⁹

²²⁸ The SGA s. 13(1).

²²⁹ For the meaning of the description by reference to which the goods were sold, see *infra* n. 404-406 and accompanying texts.

²³⁰ The SGA s. 14(2).

²³¹ *Id.* Cf. *infra* n. 408 for the interpretation of ‘in the course of a business’.

²³² The SGA s. 61(1).

²³³ The SGA s. 14(3).

²³⁴ *Id.* For the definition of ‘business’, see the SGA s. 61(1) and *infra* n. 408.

²³⁵ The SGA s. 14(3).

²³⁶ The SGA s. 15(2)(a).

²³⁷ The SGA s. 15(2)(c). A sale is not a sale by sample unless there is an express or implied term in the contract to that effect. See the SGA s. 15(1).

²³⁸ The SGA ss. 11(3), 13(1A), 14(6), and 15(3).

²³⁹ The SGA s. 30.

2.2.1.3.3. The Directive

Like English law, the Directive also imposes on the seller a presumed guarantee liability on the ground that the seller undertakes implied obligations in the sale of consumer goods to deliver the goods in conformity with the contract of sale. The heart of the relevant provisions as to the seller's guarantee liability for defective goods is art. 2. First of all, it requires as a ground rule that the goods must be in conformity with the contract of sale.²⁵⁵ Then, the Directive specifies four aspects of conformity of goods in quality for the purpose of deciding if the goods are in conformity with the contract.²⁵⁶ Therefore, insofar as the seller delivered the goods in conformity with the contract satisfying the four aspects, there is a presumption that the seller fulfilled his implied obligation to deliver the conforming goods with the contract.²⁵⁷

The seller's implied obligations are as follows. First, the goods must comply with the description given by the seller and possess the qualities of the goods the seller has held out to the consumer as a sample or model.²⁵⁸ Second, the goods must be fit for any particular purpose the consumer requires provided that the consumer has made known to the seller the particular purpose and the seller accepted it.²⁵⁹ Third, the goods must be fit for the purposes for which goods of the same type are normally used.²⁶⁰ Fourth, the goods must 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

total failure of consideration. See the SGA s. 54.

²⁵⁵ Directive(99/44) Art. 2.1.

²⁵⁶ Directive(99/44) Art. 2.2. It does not deal with the matter of a defect in quantity.

²⁵⁷ However, it seems to be unclear if the other terms of the contract than the four aspects as to quality must be considered when we decide the conformity of the goods with the contract and in the event of the breach of the other terms the remedies provided in the Directive are applied. See Beale and Howells, "EC Harmonisation of Consumer Sales Law - A Missed Opportunity?", (1997) 12 *Journal of Contract Law* 21, at 28.

²⁵⁸ Directive(99/44) Art. 2.2(a).

²⁵⁹ Directive(99/44) Art. 2.2(b).

²⁶⁰ Directive(99/44) Art. 2.2(c).

representative, particularly in advertising or on labelling.²⁶¹

The requirements for the consumer's action for the breach of the seller's implied obligations are as follows.²⁶² First, there must exist non-conformity of the goods which does not satisfy at least one of the seller's implied obligations as above.²⁶³ Second, the consumer was unaware or could not be reasonably aware of the lack of conformity at the time of contract.²⁶⁴ In addition to this, the lack of conformity must not have its origin in materials supplied by the consumer.²⁶⁵ Third, the lack of conformity which existed at the time of delivery must have emerged within the two-year cut-off period from the time of delivery.²⁶⁶ However, one must note that since this period is a minimum harmonisation requirement among the Member States, they are allowed to retain their own more extensive limitation rules.²⁶⁷ Fourth, the buyer must notify the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity.²⁶⁸ However, this requirement is subject to the option of the Member States to impose the notice duty on the buyer.²⁶⁹

The effects of the breach of one of the seller's implied obligations are explained by two stage remedies; repair or replacement for the first stage, and then reduction or rescission for the second stage.²⁷⁰ As regards the first stage, the consumer may require the seller to repair the goods or replace them free of charge unless this is impossible or disproportionate.²⁷¹ The repair

²⁶¹ Directive(99/44) Art. 2.2(d).

²⁶² For more details, see Chap. III.

²⁶³ Directive(99/44) Arts. 2.1., 2.2., 2.3.

²⁶⁴ Directive(99/44) Art. 2.3.

²⁶⁵ *Id.*

²⁶⁶ Directive(99/44) Art. 5.1.

²⁶⁷ *Id.*

²⁶⁸ Directive(99/44) Art. 5.2.

²⁶⁹ *Id.*

²⁷⁰ For more details, see Chap. IV.

²⁷¹ Directive(99/44) Art. 3.3. For the purpose of deciding which of remedies are disproportionate and which of remedies must be exercised, a comparison must be done between repair and replacement by asking the question of whether a remedy imposes costs on the seller which are unreasonable in comparison with the alternative remedy, taking account of factors such as the value of the goods if there

or replacement should be carried out within a reasonable time and without any significant inconvenience to the consumer,²⁷² and free of charge for the consumer.²⁷³ As to the second stage, the consumer can claim for an appropriate reduction in the price²⁷⁴ or have the contract rescinded if there is no right to a repair or replacement as described above, or if the seller has not completed the remedy within a reasonable time or without significant inconvenience to the consumer.²⁷⁵ The buyer, however, is not entitled to have the contract rescinded so long as the lack of conformity is minor,²⁷⁶ even though the buyer may still claim a price reduction. The Directive does not regulate the matter of damages which may involve consequential losses. This matter is left to the Member States' own law.²⁷⁷

2.2.1.3.2. CISG

Similarly to English law and the Directive, CISG imposes on the seller a presumed guarantee liability on the basis of the idea that there exist implied obligations by which the seller must deliver the goods being of certain standard and quality except where the parties have agreed otherwise.²⁷⁸ The relevant provision in particular corresponding with the seller's guarantee

were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy could be completed without significant inconvenience to the consumer. *Id.*

²⁷² *Id.*

²⁷³ Directive(99/44) Art. 3.4.

²⁷⁴ In English law the right to claim for an appropriate reduction in the price is explained by the application of damage rules. For the detailed comparison, see *infra* n. 1153-1157 and accompanying texts.

²⁷⁵ Directive(99/44) Art. 3.5.

²⁷⁶ Directive(99/44) Art. 3.6.

²⁷⁷ Green Paper on Guarantees for Consumer Goods and After-Sales Services, COM (93) 509 Final, at 90; 10th Report by Select Committee, Session 1996-7, Consumer Guarantees, HLP 57, at 21. See also Directive(99/44) Art. 8.1.

²⁷⁸ The rationale for the implied terms is that in the usual sale, and absent evidence of contrary intent, the buyer is entitled to expect the goods to possess certain basic qualities even if the contract does not explicitly specify them. See Secretariat's Commentary, *O.R.*, at 32, Art. 35, No. 13.

liability of Korean law is art. 35.²⁷⁹ It begins with the emphasis of a point that the goods delivered must be of the quantity, quality and description required by the contract and contained or packaged in the manner required by the contract.²⁸⁰ Yet, particularly important is that where the contract contains insufficient details as to the quality or quantity of the goods CISG sets out a series of implied obligations in order to determine the conformity of the goods.

The implied terms are, in the absence of any contrary agreement, as follows. First, the goods must be fit for the purposes for which the goods of the same description would ordinarily be used.²⁸¹ Second, the goods must be fit for any particular purpose expressly or impliedly made known to the seller at the time of contract.²⁸² This term applies only if the buyer relied on the seller's skill and judgment, and it was reasonable for him to do so.²⁸³ Third, the goods must possess the qualities of goods which he has held out as a sample or model.²⁸⁴ Fourth, the goods must be contained and packaged in the usual manner for such goods or if there is no usage to determine the usual manner, it must be in an adequate manner to protect and preserve the goods.²⁸⁵

The requirements for the buyer to bring an action on the seller's delivery of non-conforming goods in quality or quantity are as follows.²⁸⁶ First, there must exist the lack of conformity in accordance with, at least, one of the implied terms above or the quantity required by the

²⁷⁹ In addition CISG respects any usage widely observed in the trade concerned and any practice which the parties have established between themselves to be implied in the contract as part of the bargain in fact. See CISG Art. 9. Note that, like any other domestic sales law including Korean and English law, CISG separately provides the seller's implied obligation as to title, which are free from any right or claim of a third party. See CISG Arts. 41, 42.

²⁸⁰ CISG Art. 35(1). In fact it is not necessary to spell out the point (*e.g.*, the SGA does not specify this point).

²⁸¹ CISG Art. 35(2)(a).

²⁸² CISG Art. 35(2)(b).

²⁸³ *Id.*

²⁸⁴ CISG Art. 35(2)(c).

²⁸⁵ CISG Art. 35(2)(d).

²⁸⁶ For more details, see Chap. III.

contract.²⁸⁷ Second, the buyer did not know of and could not have been aware of the lack of conformity at the time of contract, about which he is going to bring an action.²⁸⁸ One must note that this requirement does not apply to the matter of non-conformity in quantity.²⁸⁹ Third, the buyer must examine the goods, or cause them to be examined within as short a period as is practicable in the circumstances.²⁹⁰ Fourth, the buyer must give the notice to the seller stating the nature of the lack of conformity within a reasonable time after he has discovered it or should have discovered it pursuant to art. 38.²⁹¹ Fifth, in any event, the buyer must give the seller the required notice by virtue of art. 39(1) at the latest within two years from the date on which the goods were actually handed over to the buyer.²⁹² The two-year time limit ordinarily applicable by virtue of art. 39(2) will not apply where the contract sets forth a cut-off period of shorter or longer duration.²⁹³

The effects of the seller's non-conforming delivery are as follows.²⁹⁴ First, the buyer has a right to require specific performance in the form of replacement provided that the lack of conformity represents a fundamental breach of contract.²⁹⁵ This right is not allowed if the specific performance in the form of replacement is not so available pursuant to the corresponding domestic sales law of the forum state.²⁹⁶ Second, the buyer has a right to require repair of the lack of conformity unless it is unreasonable to do so having regard to all the

²⁸⁷ There may be some overlap between the implied terms in art. 35(2) or even between arts. 35(1) and 35(2).

²⁸⁸ CISG Art. 35(3).

²⁸⁹ The wording of art. 35(3) makes it clear by referring to the aspects of non-conformity under art. 35(2).

²⁹⁰ CISG Art. 38(1).

²⁹¹ CISG Art. 39(1).

²⁹² CISG Art. 39(2).

²⁹³ *Id.*

²⁹⁴ For more details, see Chap. IV.

²⁹⁵ CISG Art. 46(2). A fundamental breach of contract is one which the buyer must have suffered a detriment which substantially deprives him of what he is entitled to expect under the contract and the detriment must be one which the seller ought to foresee. CISG Art. 25. For more detail, see *infra* n. 879-889 and accompanying texts.

²⁹⁶ CISG Art. 28. *Contra*; Honnold, *supra* n. 218, at 310 f.

circumstances.²⁹⁷ This right is also subject to the domestic sales law of the forum state.²⁹⁸ Third, the buyer can declare the contract avoided on the grounds of lack of conformity provided that it amounts to a fundamental breach of contract.²⁹⁹ However, the seller's right to cure the lack of conformity within the contract delivery date may limit the buyer's right to avoid for a fundamental breach unless the cure causes the buyer unreasonable inconvenience or unreasonable expense, since the buyer cannot avoid until the contract delivery date has passed.³⁰⁰ Fourth, the buyer has a right to a price reduction.³⁰¹ The price reduction is available even where the buyer is not entitled to avoidance or cure except where the seller cures the lack of conformity in accordance with arts. 37 or 48 or the buyer refuses to accept the seller's cure in accordance with those articles.³⁰² Fifth, the buyer is entitled to damages in accordance with the rules for measurement of damages as provided in art. 74.³⁰³ The buyer who requires the seller to perform either repair or replacement may also recover damages for the loss resulting from the delay or other deficiency in the seller's performance.³⁰⁴ In the case of avoidance, he may recover damages as provided in arts. 75 and 76³⁰⁵ as well as damages for the loss suffered as a

²⁹⁷ CISG Art. 46(3). This right is not limited to the cases of a fundamental breach of contract, but applied to any breach of the seller's duty to deliver conforming goods.

²⁹⁸ CISG Art. 28.

²⁹⁹ CISG Art. 49(1)(a). A declaration of avoidance should be duly communicated in accordance with the applicable notice rules. CISG Art. 26.

³⁰⁰ CISG Art. 37; Honnold, *supra* n. 218, at 269. Arguably, the seller's right to cure even after the delivery date cannot be defeated by the buyer's declaration of avoidance for a fundamental breach. Thus, where cure is feasible and an offer of cure can be expected even after the delivery date the buyer's right to avoid the contract may be limited because the possibility of cure may not reach a fundamental breach in accordance with art. 25. CISG Art. 48; Honnold, *supra* n. 218, at 319 ff. However, this limit to avoidance is far from clear. For more detail, see *infra* n. 890-899 and accompanying texts.

³⁰¹ CISG Art. 50.

³⁰² *Id.*

³⁰³ CISG Art. 45(1)(b).

³⁰⁴ CISG Art. 45(2). For the measurement of damages in this case, CISG Art. 74 applies.

³⁰⁵ CISG Arts. 75 and 76 provide contract/cover differential and contract/market differential as a rule to compensate the loss in the case of avoidance.

consequence of the breach by virtue of art. 74.³⁰⁶ However, the buyer may be arguably deprived of his right to damages where the seller proves that the lack of conformity is due to an impediment beyond the seller's control and that he could not reasonably be expected to have taken the impediment into account at the time of entering into the contract or to have overcome or avoided it or its consequences.³⁰⁷

2.2.2. The nature of the seller's liability for defective goods

2.2.2.1. Contractual liability

As was briefly discussed about the nature of the seller's guarantee liability, Korean law has suffered tortuous debates about the nature of the seller's guarantee liability³⁰⁸ and the relationship between the general liability and the seller's guarantee liability.³⁰⁹ However, English law, CISG and the Directive do not need to be involved in such an endless debate because of their idea that there exists implied obligations in the contract of sale to deliver the goods in conformity with the contract and to deliver the goods corresponding with a certain standard or quality, *e.g.*, satisfactory, ordinary or normal quality, compliance with description, fitness for particular purpose, and fitness for sample or model.³¹⁰ These obligations are imposed on the seller regardless of the subject-matter of the sales contract, *i.e.*, specific goods or generic goods. Therefore, there is no doubt in that the seller's liability for defective goods is a

³⁰⁶ CISG Arts. 45(2), 75, 76(1).

³⁰⁷ CISG Art. 79(1) and (5). Yet, one must note that the seller's exemption from damages in the case of the lack of conformity is not so obvious. See *infra* n. 222. In addition to all the remedies above, the buyer may claim interest insofar as the award of interest is valid under the law of forum state without prejudice to any claim for damages recoverable under art. 74. CISG Art. 78; Schlechtriem, *Uniform Sales Law*, (1986), at 100.

³⁰⁸ See *supra* n. 134-207.

³⁰⁹ See *supra* n. 161-166, 203-207 and accompanying texts.

³¹⁰ The SGA ss. 13, 14, 15, CISG Art. 35, Directive(99/44) Arts. 2.1., 2.2.

contractual one.³¹¹

2.2.2.2. Non-fault based liability

Like Korean law³¹² the seller's liability for defective goods under English law, CISG and the Directive is non-fault-based liability; it is strict in that the seller is liable even though he was unaware of the defect and took all reasonable care. This is based on their idea as a theoretical starting point that they treat all contracts as promises leading to a claim for 'breach of contract' if the promised result is not produced by the debtor.³¹³ In this context the starting point is different in that while the starting point of English law and CISG is based on a strict liability treating all contracts as promises,³¹⁴ that of Korean law is relied on the fault principle but gives an exception for the special regime for the seller's guarantee liability.³¹⁵

2.3. Comparative view

As was examined above in a comparative way, the seller's guarantee liability for defective goods in each jurisdiction is explained as one within either the unified liability system or the dual liability system.³¹⁶

Under English law and CISG, the seller's guarantee liability is understood as a part of the unified liability system using the concept of 'breach of contract' because the breach of

³¹¹ Even though the liability system itself is quite different compared to Korean law, the understanding of the seller's guarantee liability in its nature is same as the contractual liability theory in Korea.

³¹² See *supra* n. 158, 199-200 and accompanying texts.

³¹³ See *supra* n. 218-225 and accompanying texts.

³¹⁴ The starting point of the Directive cannot be discussed because it does not deal with the liability system. See *supra* n. 224-225 and accompanying texts.

³¹⁵ The difference in the starting point may result in the differences in the scope of damages; the scope of damages under English law and CISG seems to be based on the buyer's expectation losses, whereas that under Korean law is generally understood that it is limited to something lesser than the expectation losses. See *supra* n. 128, 214-216 and accompanying texts.

³¹⁶ For the general comparison between Korean law, English law and CISG, see *supra* n. 218-223 and accompanying texts.

guarantees in the sales contract are just same as all other breaches of contract which themselves arise from broken promises.³¹⁷ Their way to impose the seller's guarantee liability on the seller is to understand that there impliedly exists 'a contractual duty' to deliver the goods with a certain standard and quality in the contract.³¹⁸ The Directive also imposes the seller's guarantee liability in the same way as English law and CISG.³¹⁹ In this sense the seller's guarantee liability is said to be the contractual one in its nature. Undoubtedly, the seller's liability in these jurisdictions is a strict one which exists regardless of the fault principle.

In contrast with English law and CISG, the seller's guarantee liability under Korean law constitutes one within the dual liability system; the general liability for non-performance³²⁰ and the seller's guarantee liability for defective goods.³²¹ The former is governed by the fault principle (so called, fault liability), whereas the latter is a strict one to ensure the delivery of the goods free from any defect (so called, strict liability or no-fault liability). As far as the nature of the seller's guarantee liability is concerned, scholars in Korea have been divided into two groups; the legal liability theory group and the contractual liability theory group. The main difference between two theories is that the former does not admit a contractual duty to deliver non-defective goods in the sale of specific goods, whereas the latter assumes the duty.³²² In addition, adopting either theory may result in substantial differences in practice as to the matters of the existence of a defect and the scope of damages.³²³

³¹⁷ As has been noted, the liability system of the Directive in general is out of question because of its restricted application in certain aspects. See *supra* n. 224-225 and accompanying texts.

³¹⁸ For the implied terms of English law and CISG in General, see *supra* n. 226-238, 278-285 and accompanying texts.

³¹⁹ For the implied terms of the Directive in General, see *supra* n. 258-261 and accompanying texts.

³²⁰ For the general liability under Korean law in general, see *supra* n. 66-100 and accompanying texts.

³²¹ For the seller's guarantee liability under Korean law in general, see *supra* n. 101-124 and accompanying texts. As to the differences and the interrelationship between two liabilities in general, see *supra* n. 125-133, 161-166, 203-207 and accompanying texts.

³²² For the background of each theory, see *supra* n. 136-157, 168-198 and accompanying texts.

³²³ See *supra* n. 208-216 and accompanying texts.

3. Evaluating accounts

3.1. Internal evaluation

3.1.1. Unified liability system *vs.* Dual liability system

3.1.1.1. General

The matter of ‘the unified liability system *vs.* the dual liability system’ can be evaluated by the inquiry of how the problems inherent in the dual liability system are exposed in light of the unified liability system and whether the problems are properly resolved in the unified liability system, and *vice versa*. Thus, the following accounts are of what problems Korean law has suffered by not having the unified liability system, but having the dual liability system, and whether the liability system of English law and CISG are enough to settle the problems.

3.1.1.2. The origin of problems in the dual liability system

The dual liability system in Korea, on the one hand, has benefits in that this system efficiently controls various legal problems raised from sales contracts. This is due to the role of the seller’s guarantee liability which is applied only to sales contracts, supplementing the general liability for non-performance which is applied to all other contracts. This is a relationship that the special rules supplement the general rules without infringing the other general rules not related to the special rules.³²⁴ On the other hand, as to the matter of the liability system, itself, this dual liability system causes some complexities owing to the separate existence of the two systems.

The complexities originate in the unique idea in the dual liability system that the seller’s liability is differentiated according to the external type of non-performance. That is, whether the seller is responsible under the general liability or the seller’s guarantee liability depends upon, first of all, the question of whether the external type of non-performance falls within the

broad category of non-performance or defective performance. However, it has revealed some drawbacks of the idea. One is where there is a borderline case; it is necessary to distinguish between the matters of *aliud* and a defect in quality.³²⁵ In the first instance, the buyer is entitled to demand either specific performance, or rescission and/or damages in accordance with the rules of the general liability.³²⁶ The remedies are in principle governed by the fault principle and must be pursued within ten years.³²⁷ In the second, the buyer is limited to the remedies of claiming a substitute good, or rescission and/or damages under the special rules of the seller's guarantee liability,³²⁸ which are available regardless of the fault principle and must be exercised within the short limitation period of six months after the buyer's awareness of the defect.³²⁹ These differentiations may cause unjustified results in some borderline cases to either the seller or the buyer because the substantial differences in the available remedies and the limitation period are hardly justified in one breach of contract.

In addition, the complexities also originate in the assumption of the dual liability system that the general liability is quite different from the seller's guarantee liability in light of its nature and contents.³³⁰ It causes confusion in that, unlike German law, rescission and damages in the

³²⁴ In this way the special nature of the other contracts could be preserved.

³²⁵ For instance, in the case of a sales contract for a consignment of Auslese wine, the wine only tasted like Auslese because it contained certain prohibited additives. It was held that this was the delivery of an *aliud* and not of defective goods. See the German case, BGH (VIII) ZR 247/87, 23 November 1988 [1989] DB 1513. Another borderline case is where a robot without an arm essential for its proper performance was delivered. It was held that it was a delivery of *aliud* not of defective goods. See BGH (VIII) ZR 72/89, 27 June 1990, DB 2016. The delivery of winter wheat instead of spring wheat agreed in the contract was held to be an *aliud*. See BGH, NJW 68, 640.

³²⁶ The seller may first demand a substitute good in the form of specific performance in the case of the sale of generic goods. If the seller refuses to provide a substitute good or it is impossible to provide a substitute good, the buyer may rescind the contract and/or claim damages. For the remedies under the general liability, see *supra* n. 70-75, 80-91, 98-100 and accompanying texts.

³²⁷ KCC Art. 162.

³²⁸ For the remedies under the seller's guarantee liability in general, see *supra* n. 118-124 and accompanying texts.

³²⁹ KCC Art. 582.

³³⁰ See *supra* n. 125-133 and accompanying texts.

general liability are identically specified for the remedies in the seller's guarantee liability under KCC.³³¹ That is, the difficulties are in the question of how the assumption of the dual liability system would explain the remedies of damages and rescission in the seller's guarantee liability even though these are identical to those in the general liability and how these could be differentiated from the general liability.³³²

Furthermore, in some occasions, it is plausible to say that the complexities may extend to the problem of co-existence of two liabilities in one breach of contract: namely, the problem of concurrence with incomplete performance.³³³

The scholar's theories and the cases have tried to solve the problems caused by the aforementioned complexities and have appreciated the unique features of the dual liability system since the legislation of KCC in 1950's. However, the fact that there has been no satisfactory theory which most people can agree on for 43 years since the legislation of KCC draws our attention to the question of whether there is any need to re-examine this liability system.³³⁴

³³¹ In German law, the remedies under the special regime for the seller's guarantee liability are *Wandlung* and *Minderung* (cancellation and price reduction). *Wandlung* is used in somewhat different sense from *Rücktritt* (rescission) even though it is similar to *Rücktritt* in its effects and is, indeed, in many respects governed by the same rules (BGB §467). KCC does not differentiate between *Rücktritt* and *Wandlung*, using *Rücktritt* in the rules for both the general liability and the seller's guarantee liability. Compared to *Wandlung* in German law, the rescission in the seller's guarantee liability under Korean law is given on the condition that it is unattainable to achieve the objective of the contract due to the defect, whereas the requirements for *Wandlung* in German law are in principle same as for *Minderung*. In this sense the requirements for rescission in Korean law are stricter than those for *Wandlung* in German law. *Minderung* is a reduction of price which is not expressly provided in KCC for the remedies in the case of a defect in quality, but in the case of a defect in quantity. While KCC allows the buyer to claim damages in any cases, under BGB the buyer's right to damages is limited to only those cases where there is a violation of a warranty or deceit. See BGB §§459 II, 463.

³³² The explanations of damages and rescission by scholars which start from the finding of the nature of the seller's guarantee liability are well related to practical points too. See *supra* n. 208-216 and accompanying texts.

³³³ See *supra* n. 161-166, 203-206 and accompanying texts.

³³⁴ Prof. Hyung-bae Kim also pointed out the need of re-examination under Korean law in order to

The need for the re-examination is further inspired by the German proposal to reform the law of obligations, which can be appreciated as a further step forward to an unified liability system in Germany in terms of the obligation law influenced by CISG.³³⁵ It also very much suggests that English law and CISG, which have an unified liability system, solve most difficulties originated in having the dual liability system in Korea because all the matters of non-performance are homogeneously dealt under the name of ‘breach of contract’.³³⁶

3.1.2. Legal liability vs. Contractual liability

3.1.2.1. General

As has been discussed, the difficulties faced by the dual liability system have led us to ask ourselves whether there is any need to re-examine it. Given that the re-examination can reveal any superiority of the unified liability system under the existing law³³⁷ and a vehicle to unify the dual liability system is a contract, the residual matter in light of the possible unification of the dual liability system is the question of whether the seller’s guarantee liability can be understood as a contractual one rather than a legal one specially imposed by the law. In this context, the matter of ‘legal liability vs. contractual liability’ is closely connected with the matter of ‘the unified liability system vs. the dual liability system’. The thing to note is that the former matter is in its essence in the question of whether the seller’s contractual duty to deliver non-defective goods is recognized even in the sale of specific goods.

simplify the dual liability system and re-arrange the effects of two liabilities. See Hyung-bae Kim, “Gae-yak-chaek-im-ron Bi-pan (Critics on the Contractual Liability Theory)”, (Dec., 1992) 430 *Ko-shi-gae* 116; Young-bok Park, “Choi-keun Seo-koo-eoi Gae-yak-chaek-im-non-eoi-wa Woo-ri-min-bup-sang-eoi Gae-yak-chaek-im-chae-gae (Current Discussions as to Contractual Liabilities in the West and the Liability System in Korea)”, (1996) 13 & 14 *Min-sa-bup-hak* 316, at 337.

³³⁵ *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts*, hrsg. von Bundesminister der Justiz (1992).

³³⁶ See *supra* n. 218-223 and accompanying texts.

³³⁷ The complexities of the dual liability system as examined above seem to prove the superiority fairly

The next discussions are to examine the existing theories with regard to the nature of the seller's guarantee liability in light of the possible unification of the dual liability system in Korean law.

3.1.2.2. Problems of the legal liability theory

Further to the arguments of the contractual liability theory,³³⁸ more questions can be pointed out in order to prove the legal liability theory based on the principle of *impossibilium nulla obligatio* and *specific goods dogma* unjustifiable.³³⁹

First, the principle of *impossibilium nulla obligatio* and *specific goods dogma* should at least make clear to what extent the principle can be applied.³⁴⁰ This is because it seems unreasonable to apply the principle to all kinds of specific goods including substitutable and repairable goods. The argument is analogous to the criticism that the principle of *impossibilium nulla obligatio* is not justified in Korean law when one considers that there is a tendency gradually to modify and interpret it narrowly by saying the seller has undertaken a guarantee.³⁴¹ For instance, there may be a case where the implied guarantee of the seller's ability to deliver non-defective goods can

enough.

³³⁸ See *supra* n. 167-198 and accompanying texts.

³³⁹ See *supra* n. 134-157 and accompanying texts.

³⁴⁰ Accord: Dae-jeong Kim, "Mae-do-in-eoi Ha-ja-dam-bo-chaek-im-eoi Bon-jil (The Nature of the Seller's Guarantee Liability)", (1992) 19 *Bup-hak-yeon-koo* (Chun-buk National Univ.) 181, at 208. According to this principle, if the goods are specified at the time of contract and there exists a defect at that time (initial defect), the seller's contractual duty is only to deliver the goods in *status quo* because of its idea of the delivery of non-defective goods being impossible in light of the unique nature of specific goods. The extent to which the principle applies seems to include all kinds of specific goods since the idea is identified as from the time of contract. See *supra* n. 146-148 and accompanying texts.

³⁴¹ For the trend and some criticism on this principle in general, see Markesinis, Lorenz, and Dannemann, *supra* n. 62, at 405 ff. For some queries about this principle in Korean law in general, see Chang-soo Yang, "Won-shi-jeok Bul-neung-ron I (Initial Impossibility I)", (1986) 27(2&3) *Bup-hak* (Seoul National University) 126. In addition, it should be noted that there is no provision like the present BGB §306 specifying the principle in 'the draft for the German proposal to reform the obligation law' (the *Kommissionsentwurf*, hereinafter BGB-KE).

be found in the seller's act to enter the contract.³⁴² The denial of this principle seems to be also proved by the absence of a positive background for the principle in KCC in contrast with German law.³⁴³ Therefore, the extent to which the principle can be applied should be limited at most to the cases of non-substitutable goods and non-repairable defect.

Second, the proposition of the *specific goods dogma* seems to treat the obligation to tender only as a matter of the *status quo* and disregard the question of what the tender should be.³⁴⁴ However, the law as a norm may require the tender of non-defective goods even if the tender is impossible in physical terms because the law is not physics but a norm to state what should be tendered.³⁴⁵

Third, contrary to the insistence of KCC Art. 462 as a positive law background for the *specific goods dogma*,³⁴⁶ it should be noted that while KCC Art. 462 deals with the defect at the time of delivery, the *specific goods dogma* is concerned with the matter of the defect at the time of contract.³⁴⁷ Therefore, it proves itself wrong in its positive background on KCC Art. 462 for the *specific goods dogma*.

Fourth, the distinction between initial and subsequent defects in the specific goods and the

³⁴² This is the case, *e.g.*, where the specific good is a good specified by the intention of the parties among the generic goods.

³⁴³ BGB §306.

³⁴⁴ Accord: Hyung-bae Kim, *supra* n. 66, at 224 f.; Dae-jeong Kim, *supra* n. 340, at 208.

³⁴⁵ For instance the seller's obligation to acquire and pass the title to the buyer in the sale of a title belonging to another person proves the 'what should be' proposition in light of the role of the law as a norm. KCC Art. 569; *Contra*, French Code Civil Art. 1599.

³⁴⁶ For the texts of art. 462, see *supra* n. 150 and accompanying texts.

³⁴⁷ Accord: Dae-jeong Kim, *supra* n. 340, at 213 f. The insistence seems to make sense provided that the *specific goods dogma* is based on the German idea of 'error in motive' because error in motive can be effective to the matter of a subsequent defect as well, but most legal liability theorists in Korea generally relies on the principle of *impossibilium nulla obligatio* dealing with the matter of the defect at the time of contract. Cf. Choon-soo Ahn, *supra* n. 167, at 427. For the idea of error in motive in German law, see Larenz, *Lehrbuch des Schuldrechts*, Band II, Halbband 1, Aufl. 13, (1986), at §66 ff.; see also Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, Band 2, Aufl. 3, (1979), at §435 ff.

seller's guarantee liability being limited only to the cases of initial impossibility³⁴⁸ may lead us to inquire whether there is any justification in the different treatments between an initial and subsequent defect in cases of a defect in the sale of specific goods. The different treatments may cause substantial differences in the remedies available for an initial or subsequent defect. Namely, in the case of an initial defect the buyer may recover his losses due to the defect on the basis of the seller's guarantee liability regardless of the fault principle, whereas in the case of a subsequent defect it may be possible to recover his losses under the general liability governed by the fault principle, but he will not be able to recover any if any fault is not found on the seller's part.³⁴⁹ What justifications could be made for the substantial differences in the remedies where there may be a borderline case, where it is not easy to distinguish between an initial and subsequent defect?³⁵⁰

Fifth, it is open to criticism that the legal liability theorists' understanding as to the sale of specific goods may yield a kind of unnecessary detour and complexities in imposing on the seller the liability for defective goods; they understand that, in contrast with the sale of generic goods, the seller's delivery of defective goods in *status quo* is, at first, treated as the seller having completed his contractual duty and then the law imposes the liability for defective goods on the seller.³⁵¹ This account becomes clear when it is considered that in the end the liability means an obligation so that there is no doubt in implying the seller's contractual duty to deliver non-defective goods.³⁵²

Finally, it is needless to say that the legal liability theory which sticks to the dual liability system runs counter to the unification of the dual liability system in Korea.³⁵³

³⁴⁸ See *supra* n. 159-160 and accompanying texts.

³⁴⁹ KCC Art. 374.

³⁵⁰ The difficulty may result in harshness for the buyer who has to prove the existence of an initial defect in order to raise the seller's guarantee liability.

³⁵¹ This is in the same context as an argument of the contractual liability theory that there is a contractual duty to deliver non-defective goods even in the sale of specific goods.

³⁵² Eun-young Lee, *supra* n. 68, at 787.

³⁵³ Note that the problems in the dual liability system are in its essence analogous to the problems in the

All in all, the above arguments the legal liability theory is unjustifiable under the existing KCC seem to show why the seller's guarantee liability should be a contractual one.

3.1.2.3. Illusion in the contractual liability theory

3.1.2.3.1. An immutable truth of the seller's guarantee liability

Scholars in both the legal liability theory and the contractual liability theory camps have generally admitted the idea as an immutable truth that the relationship between the general liability and the seller's guarantee liability is the one between fault liability and no-fault liability so that all the remedies under the general liability are governed by the fault principle, whereas those under the seller's guarantee liability exists regardless of the principle.³⁵⁴ This relationship has led them to argue that, although the remedy of damages under the general liability is identically specified for that under the seller's guarantee liability, the latter remedy is distinguished from the former remedy in a way that limits the scope of damages the buyer can recover under the seller's guarantee liability. This is based on their artificial idea that the damages under the seller's guarantee liability which exists regardless of the fault principle cannot be treated in the same way as the damages under the general liability which is governed by the fault principle.³⁵⁵ The idea, however, has yielded various complexities, in particular, in the ways to find the most appropriate interpretation of damages under the seller's guarantee liability and the relationship with damages under the general liability.³⁵⁶ This can be said to be another casuistry inherent in the distinction between fault liability and no-fault liability in addition to that we have experienced in the distinction between the general liability as a

legal liability theory because the legal liability theory represents the dual liability system.

³⁵⁴ See *supra* n. 158, 199-200 and accompanying texts.

³⁵⁵ This is because of a unique idea in Korean law derived by the way to find the solution in the conflict between the tradition of continental law of '*Wandlung* and *Minderung*' and KCC's provision of the same 'rescission and damages' as in the general liability. For the differences between German and Korean law in general, see *supra* n. 331.

contractual liability and the seller's guarantee liability as a legal liability.³⁵⁷

3.1.2.3.2. The immutable truth equals illusion in the contractual liability theory

The contractual liability theory has been much appreciated in that it has been made quite a plausible theory in terms of finding the contractual nature of the seller's guarantee liability in its attempt to unify the dual liability system. However, quite unlike the rationale of the theory to unify and simplify the dual liability system, it proves the rationale itself somewhat illusive in that it has created another complexity in relation to its interpretation of damages under the seller's guarantee liability. This is because the theory has not overcome the same casuistic distinction between fault and no-fault liability as the legal liability theory has that all the remedies under the general liability are governed by the fault principle and those under the seller's guarantee liability exist regardless of the fault principle so that the damages under the seller's guarantee liability cannot be treated in the same way as the damages under the general liability.³⁵⁸

In defiance of the artificial distinction of fault or no-fault liability and its consequences in the interpretation of damages under the seller's guarantee liability, it is submitted that we should consider another way of thinking that, unlike German law, the fact that the rules of the seller's guarantee liability have the same remedies of rescission and damages as those of the general

³⁵⁶ See *supra* n. 128, 214-216, *infra* n. 1014-1066 and accompanying texts.

³⁵⁷ *Accord*: Young-bok Park, *supra* n. 334, at 338.

³⁵⁸ On the basis of the distinction, the theory has attempted to limit the scope of damages under the seller's guarantee liability to the buyer's reliance losses or mere price reduction. See *supra* n. 215-216 and accompanying texts. The other losses (*e.g.*, expectation losses or consequential losses) may be compensated according to one's interpretation as to the relationship with the damages under the general liability (*i.e.*, whether concurrence with the general liability should be allowed). See Hyung-bae Kim, *supra* n. 67, at 314 f. and 345 f. However, there are some scholars who argue that the losses are also compensated within the seller's guarantee liability with the requirement of fault or without the requirement of fault. For the former view, see Kyu-chang Cho, *supra* n. 136, at 262 ff. For the latter view, see Eun-young Lee, *supra* n. 68, at 799 f. For more details about the various interpretation of damages, see *infra* n. 1014-1066 and accompanying texts.

liability have may give a good opportunity to unify the dual liability system in Korean law.³⁵⁹ Namely, one's interpretation of the remedies under the seller's guarantee liability should be uniform so that those remedies are as they are under the general liability and the requirement of fault depends upon what remedy the buyer seeks to claim.³⁶⁰ This unified way of interpretation may not raise, at least, the complexities the contractual liability theory has experienced so far in interpreting damages under the seller's guarantee liability and in finding the relationship with damages under the general liability. For instance, suppose that a seller delivers a defective car in quality and a buyer seeks to claim damages under the seller's guarantee liability because the defect is not serious enough to rescind the contract. Assuming that all the remedies under the seller's guarantee liability are differently treated from those under the general liability on the basis of the distinction between fault and no-fault liability, the scope of damages the buyer can recover under the seller's guarantee liability may be governed by one's artificial rules which are separate from those under the general liability and may depend upon how one interprets the damages under the seller's guarantee liability and the relationship with the damages under the general liability.³⁶¹ However, if it is presumed that the remedy of damages is as it is under the general liability, the buyer can recover his losses simply by virtue of the same rules of the scope of damages as under the general liability; it does not need to be involved in endless debates to create the artificial rules and to find the relationship with damages under the general liability. The critical point here is that the prerequisite of fault depends upon whether the rules as to damages under the general liability require fault, rather than the casuistic idea that all the remedies under the general liability are governed by the fault principle, whereas those under the seller's guarantee liability exists regardless of the principle. Consequently, as the provision for

³⁵⁹ German law has *Minderung* and *Wandlung* quite different from *Rücktritt* (rescission) and damages. Cf. See *supra* n. 331. However, the seller's guarantee liability under BGB-KB has the same rescission and damages as under the general liability. BGB-KE §462.

³⁶⁰ Cf. This view is in the same line as under BGB-KE which provides that the rules as to rescission and damages under the general liability are correspondingly applied to the cases of the seller's guarantee liability. BGB-KE §462.

damages under the general liability specifies,³⁶² the prerequisite is crucial for the buyer's damages claim. At first sight, this presumption appears to yield disadvantages from the point of view of the buyer compared to the above artificial rules because, given that he cannot claim a price reduction due to no specific provision on the price reduction in the case of qualitative defects under KCC,³⁶³ he may not be entitled to rely on any monetary relief where it is not shown any fault on the seller's part. Yet, one must note that there may be no difference in practice when one considers that, even if there is no fault, as will be argued later, the buyer is still allowed to claim a price reduction which exists separately from a damages claim,³⁶⁴ and the above artificial rules may limit the scope of damages under the seller's guarantee liability to, at most, reliance losses or price reduction.³⁶⁵

3.2. External evaluation

3.2.1. General

The ensuing discussion is to investigate the liability system in each jurisdiction from the perspective of efficiency. Of the aspects of efficiency as given in the previous chapter, the question of to what extent the rules are consistent with certainty³⁶⁶ will be particularly inquired in order to evaluate the dual liability system in Korean law and the unified liability system in English law and CISG. In the same context it will also examine the nature of the seller's guarantee liability, which has been said either the contractual liability or the legal liability in

³⁶¹ See *supra* n. 358.

³⁶² KCC Art. 390.

³⁶³ But note that KCC has such provision in the case of defects in quantity. KCC Art. 572(3).

³⁶⁴ Notwithstanding no provision on price reduction, the ensuing discussion will show how the price reduction in the case of defects in quality could be independently recognised of damages under the existing KCC. See *infra* n. 1175 and accompanying texts.

³⁶⁵ See *supra* n. 358.

³⁶⁶ For the importance of certainty or clarity in promoting efficiency of the rules, see *supra* n. 38-40 and accompanying texts. See also *supra* n. 52-55 and accompanying texts for another importance in

each jurisdiction including the Directive.

3.2.2. Dual liability system vs. Unified liability system

As has been examined in the internal evaluation of the dual liability system, all the problems Korean law has faced by having the dual liability system are related to the issue of uncertainty and complexity.³⁶⁷ The fact that there have been no satisfactory theories and cases to understand the dual liability system inherent in Korean law proves itself how uncertain and complex to the ordinary people involved in this area because it has been not so clear even to the experts both in courts and in schools.

The uncertainty and the cost of remedying it can lead to a form of market failure in which the transaction cost prevents what would otherwise be wealth-maximising exchanges taking place. To take an example of a borderline case,³⁶⁸ both the buyer and the seller who are not certain about his rights or liabilities may cause an inefficient situation where two parties carry insurance against the same event at the same time, causing to raise the transaction costs. In this example, the inefficient situation in the form of the increase of the transaction costs can also appear where the parties who are not clear will try to add or exclude his rights or liabilities.³⁶⁹ In addition, it may be also expected that the litigation of the parties will be more likely to occur due to its uncertainty. All these points seem to say to us that the uncertainty can not be solved unless either it is attempted to interpret the existing liability system at least in an unified way, *i.e.*, the unified liability system, or clear guidelines are found to distinguish between the seller's guarantee liability and the general liability.³⁷⁰

consumer sales.

³⁶⁷ See *supra* n. 325-333 and accompanying texts.

³⁶⁸ See *supra* n. 325.

³⁶⁹ This is a case in particular where the parties are uncertain as to the limitation period so that they try to add a clause in the contract specifying his clear rights or liabilities.

³⁷⁰ Although it seems true that the finding of clear guidelines would well settle the problems of uncertainty, one must note that one's experience since the legislation of KCC shows that many studies to find the guidelines have not been so successful. Cf. Won-lim Jee, *supra* n. 135, at 374 ff.

By the same token the casuistic distinction between fault liability and no-fault liability also gives much room to cause an inefficient result increasing the transaction costs. This is because, as we have examined, all the attempts to interpret the remedy of damages under the seller's guarantee liability on the basis of the distinction have caused another complexity in their understanding in light of the unification of the dual liability system.³⁷¹

On the other hand, the unified liability system may well enhance its certainty and simplicity, and reduce the transaction costs. This is because under English law and CISG conceptions a mere breach of obligation is enough to trigger one of remedies irrespective of the type of breach falling within the seller's guarantee liability or the general liability; no distinction need be made between them and the parties will know what liability or rights they would have. It will also facilitate decision-making in the courts, reducing transaction cost, especially in light of the fact that English law and CISG authorize an award of monetary compensation for any breach along the lines of a no-fault regime.

3.2.3. Legal liability vs. Contractual liability

Given that the above evaluation in terms of uncertainty and complexity has well revealed any superiority of the unified liability system in Korean law, it proves itself that the nature of the seller's guarantee liability should be a contractual one rather than a legal one because it is needless to say that a vehicle to unify the dual liability system is a contract. That is, the understanding that the seller's guarantee liability is a legal one in its nature may obstruct one's passage to the unification of the dual liability system because it still theoretically sticks to the dual liability system by insisting that the general liability is raised in the case of the breach of contractual duty, whereas the seller's guarantee liability is brought in the case of the breach of legal duty imposed by the law.³⁷²

³⁷¹ See *supra* n. 354-361 and accompanying texts.

³⁷² The evaluations on the practical differences (see *supra* n. 208-216 and accompanying texts) produced from the different understanding as to the nature of the seller's guarantee liability in light of efficiency

4. Concluding remarks

4.1. Conclusion on the evaluation

The evaluation of ‘the dual liability system vs. the unified liability system’ has been executed first by the question of how the problems inherent in the dual liability system are exposed in light of the unified liability system and whether the problems are properly resolved in the unified liability system. It has found that the dual liability system caused various complexities owing to the separate existence of the general liability and the seller’s guarantee liability which relies on its artificial distinction between ‘non-performance’ and ‘defective performance’.³⁷³ As long as the complexities are basically due to the separate existence of two liabilities, the unified liability system seems to resolve most problems Korean law faces because all the matters of non-performance in English law and CISG are homogeneously dealt under the name of breach of contract. The resolution of the complexities of the dual liability system by having the unified liability system and the fact that there have been no satisfactory theories and cases for the complexities seems to suggest us the need for re-examination of the dual liability system.

Along the same lines as the above evaluation, the issue of ‘legal liability vs. contractual liability’ has been evaluated in terms of the logic and reasonableness of existing theories, which is closely related to the possible unification of the dual liability system in Korea. The examination of the legal liability theory has revealed its theoretical background of the principle of *impossibilium nulla obligatio* and *specific goods dogma* unjustifiable by several pieces of evidence.³⁷⁴ In addition, the contractual liability theory has been investigated in light of another casuistic distinction between fault and no-fault liability. It has been found that the rationale of the theory to unify and simplify the dual liability system is proved somewhat illusive in that it

will be attempted when this study examines each rule as to the seller’s guarantee liability. As will be examined later, the evaluations consistently argue that it is a contractual one.

³⁷³ See *supra* n. 325-333 and accompanying texts.

does not overcome an artificial idea that all the remedies in the general liability are governed by the fault principle and those in the seller's guarantee liability exist regardless of the fault principle even though it is much appreciated for its contribution for the unification of the dual liability system. In this context, it was suggested to avoid the idea and consider that the fact that the remedies of rescission and damages in the general liability are identically specified in the articles dealing with the seller's guarantee liability may provide us a good opportunity to unify the dual liability system.

Having said that, the external evaluation of 'the dual liability system vs. the unified liability system' in light of efficiency has been pursued by the question of which liability system is clearer. As was examined above in the internal evaluation, the complexities Korean law has experienced prove by themselves that the unified liability system seems to offer more clarity.³⁷⁵ An artificial distinction between fault and no-fault liability in Korean law was also proved that it might result in inefficiency due to its inherent complexities.³⁷⁶ In addition, given that the above external evaluation shows any superiority of the unified liability system in Korean law, it proves itself that the nature of the seller's guarantee liability should be a contractual one insofar as there is no doubt in that a vehicle to unify the dual liability system is a contract.

4.2. The unified liability system in Korea ?

All the aforementioned evaluations seem to prove that the unified liability system provides us instructive substitutes for the problems the dual liability system has experienced in Korea. As a starting point to achieve the genuine unified liability system in Korean law which is free from all the problems, the first hurdle to overcome is related to the question of whether and how the seller's guarantee liability is understood as a contractual one in its nature. The question seems to be well answered by the previous evaluations which have argued that it is better to interpret

³⁷⁴ See *supra* n. 340-353 and accompanying texts.

³⁷⁵ See *supra* n. 368-370 and accompanying texts.

³⁷⁶ See *supra* n. 371 and accompanying texts.

that the nature of the seller's guarantee liability is a contractual one.³⁷⁷ However, given that the contractual nature is still arguable in terms of the theories themselves, one seems to need a legislative consideration to introduce a provision for a contractual duty to deliver non-defective goods in the sale of goods including specific goods, which is similar to English law, CISG and the Directive. The ultimate goal of introducing the provision is to finalize the endless debates as to the nature of the seller's guarantee liability, to clarify the contractual nature and to launch the unified liability system.

Another hurdle is related to a casuistic distinction between fault and no-fault liability that all the remedies in the general liability are governed by the fault principle and those in the seller's guarantee liability exist regardless of the fault principle.³⁷⁸ As was suggested in the internal evaluation, this hurdle can be overcome by another way of thinking that the fact that the remedies of rescission and damages in the general liability are identically specified in the articles of KCC dealing with the seller's guarantee liability may provide us a good opportunity to unify the dual liability system. That is, it should be interpreted in a unified way that the remedies of rescission and damages in the seller's guarantee liability should be as they are in the general liability and the focus of distinction should be based on the requirements of each remedy rather than resting on the casuistic distinction between fault and no-fault liability. Consequently, each remedy could stand individually on the basis of its own requirements so that, unlike the casuistic distinction, not all the remedies in the seller's guarantee liability are free from no-fault principle. One must note here that the assumption that each remedy stands individually in terms of its own requirements means abandonment of the proposition that the prerequisite of fault is always necessary to raise the general liability for non-performance. In this context, it is submitted that, like the concept of 'breach of contract' under English law and CISG, one needs to create a unitary new concept of non-performance which is free from the

³⁷⁷ See *supra* n. 338-353, 372 and accompanying texts.

³⁷⁸ For the complexities in relation to damages by the casuistic distinction, see *supra* n. 358, 361 and accompanying texts.

fault principle. The reason for this is that the previous concept of non-performance assumes the existence of fault as one of crucial factors to constitute non-performance and raise the general liability for non-performance;³⁷⁹ namely, insofar as fault cannot be proved, the existence of non-performance itself is denied and consequently the buyer cannot rely on the general liability for non-performance.³⁸⁰ The use of the new concept of non-performance isolated from the fault principle may enable one to deal with each remedy individually in terms of its requirements, in particular, the requirement of fault; on this basis fault is relevant to individual remedies but not to the existence of liability.³⁸¹ This construction to deal with each remedy individually can be proved by the separate provision for each remedy with its own requirements under the existing KCC.³⁸² The consequence of the construction would be that, as the wording of KCC Art. 390 specifies,³⁸³ it should be interpreted that fault is only required for a claim for damages,³⁸⁴ but not for other claims.³⁸⁵ Therefore, even if the goods are defective without the seller's fault, the buyer may be still entitled to rescission, price reduction and replacement provided that, as will be examined later, the requirements of each remedy are fulfilled.³⁸⁶

³⁷⁹ See *supra* n. 67, 78, 96 and accompanying texts.

³⁸⁰ Accord: Eun-young Lee, *supra* n. 68, at 600; Young-bok Park, *supra* n. 334, at 339. Cf. Hyung-bae Kim, *supra* n. 66, at 150 ff. (He uses the concept of 'irregularity in performance' which is free from fault and can be differentiated from the concept of non-performance cohesive with fault); BGB-KE §280.

³⁸¹ Eun-young Lee, *id.*

³⁸² For instance, see KCC Arts. 389 (Specific performance), 544 ff. (Rescission), 390 (Damages)

³⁸³ KCC Art. 390 (Non-performance of Obligations and Claim for Damages): "If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may claim damages; but this shall not apply to cases where the performance has become impossible and this is due to the obligor's intention or fault."

³⁸⁴ Although it seems inevitable to require fault for damages under the existing KCC, it will be found later that Korean law may need a legislative consideration to remove the requirement. See *infra* n. 1132-1133 and accompanying texts.

³⁸⁵ Young-bok Park, *supra* n. 334, at 341 ff. Cf. Hyung-bae Kim, *supra* n. 334, at 117. Contrary to this consequence, KCC Art. 390 has been presented in the prevailing view to prove the fault principal for any claim under the general liability for non-performance.

³⁸⁶ For the requirements of rescission and replacement, see *infra* n. 826-840, 1199-1202 and accompanying texts. For the recognition of price reduction in the case of qualitative defects which is

III. Requirements for the Seller's Liability for Non-conforming Goods

1. General Remarks

The study has so far examined in a comparative way a) under what kind of liability system the problems raised in the event that the seller delivers non-conforming goods either in quality or in quantity are governed in each jurisdiction, b) what is the position of the rules dealing with those problems within the liability system, and c) what is the nature of those rules. In addition, the study has briefly described the substance of those rules in each jurisdiction as to the requirements and effects of the seller's liability for non-conforming goods.

The ensuing discussions are a further study to scrutinise in detail the rules as to what requirements must be satisfied in order to raise the seller's liability for non-conforming goods in each jurisdiction. The study will attempt to compare the rules in one jurisdiction to those in another in light of the ultimate purpose of this thesis to investigate if there is any need to introduce a unified liability system into Korean law, and how effectively the rules protect the reasonable expectations of the parties.

2. The existence of a defect

2.1. The concept of a defect

2.1.1. Comparative accounts

2.1.1.1. Korean law

To define a 'defect' is crucial in the context that the seller's guarantee liability depends upon, above all, the question of whether there is a defect in the goods delivered. Different definitions

independent of damages, see *supra* n. 1175 and accompanying texts.

yield different results as to the existence of a defect, and consequently, different results as to the availability of the seller's guarantee liability. Unfortunately, notwithstanding its crucial importance, KCC fails to stipulate the definition of a defect so that it is left open to scholars' view and cases.³⁸⁷

There are two opposing views as to the definition of a defect; the objective criterion theory and the subjective criterion theory.³⁸⁸ According to the former, which is the prevailing view at present and supported by the legal liability theory, the test for the existence of a defect is, in principle, if the goods in question are of the ordinary standard in quality and performance, which are normal in goods of the same kind.³⁸⁹ Namely, the existence of a defect is judged objectively by the ordinary standard alone, regardless of the parties' intention shown by the relevant circumstances of the contract. However, in the cases where the seller promised specific quality or performance by showing a sample or an advertisement, or he specifically stated so in the contract, the test exceptionally turns on the specific quality or performance promised by the seller rather than the ordinary standard.³⁹⁰ Thus, the exceptional test is restricted to the cases of a sale by sample or an advertisement and the seller's specific warranty of the quality or performance in the contract. For instance, in the sale of whale meat, the seller's delivery of whale unfit for human consumption may not raise the seller's guarantee liability as long as it can satisfy with the ordinary standard, *e.g.*, it is useable as feed for livestock, unless the sale is categorised one of the cases of which the seller promised the specific quality by showing a

³⁸⁷ Cf. German law defines defects which diminish or destroy its value or fitness for its ordinary use, or the use provided for in the contract. BGB §459(1).

³⁸⁸ In contrast, there seems to be no particular case defining the concept of a defect and specifically dealing with which theory is better under the existing KCC. Cf. the Korean Supreme Court Cases, 5/12/1957, 4290 Min-Sang 160; 5/11/1968, 68 Da 1832; 23/11/1993, 92 Da 38980; 30/6/1995, 95 Da 2616.2617.

³⁸⁹ Yun-jik Kwak, *supra* n. 74, at 245; Juk-in Hwang, *supra* n. 200, at 258; Seok-woo Kim, *supra* n. 135, at 194. However, one scholar among the contractual liability theorists holds this view. See Joo-soo Kim, *supra* n. 125, at 213.

³⁹⁰ *Id.*

sample, by an advertisement, or by a warranty.³⁹¹

On the other hand, the latter theory that is supported by the contractual liability theorists argues that the primary test of whether the goods are defective or not is a subjective one, and turns on the use to which both parties to the contract of sale intended that the goods were to be put.³⁹² Thus, it is said that there is a defect when the goods supplied do not reach the standard the parties agreed, or they diminish or destroy their value or fitness for the use the parties intended. For example, if a buyer orders book crates, the purpose of the crates has been determined, and if the crates supplied prove to be too weak for the purpose, it can be said there is a defect and the buyer can rely on the rules on the seller's guarantee liability.³⁹³ However, if the buyer orders crates with specified dimensions rather than crates for a specified purpose, crates which are adequate for ordinary standards will not be defective even if they are not sturdy enough to carry books. All in all, the existence of a defect is primarily decided by the parties' intention and then by the ordinary standards.³⁹⁴

As regards the matter of defects in quantity, one thing to note is that the seller's guarantee liability in KCC does not deal with the matter of excess quantity. Another thing is that it must be distinguished from the above concept of a defect in quality because the cases where the goods sold by quantity³⁹⁵ show a shortage, or part of them had already been lost at the time of

³⁹¹ This is because the theory is based on the ordinary standard of the goods supplied which are normal in goods of the same kind, disregarding the parties' contemplation that the goods were to be put.

³⁹² Hyung-bae Kim, *supra* n. 67, at 337 f.; Dae-jeong Kim, "So-bi-ja-bo-ho-rul-we-han Ha-ja-dam-bo-chaek-im-eoi Bup-ri-koo-seong (The Construction of the Legal Theory as to the Seller's Guarantee Liability for the Purpose of Consumer Protection)", (1993) 10(1) *Jae-san-bup-yon-koo* 9, at 13 f. and 16 ff.; Sang-yong Kim, *Chae-kwon-gak-ron (Particulars in Obligatory Law)*, (1998), at 237. Cf. Eun-young Lee, *supra* n. 167, at 219 f. (she argues that the concept of 'non-conformity with the contract' should be used to define a 'defect', which is similar to that in the Directive and CISG).

³⁹³ On the other hand, according to the legal liability theory, it may not be found any defect because it is judged by the ordinary standard alone.

³⁹⁴ Hyung-bae Kim, *supra* n. 67, at 337 f.

³⁹⁵ The goods sold by quantity means the sales that the buyer pays the price on the basis of the quantity agreed in the contract. For an example of a shortage in this kind of sale, a sale for land of 100 sq., payment \$ 1,000 per sq. but in fact only 90 sq. Yun-jik Kwak, *supra* n. 74, at 237.

the conclusion of contract, are governed by the rules as to the seller's guarantee liability for *defects in title* of the goods rather than those for defects in quality.³⁹⁶ And the other thing is that, although KCC does not specifically state it, it is deemed to be of relevance only to specific goods.³⁹⁷ The cases of generic goods are, thus, excluded from the scope of the seller's guarantee liability and governed by the rules of the general liability.³⁹⁸

The matters of *aliud* and defects in packaging are not within the definition of a defect under the seller's guarantee liability.³⁹⁹ Consequently, they are not governed by the rules of the seller's guarantee liability, but by those of the general liability for non-performance.⁴⁰⁰

2.1.1.2. English law

In English law, there is no concept of 'defect' or 'non-conformity' as in Korean law, the Directive and CISG.⁴⁰¹ However, it is rather explained through the notion of implied terms of the contract, which are mainly embodied in the SGA.⁴⁰² Namely, it is said there is a breach of implied term when the seller delivers the goods which do not comply with any one of the implied terms.

The test to judge whether the goods delivered comply with those terms is as follows. First, the question is whether the goods correspond with the description by which the goods are sold.⁴⁰³

³⁹⁶ KCC Art. 574. Namely, the provisions for the seller's guarantee liability for defects in title rather than for defects in quality are *mutatis mutandis* applicable to the cases of deficiency in quantity.

³⁹⁷ No opposing view about this. See Yun-jik Kwak, *supra* n. 74, at 238; Hyung-bae Kim, *supra* n. 67, at 326 f.; Eun-Young Lee, *supra* n. 167, at 223.

³⁹⁸ The reason for the application only to specific goods is that the shortage of the quantity agreed and the partial loss of the goods which had already been occurred at the time of contract is a typical type of initial impossibility of performance, which can be applied only to specific goods. In the cases of generic goods, there could not be partial loss or shortage at the time of contract.

³⁹⁹ Dong-seok Kim, *supra* n. 104, at 99 ff.

⁴⁰⁰ For the scholars who argue the matter of *aliud* may fall within the category of incomplete performance, see *supra* n. 104.

⁴⁰¹ The concept of non-conformity used in the Directive and CISG will be examined shortly.

⁴⁰² The SGA ss. 13, 14 and 15. Cf. *supra* n. 227.

⁴⁰³ The SGA s. 13(1).

This test may not be undertaken unless the statement made about the goods forms part of the description by reference to which the goods were sold.⁴⁰⁴ It means that the statements must be expressly or by implication employed in order to identify or define the goods sold⁴⁰⁵ and they must, at least in some measure, be relied upon by the buyer to identify or define the goods.⁴⁰⁶

Second, the question is whether the goods supplied under the contract are of satisfactory quality.⁴⁰⁷ This question is applied provided that the seller sells the goods in the course of a business,⁴⁰⁸ which includes ‘a profession and activities of any government department or local or public authority’.⁴⁰⁹ ‘The goods supplied under the contract’ makes clear that what is required to be of appropriate quality is not only the contract goods agreed but also the whole of what is supplied in purported performance of the contract, including containers and other articles mixed in with the contract goods.⁴¹⁰ The criterion to decide whether the goods are of satisfactory quality is whether they comply with the standard that a reasonable person would regard as satisfactory, taking into account the description, the price of the goods and all the other relevant circumstances.⁴¹¹ The following aspects of quality are also considered in

⁴⁰⁴ The SGA s. 13 does not seem to remove the distinction between mere representation and contractual term. Thus, in order for a contract to be for sale by description, first of all, the descriptive statements must be a contractual term. See *e.g.*, *Oscar Chess Ltd v. Williams* [1957] 1 All ER 325; *Harlingdon & Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd* [1991] 1 QB 564; *T & J Harrison v. Knowles and Foster* [1918] 1 KB 608.

⁴⁰⁵ The statements must identify the kind of goods to be supplied, rather than simply identify the particular item. See *Ashington Piggeries Ltd v. Christopher Hill Ltd* [1972] AC 441; *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 WLR 989. But identity could be more or less large according to commercial context; *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* (Lord Wilberforce at 998).

⁴⁰⁶ *Joseph Travers & Son Ltd v. Longel Ltd* [1947] 64 TLR 150; *Harlingdon & Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd* [1991] 1 QB 564.

⁴⁰⁷ The SGA s. 14(2).

⁴⁰⁸ *Id.* It should be noted that all sales by a business will be assumed that it is a transaction made in the course of that business, even if the sale in question is a one-off or ancillary transaction. See *Stevenson v. Rogers* [1999] 1 All ER 613.

⁴⁰⁹ The SGA s. 61(1).

⁴¹⁰ *Gedding v. Marsh* [1920] 1 KB 668; *Wilson v. Rickett, Cockerill & Co.* [1954] 1 QB 598.

⁴¹¹ The SGA s. 14(2A).

appropriate cases to see the existence of unsatisfactory quality: fitness for all the purposes for which goods of that kind are commonly supplied, appearance and finish, freedom from minor defect, safety, and durability.⁴¹²

Third, the question is whether the goods supplied under the contract⁴¹³ are reasonably fit for the purpose made known to the seller.⁴¹⁴ Like the question as to satisfactory quality, this question will not be applied unless he sells the goods in the course of a business.⁴¹⁵ The particular purpose can be made either expressly or by implication so that where the goods are bought for their normal purpose, the buyer will be held to have impliedly made his purpose known to the seller and will be able to rely on this test.⁴¹⁶ However, this test does not apply where the circumstances show that the buyer does not rely or it is unreasonable for him to rely on the seller's skill or judgment.⁴¹⁷

Fourth, the question is whether the bulk corresponds with the sample⁴¹⁸ or the goods are free from any hidden defect making the quality of the goods unsatisfactory.⁴¹⁹

With regard to the matter of discrepancy in quantity, although the SGA does not deal with it under the heading of implied conditions or warranties,⁴²⁰ the SGA imposes, in substance, an implied condition as to quantity on the seller in a similar way to the above implied terms as to quality so that the seller is liable for a breach of condition in the event of the delivery of either

⁴¹² The SGA s. 14(2B).

⁴¹³ For the meaning of 'the goods supplied under the contract', see *supra* n. 410 and accompanying texts.

⁴¹⁴ The SGA s. 14(3).

⁴¹⁵ *Id.* For the definition of 'business', see *supra* n. 408-409 and accompanying texts.

⁴¹⁶ *Priest v. Last* [1903] 2 KB 148; *Grant v. Australian Knitting Mills Ltd* [1936] AC 85.

⁴¹⁷ The SGA s. 14(3). See *Wren v. Holt* [1902] 1 KB 610. Cf. *Manchester Liners Ltd. v. Rea* [1922] 2 AC 74.

⁴¹⁸ The SGA s. 15(2)(a).

⁴¹⁹ The SGA s. 15(2)(c). It should be noted that in the sale by sample as well as by description the buyer will be able to claim for the breach of the implied terms in the sale by description should the bulk of the goods do not correspond with the description, even though the bulk of the goods corresponds with the sample. The SGA s. 13(2).

⁴²⁰ It is dealt with under the heading of 'Performance of the Contract'.

excess or deficient quantity.⁴²¹

2.1.1.3. The Directive

The Directive uses the concept of ‘non-conformity with the contract’ for the rules of the seller’s guarantee liability.⁴²² The concept includes discrepancies in quality and delivery of *aliud*. However, the matter of discrepancies in quantity is not dealt as a kind of non-conformity with the contract in the Directive so that it seems to be left to the applicable domestic law.⁴²³

The primary test to determine non-conformity with the contract is what the parties lay down for qualities of the goods in the contract.⁴²⁴ The presumption of conformity with the contract is made by asking the following questions. First, do the goods comply with the description given by the seller and possess the qualities of the goods the seller has held out to the consumer as a sample or model?⁴²⁵ Second, given that the consumer has made known to the seller of his particular purpose and the seller accepted it, are the goods fit for the particular purpose the

⁴²¹ Atiyah and Adams, *Sale of Goods*, (1995), at 109 f.; Beale, *supra* n. 25, at 36; Treitel, *Remedies for Breach of Contract*, (1988), at 364. For a contrary view, see *infra* n. 858 and accompanying texts.

⁴²² Directive(99/44) Art. 2.1.

⁴²³ Cf. Oughton and Lowry, *Consumer Law*, (2000), at 195 (arguing that a shortage in quantity may amount to a breach of art. 2.2(a), *i.e.*, non-compliance with the description given by the seller).

⁴²⁴ Directive(99/44) Art. 2.1.

⁴²⁵ Directive(99/44) Art. 2.2(a). Unlike English law, there seems to be no warrant in art. 2.2(a) for restricting the statements made by the seller to the contractual terms so that it may extend to mere representations. Bradgate and Twigg-Flesner, “The EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees – All Talk and No Do?”, (2000) *Web Journal of Current Legal Issues*, No. 2 (seen at “<http://webjcli.ncl.ac.uk/2000/issue2/flesner2.html>”) Notwithstanding this argument and that there is no provision in the Directive for the interpretation of statements, there seems to be no doubt in that the Directive will reach the same result as English law because most Member States may understand that the seller’s liability for non-conformity with the description in art. 2.2(b) stands only on the assumption that it is a contractual term taking account of the parties’ intention. If a statement does not amount to a contractual term, it may be distinctively dealt with under the heading of error or misrepresentation under domestic law. Cf. It is conceivable that although a statement is treated as a contractual term, it may also raise the matter of error or misrepresentation under domestic law.

consumer requires?⁴²⁶ Third, are the goods fit for the purposes for which goods of the same type are normally used?⁴²⁷ Fourth, do the goods 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?⁴²⁸ Fifth, was there any lack of conformity caused by incorrect installation where installation of the consumer goods forms part of the contract and the goods were installed by the seller or under his responsibility?⁴²⁹ Sixth, was the consumer's incorrect installation due to a shortcoming in the installation instruction where he is to install the product?⁴³⁰

2.1.1.4. CISG

In a similar way to the Directive, CISG is based on the concept of 'lack of conformity'.⁴³¹ It is a unitary concept which includes not only discrepancies in quality, but also discrepancies in quantity, delivery of an *aliud*⁴³² and defects in packaging.⁴³³

⁴²⁶ Directive(99/44) Art. 2.2(b).

⁴²⁷ Directive(99/44) Art. 2.2(c).

⁴²⁸ Directive(99/44) Art. 2.2(d). However, the seller is not bound by public statements if he shows that he was not aware and could not reasonably have been aware of the statement in question, or shows that by the time the contract was concluded the statement had been corrected, or shows that the decision to buy the consumer goods could not have been influenced by the statement. Directive(99/44) Art. 2.4.

⁴²⁹ Directive(99/44) Art. 2.5. That is, such lack of conformity is treated as if the goods themselves did not conform.

⁴³⁰ *Id.*

⁴³¹ CISG Art. 35.

⁴³² In CISG it is of no significance in art. 35 to distinguish between '*peius*' and '*aliud*' so that the seller's delivery of coffee instead of cocoa required in the contract constitutes non-conformity under art. 35 and accordingly, the buyer is obliged to give notice of non-conformity under art. 39. See Schwenger, Schlechtriem (ed.), *supra* n. 218, at 277 f.; Enderlein and Maskow, *International Sales Law*, (1992), at 142 f.; Schlechtriem, *supra* n. 307, at 67; Schlechtriem, "The Seller's Obligations under the United Nations Convention on Contracts for the International Sale of Goods", in: Galston/Smit (ed.), *International Sales*, (1984), at 6-12/13; probably also Bianca, Bianca/Bonell (ed.), *supra* n. 221, at 270 ff.

The conformity determination in CISG begins with the inquiry of what characteristics of the goods the parties lay down in the contract by means of description as to quantity or quality. The primary test is to ask whether the goods are in conformity with the quantity, quality and description required by the contract and they are contained or packaged in the manner required by the contract.⁴³⁴ The requirements of the contract can be expressly or impliedly determined by the contract.⁴³⁵ In the cases of there being no details at all or insufficient details of the requirements in the contract to be satisfied by the goods for the purpose of the above primary test, the following series of subsidiary criteria are used in order to determine the conformity of the goods. First, the goods must be fit for the purposes for which the goods of the same description would ordinarily be used.⁴³⁶ Second, they must be fit for any particular purpose expressly or impliedly made known to the seller at the time of concluding the contract.⁴³⁷ This test applies only if the buyer relied on the seller's skill and judgment, and it was reasonable for

Cf. OLG Düsseldorf, 6U119/93, 10-2-1994: seen at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/test/115.html> and <http://www.uncitral.org/en-index.htm> (CLOUT No.82) (which has taken the view that an *aliud* is a non-conforming delivery by simply stating that art. 39 was applicable in that case). *Contra*; Neumayer, in Doralt (ed.), *Das UNICITRAL-Kaufrecht im Vergleich zum österreichischen Recht*, (1985), at 136; Bydlinski, in Doralt (ed.), *op.cit.*, at 137; Loewe, *Internationales Kaufrecht*, (1989), at 52; quoted in Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 278 (arguing by reference to the Secretariat's Commentary (*O.R.*, at 29, Art. 29, No. 3) that an *aliud* is treated as a failure of delivery so that it does not constitute non-conformity under art. 35 and there is no need to give notice).

⁴³³ *Id.*

⁴³⁴ CISG Art. 35(1). Unlike English law, CISG does not draw any technical distinction between different types of descriptive statements so that it appears that there is no warrant in art. 35 for restricting the seller's liability to a contractual term, but it is extended even to mere representations. See Bridge, *The International Sale of Goods*, (1999), at 82. Note that CISG gives effect to the expectation latent in any description of the goods (art. 35(2)(a)) and the basic rules on contract interpretation emphasise the understanding that statements produce in a reasonable person (art. 8). See Honnold, *supra* n. 218, at para 254 f.

⁴³⁵ Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 276 f.; Enderlein and Maskow, *supra* n. 432, at 141.

⁴³⁶ CISG Art. 35(2)(a). Cf. The SGA s. 14(2) and Directive(99/44) Art. 2.2(c). Like English law, the seller must furnish the goods that are fit for 'all the purposes' for which the goods of the same description are ordinarily used. See Secretariat's Commentary, *O.R.*, at 32, Art. 33, No. 5.

⁴³⁷ CISG Art. 35(2)(b). Cf. The SGA s. 14(3) and Directive(99/44) Art. 2.2(b).

him to do so.⁴³⁸ Third, they must possess the qualities of goods which he has held out as a sample or model.⁴³⁹ Fourth, they must be contained and packaged in the usual manner for such goods or if there is no usage to determine the usual manner, it must be in an adequate manner to protect and preserve the goods.⁴⁴⁰

2.1.1.5. Comparative view

The terminology used in each jurisdiction to deal with the seller's liability for the goods that do not coincide with the parties' expectation is different; 'defect' of Korean law, 'non-conformity' of the Directive and CISG, and 'breach of implied term' of English law. Even though it seems needless to mention that there is no practical difference in terms of its use of terminology, the concept of 'non-conformity' in CISG is quite distinctive from the other laws in the context that it is a unitary concept embracing not only discrepancies in quality, but also discrepancies in quantity, discrepancies in nature and defects in packaging. The following comparative accounts are for the question of how each law solves the problem of discrepancies in aspects other than quality.

First, as regards the matter of discrepancies in quantity, Korean law deals with it separately under the heading of the seller's guarantee liability for defects in title, thus the requirements of the seller's guarantee liability for discrepancies in quantity are quite different from those for discrepancies in quality,⁴⁴¹ and unlike English law and CISG, it is limited to the cases of specific goods so that the cases of generic goods are governed by the rules of the general liability for non-performance. In English law, although it appears to be dealt with separately from the implied terms as to quality, there seems to be of no difference because it is, in substance, an implied condition. The Directive does not deal with this matter.

⁴³⁸ *Id.*

⁴³⁹ CISG Art. 35(2)(c). Cf. The SGA s. 15(2) and Directive(99/44) Art. 2.2(a).

⁴⁴⁰ CISG Art. 35(2)(d). Cf. English cases quoted in *supra* n. 410.

⁴⁴¹ It will be examined below in turn when each requirement is dealt with, *inter alia*, the buyer's good faith and absence of negligence, and the limitation period.

Second, regarding the matter of *aliud*, it is governed under the general liability for non-performance in Korean law. In English law, there is no doubt in that it is dealt with under the heading of correspondence with description,⁴⁴² whereas it seems uncertain that the same rule as English law applies in the Directive by means of using non-conformity with description because there may be a tendency to interpret the matter of *aliud* as non-performance in light of the Member States' own law.⁴⁴³

Third, the matter of defects in packaging does not fall within the definition of a defect under the seller's guarantee liability in Korean law, which are rather governed by the rules of the general liability,⁴⁴⁴ whereas CISG includes it as part of conformity of the goods so that it may raise the seller's liability for non-conforming goods in the event of unusual or inadequate packaging.⁴⁴⁵ The position in English law is that it is treated as part of implied condition as to satisfactory quality and fitness for a particular purpose required by the buyer.⁴⁴⁶ The Directive does not specifically deal with the matter of packaging within its scope of non-conformity, even though it may be arguable that goods include packaging.

Having said that, the following accounts discuss the matter of discrepancies in quality by asking the question of what tests are taken to judge the existence of a defect in each law.

First, there are two different views as to the criterion to judge the existence of a defect in Korean law; the objective criterion theory and the subjective criterion theory.⁴⁴⁷ The main difference between them depends upon the question of whether or not the parties' intention is recognised as a crucial factor to decide the existence of a defect. In this light, the position in English law, the Directive and CISG seems close to the subjective criterion theory in that it is

⁴⁴² The SGA s. 13.

⁴⁴³ German law can be a unique example, which distinguishes between *peius* and *aliud*. Cf. Bradgate and Twigg-Flesner, *supra* n. 425.

⁴⁴⁴ The defect in packaging may be categorised as a breach of ancillary duty.

⁴⁴⁵ CISG Art. 35(2)(d).

⁴⁴⁶ See the English cases quoted in *supra* n. 410.

⁴⁴⁷ See *supra* n. 388-394 and accompanying texts.

decided not only by ordinary standards,⁴⁴⁸ but also by the parties' intention.⁴⁴⁹

Second, while the interpretation of description in the SGA s. 13 is confined to the essence or identity of the goods and the contractual term,⁴⁵⁰ Korean law, the Directive and CISG seem to employ a broader interpretation without limiting the description to the essence or identity of the goods and without the technical distinction between mere representation and contractual term so that the whole range of remedies under the seller's guarantee liability are potentially available.⁴⁵¹ However, the buyer who relies on a contractual description which is not related to the essence or identity of the goods in English law may still have some remedy depending upon the nature and seriousness of the breach because it may fall within the category of innominate terms.⁴⁵² In addition, although a descriptive statement does not amount to a contractual term, the seller may be liable for misrepresentation provided that the statement was found untrue and induced the

⁴⁴⁸ E.g., fitness for the ordinary purposes (CISG Art. 35(2)(a)), being of satisfactory quality (the SGA s. 14(2)) or being of the normal quality and performance (Directive(99/44) Art. 2.2(d)).

⁴⁴⁹ E.g., compliance with description (the SGA s. 13, Directive(99/44) Art. 2.2(a), CISG Art. 35(1)), fitness for the purpose the buyer requires and made known to the seller (the SGA s. 14(3), Directive(99/44) Art. 2.2(b), CISG Art. 35(2)(b)).

⁴⁵⁰ *Ashington Piggeries Ltd v. Christopher Hill Ltd* [1972] AC 441; *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 WLR 989. Cf. *supra* n. 404 (descriptive statements for the application of s. 13 must be a contractual term).

⁴⁵¹ In Korean law, even though there is no such technical distinction, the rules of interpretation may achieve the same result as English law, which are centred on the intention of the parties. Cf. Eun-young Lee, *supra* n. 68, at 76 ff. The result may be also achieved in the Directive and CISG. See *supra* n. 425, 434. One must note that so far as the Directive and CISG are concerned, the remedial scheme of the seller's guarantee liability under the Directive and CISG may conflict with that of error or misrepresentation under domestic law because it is conceivable that a statement concerning qualities of the goods may fall within both the issue of the seller's guarantee liability and the issue of error or misrepresentation. In Korean law, the majority view is that the rules as to the seller's guarantee liability prevail over those as to error in the event of the conflict. Eun-young Lee, *supra* n. 68, at 790.

⁴⁵² *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26; *The Hansa Nord* [1976] QB 44. Note that a descriptive statement that is incorporated as a contractual term also retains its identity as an inducing misrepresentation which may give the representee the usual remedies available for the misrepresentation.

buyer to enter into a legally binding contract.⁴⁵³

Third, Korean law seems to require the particular purpose to have been contractually agreed upon.⁴⁵⁴ Similarly, the requirement in the Directive of acceptance by the seller intends the purpose to be contractually agreed upon.⁴⁵⁵ On the other hand, there seems to be no need for the purpose to have been contractually agreed upon in English law as it appears in the SGA s. 14(3),⁴⁵⁶ and also in CISG Art. 35(2)(b).⁴⁵⁷ All they ask is whether it was impliedly or expressly made known to the seller. However, it seems that there is no real difference in practice because in the end both English law and CISG would make an enquiry as to what amounts to a contractual agreement when this is in disputes.⁴⁵⁸ That is, the mere fact that buyer made known the particular purpose to the seller does not necessarily allow the buyer to insist on the particular purpose if the enquiry finds that the seller was deemed to raise an objection as to the purpose at

⁴⁵³ *Oscar Chess Ltd. v. Williams* [1957] 1 WLR 370; cf. *Dick Bentley v. Harold Smith* [1965] 1 WLR 623.

⁴⁵⁴ In Korean law, whichever theory to be taken the buyer can rely on the purpose only if the purpose is contractually agreed. In the objective criterion theory, the seller may be liable for non-compliance with the purpose only if the buyer is given a warranty. On the other hand, according to the subjective criterion theory, the seller will be liable either if the buyer is given a warranty or if the purpose is intended by the parties.

⁴⁵⁵ Directive(99/44) Art. 2.2(b).

⁴⁵⁶ *Bristol Tramways v. Fiat Motors Ltd.* [1910] 2 KB 831. Cf. In another aspect, the Directive seems narrower than English law and CISG; the Directive appears to require the seller's actual awareness of the particular purpose for which the goods would be put because of the requirement of the seller's acceptance on that purpose, whereas English law and CISG seem to be sufficient that the seller had cause to recognise the purpose for which the goods would be used because the wording of s. 14(3) and art. 35(2)(b) which focuses on the act of 'making known' seems to indicate that it is sufficient if one could have recognised the particular purpose from the circumstances. Cf. Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 281; Enderlein and Maskow, *supra* n. 432, at 145. But Secretariat's Commentary appears to require the seller's actual awareness. See Secretariat's Commentary, *O.R.*, at 32, Art. 33, No. 8.

⁴⁵⁷ Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 281. Cf. *O.R.*, at 316, No. 57 ff. (A German proposal for the requirement of a particular purpose being contractually agreed upon was rejected because it may unjustifiably restrict the seller's liability for the fitness of the goods for a particular purpose; UNCITRAL Yearbook VIII, A/CN.9/SER.A/1977, (1978), at 37, para. 173).

⁴⁵⁸ Cf. Secretariat's Commentary, *O.R.*, at 32, Art. 33, No. 8.

the time of contract.

Fourth, fitness for all the common purpose(s) for the goods of the kind in question in English law is qualified by the wording of ‘in appropriate cases’, whereas the Directive, Korean law and CISG⁴⁵⁹ do not have the qualification so that it appears to impose an absolute requirement.⁴⁶⁰ For instance, assuming that the goods are not fit for one of the common purposes and a buyer states at the time of sale that he intends the goods for another purpose, or he does not intend to use the goods for the purpose for which they are unfit. In this event, there is a possibility for the buyer to change his mind in the former case, and to behave opportunistically relying on their selective unfitness for the purpose of repudiating the contract.⁴⁶¹ However, it seems that the same result would be achieved by reference to the principle of good faith.⁴⁶²

Fifth, the concept of a defect in the Directive seems to be broader than that in English law, Korean law and CISG in that it takes into account the public statements made about the goods not only by the seller, but also by the producer or his representative.⁴⁶³ Therefore, the seller in the Directive may be liable if the goods do not correspond with the quality or performance in the way suggested in advertising by the manufacturer or by his representative unless the seller can prove one of the safeguards set out in art. 2.4. In contrast the public statements in English law, Korean law and CISG are only applied to the circumstances between the seller and the

⁴⁵⁹ For the requirement of fitness for all the common purposes in CISG, see Secretariat’s Commentary, *O.R.*, at 32, Art. 33, No. 5. Even though it is submitted that the Directive seems a bit ambiguous about whether it requires fitness for all the common purposes or fitness for almost all the common purposes (Twigg-Flesner, “The EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, (1999) 7(2) *Consumer Law Journal* 177, at 181), the better view seems to extend to the fitness for all the common purposes.

⁴⁶⁰ See Bridge, *supra* n. 434, at 80 f.

⁴⁶¹ *Id.*

⁴⁶² *Id.* Cf. For the principle of good faith, see CISG Art. 7(1); Eun-young Lee, *supra* n. 68, at 30 ff.

⁴⁶³ It seems to be still far from clear about the meaning of the public statements even though it stresses on advertising and labelling. It is submitted that it is intended to be wider than advertising and labelling themselves. Cf. Memorandum by Beal and Howells, in Minutes of Evidence (appended in Consumer Guarantees, 10th Report by Select Committee, Session 1996-7, HLP 57), at 5.

buyer.⁴⁶⁴

Sixth, any lack of conformity resulting from incorrect installation by the seller or under his responsibility is dealt with as if the goods themselves are defective in the Directive,⁴⁶⁵ whereas in English law it may arguably fall within the category of a contract for work and materials in some cases so that it is governed by another regime, namely the Supply of Goods and Services Act 1982.⁴⁶⁶ In English law a defect in the supply of services is deemed to exist only when the supplier does not carry out the service with reasonable care and skill,⁴⁶⁷ whereas in the other jurisdictions it is strict in the context that if a supplier installs goods which fail to perform properly as a result of defective installation, he is liable for the failure no matter how negligent he was in the installation.⁴⁶⁸ Although this seems to show a significant difference at first sight, it is not necessarily true since it will be often easy to prove negligence by the supplier where the goods installed do not work properly and common law may impose strict liability on the

⁴⁶⁴ Cf. Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 277; Bianca, Bianca/Bonell (ed.), *supra* n. 221, at 273.

⁴⁶⁵ Directive(99/44) Art. 2.5. Cf. Directive(99/44) Art. 1.4. (stating that ‘contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive’).

⁴⁶⁶ E.g., a contract to supply and fit a gas fire or a shower. See Bradgate, “Consumer Guarantees: the EC’s Draft Directive”, (1997) *Web Journal of Current Legal Issues*, No.1 (seen at “<http://webjcli.ncl.ac.uk/1997/issue1/bradgate1.html>”).

⁴⁶⁷ Supply of Goods and Services Act 1982 s. 13.

⁴⁶⁸ In CISG this is the case only where an obligation to supply or obtain labour or other services does not constitute the preponderant part of the obligations of the party who supplies the goods. Otherwise, it is left with the applicable domestic law. CISG Art. 3(2). In Korean law, no matter what the contract for supply of goods and services is governed by the contractor’s guarantee liability for the supply of services (KCC Arts. 667 ff.) or the seller’s guarantee liability for defective goods (KCC Arts. 580 ff.), there is no doubt in that the seller/installer is strictly liable for the result of his performance. Cf. Regarding the question of whether the contract for supply of goods and services is construed as a sales contract or a contract for work, the better view seems that it depends upon whether the contract is related to generic goods or specific goods; a contract related to generic goods is deemed to be a sales contract, whereas a contract regarding specific goods a supply of services contract. See Yun-jik Kwak, *supra* n. 74, at 441 ff.; probably Hyung-bae Kim, *supra* n. 67, at 593 ff. Cf. BGB §651.

supplier.⁴⁶⁹

Seventh, insofar as an implied term of satisfactory quality and fitness for the purpose made known to the seller is concerned, it is not applied to the case of a private sale in English law,⁴⁷⁰ whereas it may be so in Korean law and CISG.⁴⁷¹

2.1.2. Evaluating accounts

2.1.2.1. Internal evaluation

2.1.2.1.1. Unitary concept vs. Separate concept

As examined above in a comparative study, Korean law separately deals with the matters of quality, quantity, *aliud* and packaging in the context that differences both in quantity and in quality are treated as the matters of ‘defect’, whereas both delivery of *aliud* and defects in packaging are dealt as the matters of ‘non-performance’. Once the case is categorised as the matter of defect, it is governed by the special regime for the seller’s guarantee liability resulting that remedies are available regardless of the fault principle,⁴⁷² but subject to a short limitation period of six months in the case of difference in quality and one year in the case of difference in quantity.⁴⁷³ On the other hand, the categorisation of non-performance results that it is governed by the rules of the general liability for non-performance, and consequently all the remedies are

⁴⁶⁹ *IBA v. BICC Construction Ltd* [1980] 14 BLR 9 (quoted in Bradgate, *supra* n. 466). Cf. Bradgate and Twigg-Flesner, *supra* n. 425. Notwithstanding that, the codification of the strict liability cannot be same as the rules in case law from the point of view of the consumer. Cf. Bradgate, *supra* n. 466.

⁴⁷⁰ See *supra* n. 408-409, 415 and accompanying texts. The same is also true in the Directive. Cf. *Infra* n. 631-635 and accompanying texts.

⁴⁷¹ In light of the clear wording of CISG Art. 2(a), private purchases are excluded from the application of the rules of CISG, but not private sales. See Herber, Schlechtriem (ed.), *supra* n. 218, at 32. Cf. See *supra* n. 636-640 and accompanying texts.

⁴⁷² For the remedies available in general, see *supra* n. 118-124 and accompanying texts.

⁴⁷³ KCC Art. 582 and KCC Art. 573 respectively.

subject to the fault principle⁴⁷⁴ and a relatively long limitation period of ten years.⁴⁷⁵

As discussed in the last chapter, a problem Korean law has revealed, *inter alia*, as to the matter of *aliud*, is the borderline between non-performance and defect.⁴⁷⁶ The separate treatment in the case may produce unjustified results to either the seller or the buyer because the substantial differences in terms of the remedies available and the limitation period cannot be justified in one breach of contract.⁴⁷⁷ Another problem arises where a consumer is involved and has found a defect in the goods due to a lack of packaging. It may be unjustifiable if the consumer who generally expects defect-free goods and who cannot distinguish between the matters of quality and packaging finds that he cannot rely on the seller's guarantee liability and also he cannot claim any remedies under the general liability because the seller is proved to have committed no fault in the packaging stage.⁴⁷⁸ The other problem is that although the matters of differences in quality and quantity are governed under the seller's guarantee liability, differences in quantity are separately dealt with as if there have been defects in title. The consequences are that some requirements to raise the seller's guarantee liability are quite different from those as to defects in quality; first, both the buyer's ignorance of the existence of a defect and the absence of negligence in failing to discover the defect are required in the case of defects in quality,⁴⁷⁹ whereas only the buyer's ignorance of the existence of a defect in the case of a shortage in quantity.⁴⁸⁰ Second, the limitation period in the case of defects in quality is six months⁴⁸¹

⁴⁷⁴ The case of *aliud* is governed by the rules as to either delay or impossibility in performance (cf. some argue it is governed by the rules as to incomplete performance; see *supra* n. 104) and the case of a defect in packaging is governed by the rules as to incomplete performance. For the remedies as to delay, impossibility and incomplete performance in general, see *supra* n. 70-75, 80-91, 98-100 and accompanying texts.

⁴⁷⁵ KCC Art. 162.

⁴⁷⁶ For the examples of the borderline cases, see *supra* n. 325.

⁴⁷⁷ See *supra* n. 325-329 and accompanying texts.

⁴⁷⁸ Generally, the creditor must prove the debtor's fault. In the case of a consumer involved, there may be a transfer of the burden of proof as to fault.

⁴⁷⁹ KCC Art. 580(1).

⁴⁸⁰ KCC Art. 572(3). For more detail, see *infra* pp. 117 f.

compared to one year in the case of a shortage in quantity.⁴⁸² The differences may raise in some cases the following question: given that the matter of quantity is, in its nature, generally similar to the one of the seller's liability to deliver the goods conforming to the description as to quality, what is the rationale for the different treatments?⁴⁸³ Overall, Korean law seems to ignore the fact that in some cases separate treatment cannot be justified especially when one considers that all the matters of *aliud*, packaging, quality and quantity are closely interrelated with each other.

English law does not seem to encounter the same problems as in Korean law because all the problems are homogeneously dealt with under the name of breach of implied terms. However, when one considers the whole of s. 30 is simply the application of the seller's description duty imposed by s. 13, it is doubted whether there is any justification to treat separately between breaches of quality duties and breaches of quantity duties; *e.g.*, the Unfair Contract Terms Act 1977, in consumer sales, renders invalid any attempt to exclude or limit the seller's liability for implied conditions imposed by ss. 13-15, but only an unreasonable attempt to exclude or limit his liability for wrong quantity imposed by s. 30.⁴⁸⁴

The position in the Directive seems that there is a possibility to encounter the similar problems to Korean law in relation to the matters of packaging and *aliud* where there is still a tendency to look at the Directive in light of the Member States' own domestic law.⁴⁸⁵ However, given that

⁴⁸¹ KCC Art. 582.

⁴⁸² KCC Art. 573.

⁴⁸³ It has been explained for the different treatment that there is a similarity between a shortage of quantity and a defect in title in the context that the part of shortage is under someone else's property. See Yun-jik Kwak, *supra* n. 74, at 237. However, it is doubted in that the explanation is plausible when one considers that the case of shortage in the seller's guarantee liability is a typical type of initial impossibility of performance (see *supra* n. 398), whereas the case of a defect in title is of no relevance of the initial impossibility because the defect in title is deemed to be repairable in theory. Cf. Eun-young Lee, *supra* n. 167, at 223.

⁴⁸⁴ Atiyah and Adams, *supra* n. 421, at 109 f.

⁴⁸⁵ This is the case where, in particular, Germanic legal system is involved; a lack of package and delivery of *aliud* may be treated as non-performance so that the seller may avoid his liability by proving

the Directive is inherited from CISG, those matters could be solved by analogical interpretation of Directive(99/44) art. 2 in accordance with CISG Art. 35. The residual matter is related to the quantity issue which is not specified in the Directive and left open to domestic law. The consequence is that a consumer may not bring the Directive's remedial scheme into play in the event of a breach of quantity duty so that it is separately dealt with from breach of quality duty.⁴⁸⁶

CISG uses a unitary concept of 'non-conformity with the contract', embracing not only differences in quality, but also differences in quantity, delivery of *aliud* and defects in packaging. Namely, those matters are dealt with in a unitary manner in the context that the buyer may rely on the same remedial scheme. Although it does not necessarily solve all the problems each jurisdiction has, the unitary manner using the concept of 'non-conformity' seems to give at least some idea as a suggestion of how to solve those problems.

2.1.2.1.2. The objective criterion theory vs. The subjective criterion theory

There have been the opposing views as to the criterion to judge the existence of a defect in Korean law; the objective criterion theory and the subjective criterion theory. The disputes as to the criterion are closely connected with the arguments regarding the nature of the seller's guarantee liability; the legal liability theory, as a matter of course, believes in the objective criterion because the theory is based on the idea that the seller's guarantee liability is an effect of non-juristic act, which is imposed by the law regardless of the parties' intention,⁴⁸⁷ whereas the contractual liability theory insists on that the parties' intention (subjective criterion) should not be disregarded because the seller's guarantee liability from the point of view of the contractual liability theory is imposed on the basis of the contract, namely, the parties'

the absence of fault.

⁴⁸⁶ It seems to be required to expressly insert in the Directive the duty as to quantity.

⁴⁸⁷ Cf. *supra* pp. 30 ff.

intention.⁴⁸⁸ Insofar as the latter theory has been found more suitable under the existing KCC than the former theory in the last chapter, there seems to be no doubt in that the subjective criterion is superior to the objective criterion.⁴⁸⁹ In addition, the objective criterion cannot be supported in the following two aspects. First, the criterion supported by most scholars before the present KCC came into force cannot be brought into the present law because, unlike the present law, the seller's guarantee liability at that time was not applied to generic goods, but only to specific goods.⁴⁹⁰ Second, the objective criterion proves itself contradictory by allowing the subjective criterion to be used in the exceptional cases of the seller's warranty on the specific quality so that it reveals the objective criterion cannot stand as a comprehensive concept.⁴⁹¹ Furthermore, as examined in the comparative study, English law, the Directive and CISG also support the subjective criterion theory in that a defect should be decided not only by ordinary standards, but also by reference to what the parties intended.⁴⁹²

2.1.2.1.3. Other issues

With respect to the question whether the seller's guarantee liability should take into account public statements made not only by the seller but also by the producer or his representative, unlike the Directive, English law, Korean law and CISG concern only to the statements by the seller. Although it could be justified in some cases of merchant sales, the problem is in consumer sales where the consumer often purchases branded goods relying on manufacturer's advertisements. It seems to be unreasonable if the seller is excluded from his liability by proving that it was not his statement because insofar as he takes some benefits from the

⁴⁸⁸ Cf. *supra* pp. 38 ff.

⁴⁸⁹ For the discussion about 'legal liability vs. contractual liability', see *supra* pp. 68 ff., 77 f.

⁴⁹⁰ Dae-jeong Kim, *supra* n. 392, at 16 ff.

⁴⁹¹ *Id.* In contrast, the subjective criterion can be a comprehensive concept to judge the existence of a defect because even an ordinary standard which may fall within an objective criterion is understood as a standard the parties already assumed in the contract. See *id.*, at 18. Cf. For the similar approach in English law, see *supra* n. 416 and accompanying texts.

⁴⁹² See *supra* n. 447-449 and accompanying texts.

statement, it seems reasonable to impose on the seller liability for the statement in certain circumstances⁴⁹³ except, first, where he was not, and could not reasonably have been aware of it,⁴⁹⁴ second, where he corrected it at the time of sale, and third, where it could not have influenced the consumer's decision to purchase the goods.⁴⁹⁵

As regards the position in Korean law and CISG, unlike English law, the rules as to the existence of a defect are normally applied even to a private sale, and thus the question arises as to whether it could be justified where a private seller sells goods to a merchant buyer.⁴⁹⁶ The rules are open textured so that the same criteria as in the sale involving a merchant seller may not be applied to the private sale. However, it seems unreasonable when one considers a case where a merchant buyer, who has a specific knowledge on goods, recklessly pays more than a normal price and later sues a private seller, who has no such knowledge, on the basis of that the goods are not of a satisfactory quality in terms of value for the money he paid.

2.1.2.2. External evaluation

2.1.2.2.1. Unitary concept vs. Separate concept

As discussed above in the internal evaluation, the problems inherent in Korean law were mainly due to having separate concepts as regards quality, *aliud*, quantity and packaging even though they are closely interrelated. The matter of having the separate concept could be questioned by the following two criteria in light of efficiency; first, does it provide the parties with certainty as to the separate rules?⁴⁹⁷ Second, is it enough to reflect the parties' preference in the context that it reflects what would have been mutually agreed between the parties had they

⁴⁹³ Accord; Beale and Howells, *supra* n. 257, at 30.

⁴⁹⁴ This is the case, *e.g.*, where it was advertised only in some other area.

⁴⁹⁵ Directive(99/44) Art. 2.4.

⁴⁹⁶ See *supra* n. 470-471 and accompanying texts.

⁴⁹⁷ For the importance of certainty or clarity in promoting efficiency of the rules, see *supra* n. 38-40 and accompanying texts. See also *supra* n. 52-55 and accompanying texts for another importance in

decided to negotiate for it?⁴⁹⁸

In relation to the matter of *aliud*, it has been particularly problematic in a borderline case in a way that raises uncertainty as to whether the case falls within the category of non-performance or defect. As discussed in the last chapter, insofar as there is no clear guidelines to distinguish between those categories, it seems to lead to a form of market failure which causes the increase of transactions costs for the parties uncertain about their rights or liabilities to cope with the uncertain situation and the increase of likelihood of litigation due to the uncertainty about the possible outcome at trial.⁴⁹⁹ The uncertainty may result in even more severe market failure in a consumer context because it could prevent the consumer's easier access to the relevant rules and consequently the merchant seller may easily take advantage of the ignorant consumer. In addition, the separate treatment of *aliud* does not seem to reflect the parties' preference in that the parties do not generally expect that they simply promise to do their best as to the matter of *aliud*, but expect that they guarantee non-defective goods.⁵⁰⁰

Leaving the matter of packaging to the rules of the general liability may increase the transaction costs since it may cause the court difficulties where it is hard to find whether the cause of a defect was an inherent defect or packaging. Besides, the separate treatment of packaging does not seem to reflect the parties' general preference because given that packaging is closely related to the matter of quality, the parties are likely to extend the guarantee of defect-free goods to the goods being packaged in the manner usual for such goods or in a manner adequate to preserve and protect the goods. This is truer to the reality of a contract involving the consumer who may generally expect defect-free goods actually in their hands without

consumer sales.

⁴⁹⁸ Cf. *supra* n. 32-34, 41-42 and accompanying texts.

⁴⁹⁹ Cf. *supra* n. 368-370 and accompanying texts. It seems true that the court may generally find the existence of the seller's fault on the delivery of *aliud*, but there is no guarantee of this, and thus it may still increase the transaction costs.

⁵⁰⁰ The preference seems to become clearer when one considers exchange transactions in the modern world which are very largely standardised and quickly executed in the context that the parties are generally treated as guaranteeing the certain result. Cf. Zweigert and Kötz, *supra* n. 20, at 549 f.

distinguishing between the matters of packaging and quality.

The treatment of a shortage in quantity as defects in title does not seem to raise the matter of uncertainty regarding the relevant rules. However, the question arises whether the separate treatment of a shortage in quantity from defects in quality reflects the parties' preference. It seems that the parties are likely to deal with the matter of shortage in quantity under the same heading as defects in quality rather than defects in title because, as was argued in the internal evaluation, it is closely related to the matter of description as to quality, although the consequences of the separate treatment do not seem to be an issue on which one can easily assert what the parties' preference would be.⁵⁰¹ In addition, the application of the seller's guarantee liability only to the cases of a shortage in quantity of specific goods does not seem to reflect the parties' preference in that they do not generally expect that the cases of specific goods are governed by the seller's guarantee liability, whereas the cases of generic goods are left to the rules of the general liability which is subject to the fault principle. In particular, the consumer may be surprised when he finds he has no remedies at all for a shortage in quantity of generic goods when the seller is proved not to be at fault on the shortage. Even if the court may find the seller's fault in most cases for a shortage in quantity of generic goods, one must note that there is no guarantee about that, and consequently it causes the increase of transaction costs to make clear the seller's strict liability on a shortage in quantity of generic goods.

As to the problems of the Directive found in the internal evaluation above,⁵⁰² the evaluation in terms of efficiency executed in Korean law could be correspondingly applied to the matters of *aliud*, packaging and quantity in the Directive.⁵⁰³

⁵⁰¹ For the consequences of the treatment, see *supra* n. 479-482 and accompanying texts. The consequences may reflect the parties' preference in a consumer context that it is understandable to avoid the harshness in the case of a defect in quality (*i.e.*, the shorter limitation period of six months and the absence of negligence requirement).

⁵⁰² See *supra* n. 485-486 and accompanying texts.

⁵⁰³ Insofar as the matter of a shortage in quantity is left to the domestic law, as discussed above in Korean law, the consumer may be surprised where the consumer realises that he has no remedies at all for a shortage in quantity by virtue of the domestic law (*e.g.*, German law which the seller's guarantee liability

Although English law has no such unitary concept as CISG, it cannot be said its rules are inefficient in economic terms because it does not at least face the same problems as in Korean and the Directive.⁵⁰⁴ However, it is doubted whether the consequences of the expulsion of the matter of quantity from the one of quality with regard to the Unfair Contract Terms Act 1977 are properly reflecting the parties' preference in a consumer context.⁵⁰⁵

On the other hand, CISG having an unitary concept of 'non-conformity' seems to enhance its certainty which reduces the transaction costs for the parties and to properly secure the parties' preference because insofar as the concept embraces not only the matter of quality, but also quantity, *aliud*, and packaging, there is no need to distinguish between them, and the concept is governed under the unified liability system which is of no relevance of the fault principle.

2.1.2.2.2. The objective criterion theory vs. The subjective criterion theory

One must refer to the previous evaluation on the nature of the seller's guarantee liability since, as discussed above, the issue of 'the objective criterion theory vs. the subjective criterion theory' is basically relied on the matter of the nature of the seller's guarantee liability.⁵⁰⁶ Given that the evaluation has proved that the nature is a contractual liability on the basis of that the dual liability system is inferior to the unified liability system due to its complexities and uncertainty and the only vehicle to unify the dual liability system is a contract,⁵⁰⁷ it seems that the subjective criterion theory supported by the contractual liability theorists is more efficient in the way that it reduces the transaction costs which would otherwise increase due to the complexities and uncertainty elements. In addition, the subjective criterion theory seems to be

is not applied to the cases of shortage in quantity, but left to the rules of the general liability). In this light, it seems to increase the transaction costs to amend the rules based on the fault principle as to a shortage in quantity.

⁵⁰⁴ This is because all the matters of quality, *aliud*, quantity, and packaging are governed by the strict liability rules and they are homogeneously dealt with under the name of breach of implied terms.

⁵⁰⁵ See *supra* n. 484 and accompanying texts.

⁵⁰⁶ See *supra* n. 372 and accompanying texts.

⁵⁰⁷ *Id.*

in a better position to enhance the efficient situation because, unlike the objective criterion theory, it is mainly focused on the parties' intention to judge the existence of a defect.

2.1.2.2.3. Other issues

With respect to the matter of the public statements made by the producer to be taken into account, the parties' preference in consumer sales is likely to include the statements in their judgment for the existence of a defect because, as discussed in the internal evaluation, the consumer often relies on them in making his decision to purchase the goods and the merchant seller takes some benefits from them. Otherwise, it would undermine an optimal operation of market place because the statements are deemed of part of an overall exchange for which the buyer's price is given. However, it is quite unlikely where, first, the seller has no reason to know of them, second, the consumer has no reason to be influenced by them in his purchase, and third, the seller corrected them at the time of sale.⁵⁰⁸ Although it is arguable that the same is also true in some cases of commercial sales, it does not necessarily mean that it is appropriate to include the public statements in all commercial sales because in many cases commercial buyers rely on rather their own expertise than the statements.⁵⁰⁹

Regarding Korean law and CISG, in that the rules as to the existence of a defect are

⁵⁰⁸ See *supra* n. 493-495 and accompanying texts. It is doubted whether the second situation where the seller is not bound by the statements if he proves that the buyer's decision to purchase the goods could not have been influenced by the statements is justified. As long as the statements made to the public as a whole appear to become part of bundle of attributes that the buyer purchases, the exception based on the statements that could not have been influenced the buyer's decision may undermine a market-based standard for legal guarantees. That is, it may deny the buyer's claim for non-conforming goods based on such statements even though they are included in the price the buyer paid. See Holdych, "Warranties and Conditions in the Sale of Goods: A Market Based Assessment of English and European Community Warranty Law", (1998) 29 *Cambrian Law Review* 73, at 86. One of the reasons for this seems that even if some buyers do not value the statements, rejecting enforcement of the legal warranty would undermine the utility of such promises in a sense that a rule allowing the seller to inquire into the subjective preference of purchases would inject substantial uncertainty into the enforcement of such promises, increasing transaction costs. *Id.*, at 82.

⁵⁰⁹ Cf. Lando and Beale (ed.), *Principles of European Contract Law*, (2000), at 299 ff.

unexceptionally applied to a private sale, it seems to fail to reflect the private sellers' interests which may be distinguished from the merchant sellers' when one considers the case given in the above internal evaluation.⁵¹⁰ This is because, assuming that most private sellers are risk-averse, they are not likely to take a risk that a buyer claims non-satisfactory quality in terms of value for money at the later stage. In the case stated in the internal evaluation, it may be more efficient if the buyer takes the risk insofar as he has much more knowledge of the goods than the seller.

2.2. The time when a defect must exist

2.2.1. Comparative accounts

2.2.1.1. Korean law

Further to the matter of the definition of a defect, another matter is in the question of when a defect must exist for the purpose of raising the seller's guarantee liability. In Korean law, insofar as discrepancies in quality are concerned, this matter is particularly related to the debates as to the nature of the seller's guarantee liability. According to the legal liability theory, it maintains that the time when a defect must exist is at the time of concluding the contract. This is because, as examined before, its theoretical understanding is based on the principle of *impossibilium nulla obligatio* and *specific goods dogma* which is related to the time when the contract was entered into.⁵¹¹

On the other hand, the contractual liability theory contends that the relevant time should be when risk passes to the buyer.⁵¹² It is generally submitted that the time for the transfer of risk is

⁵¹⁰ See *supra* p. 102.

⁵¹¹ For the details about the principle, see *supra* pp. 33 f. However, as long as the sale of generic goods is concerned, it is the time when the goods are specified. See *supra* n. 149 and accompanying texts. One scholar among the contractual liability theorists also argues that the relevant time is the time when the generic goods are specified. See Sang-yong Kim, *supra* n. 392, at 238.

⁵¹² Hyung-bae Kim, *supra* n. 67, at 338 f.; Eun-young Lee, *supra* n. 167, at 221; Choon-soo Ahn, *supra*

related to the time when the goods are delivered to the buyer in both the sale of specific goods and the sale of generic goods.⁵¹³ Therefore, the defect must exist, at least in embryo, at the time that the buyer takes over the goods, *i.e.*, upon the change in control over them.

As regards the cases of discrepancies in quantity, a shortage or a partial loss must exist at the time of entering into the contract.⁵¹⁴

2.2.1.2. English law

In English law, although it is far from clear, the better view seems that the goods must correspond to the terms of the contract at the time when risk passes to the buyer.⁵¹⁵ Therefore, the relevant time when the quality of the goods must be assessed to decide whether a defect exists or not is the time of the passage of risk.⁵¹⁶ It may often correspond with the time of

n. 167, at 427 ff.; Dae-jeong Kim, *supra* n. 392, at 13 f. and 16 ff.; Sang-yong Kim, *supra* n. 392, at 237. Cf. Unlike Korean law, German law stipulates in the code that a defect must exist at the time when risk passes from the seller to the buyer. See BGB §459(1).

⁵¹³ No provision for this principle in KCC, but it is generally agreed by scholars. See Eun-young Lee, *supra* n. 167, at 145 ff. and 221 (She is based on the idea that the risk generally passes when the property is transferred to the buyer and the transfer of property occurs at the time of delivery); Hyung-bae Kim, *supra* n. 67, at 160 ff. and 338 ff. (In contrast to Prof. Lee, he concludes the relevant time is when goods are delivered on the ground that the completion of bearance of risk as when a party completed all the performances must be distinguished from the concept of the passage of risk and the passage of risk should be divorced from the transfer of property because the buyer is normally in a better position to protect against the economic consequences after he takes over the goods even if the transfer of property has not occurred yet). Cf. Contrary to Korean law, this principle is stipulated in the German law code. See BGB §446(1).

⁵¹⁴ KCC Art. 574. One must note that it is only related to the specific goods. See *supra* n. 397-398 and accompanying texts. The matter of a partial loss subsequent to the conclusion of the contract is dealt with either the rules of the general liability or the rules as to the passage of risk. In the cases of generic goods, the relevant time seems the time of passage of risk that is governed by virtue of the rules of the general liability.

⁵¹⁵ Reynolds, Guest (ed.), *Benjamin's Sale of Goods*, (1997), para. 11-062.

⁵¹⁶ *Id.* Cf. Regarding the case where a defect becomes apparent after the risk is transferred, the position is that the requirement of durability as given in s. 14(2B)(e) does not put off the time when a defect must exist until it becomes apparent, but it rather requires that at the time of the passage of risk they should be

delivery. However, it does not necessarily mean that risk passes when delivery takes place because the transfer of risk and delivery are often not concurrent, even though risk passes at the time of delivery in some cases.⁵¹⁷ This may be the case where a buyer purchases a specific second hand car and agrees to collect it the following day because while the property in the car and the risk of damage to it may pass to the buyer immediately,⁵¹⁸ the delivery is postponed until the buyer's collection.⁵¹⁹ The time of the passage of risk seems to be also decisive in the cases of discrepancies in quantity.

2.2.1.3. The Directive

Although the Directive does not clearly address the time when a defect must exist, it can be inferred from art. 2 which requires the seller to ensure that the goods which are delivered to the consumer are in conformity with the contract of sale.⁵²⁰ That is, the relevant time at which a

in such a condition that they will remain fit for purpose and of satisfactory quality for a reasonable period. See Law Commission 160, 'Sale and Supply of Goods', (1987), at para. 3.52. Cf. *Lambert v. Lewis* [1982] AC 225; *Mash & Murrell v. Emmanuel* [1961] 1 WLR 862; *Healy v. Howlett & Sons* [1917] 1 KB 337.

⁵¹⁷ For the cases holding that the implied terms are related to the time of delivery, see *Henry Kendall & Sons v. William Lillico & Sons* [1969] 2 AC 31, 118; *Lambert v. Lewis* [1982] AC 225, 276; *Jackson v. Rotax* [1910] 2 KB 937, 945; *Lee v. York Coach and Marine* [1977] RTR 35, 43. In principle, the passage of risk occurs when the property in the goods is transferred to the buyer whether delivery has been made or not unless otherwise agreed by the contractual parties. The SGA s. 20(1). The property is transferred to the buyer at such time as the parties intend it to be transferred. The SGA s. 17(1).

⁵¹⁸ The SGA s. 18, r. 1.

⁵¹⁹ *Bradgate*, *supra* n. 466. In this case the second hand car is deemed to be constructively delivered to the buyer when the contract was made and thereafter the seller may be liable as bailee for loss of or damage to the goods due to negligence on his part. *Bradgate and Twigg-Flesner*, *supra* n. 425.

⁵²⁰ *Accord*; *Bradgate and Twigg-Flesner*, *supra* n. 425; probably *Shears, Zollers & Hurd*, "It will be the Biggest Change to Consumer Rights for 20 Years", (2000) *J.B.L.* 262, at 272. Cf. Recital 17. *Contra*; Singleton, "The Consumer Guarantees Directive 1999/44", (1999) 18(2) *Tr. Law* 126, at 127 (stating 'at the time of purchase'). Like English law, the requirement of durability that may be given by art. 2.2. does not seem that goods should remain true to the fitness and quality standards for a reasonable period but that at the time of delivery they should be in a condition that they will not deteriorate no more rapidly than might be reasonably expected.

defect must exist is the time of delivery.⁵²¹ It must be noted that the references to the time of delivery do not necessarily imply that the Member States must change their rules on the passing of risk.⁵²²

2.2.1.4. CISG

As to the time when a defect must exist, CISG provides that the seller is liable for any lack of conformity basically at the time when the risk passes to the buyer.⁵²³ The seller is even liable for a lack of conformity, the cause of which already exists at the time of the passage of risk, even though it becomes apparent only after that time.⁵²⁴ Therefore, the decisive moment when a defect must exist is the time at which the risk passes.⁵²⁵ The passage of risk in CISG, in principle, depends on physical acts of transfer of possession (*i.e.*, the handing over of the goods

⁵²¹ However, the Directive does not provide any rules as to what is meant by 'delivery' so that this matter seems to be left open to domestic laws.

⁵²² Recital 14. Cf. Twigg-Flesner argues that such a change seems desirable to ensure the Member States to take account of the approach taken in the Directive where the relevant time in domestic law is the time of the passing of risk of which is not linked to the time of delivery (*e.g.*, the passage of risk linked with the transfer of property). Twigg-Flesner, *supra* n. 459, at 179. Cf. Bradgate and Twigg-Flesner, *supra* n. 425.

⁵²³ CISG Art. 36(1).

⁵²⁴ *Id.* CISG also provides that, even if a lack of conformity occurs even after the passage of risk, the seller is liable for the lack of conformity of which is due to the breach of a guarantee that for a period of time the goods will remain fit for their ordinary purpose or for a particular purpose or will retain specified qualities or characteristics (CISG Art. 36(2)). Similarly to English law and the Directive, the decisive moment is here again at the time of the passage of risk because the seller was in the breach of a guarantee at the time of the passage of risk in a sense that the goods were not in such a condition to remain useful at that time.

⁵²⁵ However, the principle may be rebuttable when the lack of conformity which exists even after the passage of risk is due to a breach of any of the seller's obligations (CISG Art. 36(2)). The seller's breach includes not only the one occurred before and also after the passing of risk; for instance, in the former case, any lack of conformity due to the selection of an unreliable carrier, the choice of wrong route, or defective operating instructions, in the latter cases, any lack of conformity where the seller damages the goods when collecting his containers, where components are damaged in the course of a contract of sale with assembly obligations which falls as a whole under CISG. See Schwenzer, Schlechtriem (ed.), *supra*

to the buyer or a carrier).⁵²⁶

2.2.1.5. Comparative view

As examined above, in Korean law, the time at which a defect as to quality must exist is broadly divided into two opposing views; the time of entering into the contract and the time of the passage of risk. The latter view seems close to English law and CISG in that a defect must exist at the time of the passage of risk. However, it is understood in Korean law and CISG that the passage of risk generally occurs when the goods are handed over, whereas it does not always concur with the handing over of the goods in English law. The practical difference would be explained by the example case in respect of the sale of the specific second hand car which was given in the English law section.⁵²⁷ Assuming that the goods are damaged before delivery without the seller's fault, but after the transfer of property, the buyer in Korean law and CISG may be able to rely on the seller's guarantee liability on the ground of the existence of a

n. 218, at 291; Enderlein and Maskow, *supra* n. 432, at 150.

⁵²⁶ Honnold, *supra* n. 218, at 393; Hager, Schlechtriem (ed.), *supra* n. 218, at 504, 512; Enderlein and Maskow, *supra* n. 432, at 255 f.; Stocks, "Risk of Loss under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposed Revision of UCC Section 2-509 and 2-510", (1993) 87 *Nw.U.L.Rev.* 1415, at 1439 ff. Cf. Roth, "The Passing of Risk", (1979) 27 *Am. J. Comp. L.* 291. Cf. For the detailed rules of arts. 66-70 as to the passage of risk under CISG, see Hager, *id.*, at 501 ff. Cf. CISG abandoned the approach taken by ULIS of linking the passage of risk to the concept of *délivrance* because of the excessively complicated nature of '*délivrance*' based on its quite different functions to define the seller's obligations, the time and place for making payment and the passage of risk. In particular, the rules on the passage of risk under ULIS were proved to be unnecessarily complicated in the case of the delivery of defective goods because the seller would retain the risk indefinitely even if the buyer kept the goods so that it was required a special provision (art. 97(2)) to drop the link between the passage of risk and *délivrance* (see UNCITRAL Yearbook III, A/CN.9/SER.A/1972, (1973), at 31-40; UNCITRAL Yearbook V, A/CN.9/SER.A/1974, (1975), at 89-94; UNCITRAL Yearbook VI, A/CN.9/SER.A/1975, (1976), at 108-110; Honnold, *supra* n. 724, at 73-82, 168-173, 233-235). Cf. Note that the concept of *délivrance* is meant the handing over of conforming goods in art. 19 of ULIS. It is not delivery in the English sense because if the goods are defective there will be no *délivrance*. Nor does it amount to performance by the seller of his part of the contract because if the buyer refuses to accept conforming goods there will be no *délivrance*.

⁵²⁷ See *supra* n. 518-519 and accompanying texts.

defect at the time of handing over of the goods,⁵²⁸ whereas English law may not allow it.⁵²⁹ The result seems to be due to the differences as to the rules of the passage of risk.⁵³⁰

2.2.2. Evaluating accounts

2.2.2.1. Internal evaluation

The disputes in Korea concerning the relevant time when a defect must exist are basically related to the arguments as to the nature of the seller's guarantee liability; the legal liability theory insists 'at the time of contract' and the contractual liability theory 'at the time of the passage of risk'. Insofar as it has been found the latter theory more reasonable for the present KCC in the last chapter, the time when a defect must exist should be understood the time of the passage of risk.⁵³¹ In addition, the position in English law and CISG, which maintains the time of the passage of risk, supports this view.

The next question is related to whether the passage of risk should be linked to the transfer of property or the handing over of goods. Given that a party who takes physical control over the goods is generally in a better position to protect against the economic consequences, it is

⁵²⁸ The position in CISG relies on art. 69.

⁵²⁹ However, if such loss or damage was proved due to negligence on the seller's part, he may be liable as bailee for loss of or damage to the goods. Bradgate and Twigg-Flesner, *supra* n. 425. Cf. Compared to English law, Korean law and CISG appear to give more room for the buyer to rely on the seller's guarantee liability. However, it is not necessarily true because it is conceivable that the handing over of the goods occurs before the transfer of property so that English law may provide more room for the buyer than the others. Cf. Note that the position in the Directive is not clear because the rules as to the passage of risk is left to domestic laws.

⁵³⁰ While the passage of risk in sales law is, in effect, linked to the handing over of the goods in Korean law and CISG (KCC Arts. 188(1), 569(1); CISG Arts. 66 ff.), it is related to the transfer of property in English law based on the principle of *res perit domino* (the SGA s. 20(1)). Cf. Like English law, Prof. Lee in Korea also links the passage of risk to the transfer of property, but it must be noted that the transfer of property in Korean law is connected with the moment of the buyer's actual possession of the goods, whereas that in English law to the intention of the parties. See *supra* n. 513.

⁵³¹ For the discussion regarding 'legal liability vs. contractual liability', see *supra* pp. 68 ff.

doubted whether the passage of risk should be inevitably interrelated with the transfer of property. For instance, the problem arises, as examined above in the English law section, where the specific second hand car is damaged before delivery but after the transfer of property. Although it appears to be true that the seller would be liable for such damage in English law provided that he was negligent,⁵³² one must ask if this would be a right answer when one takes account of the fact that the seller was in a better position to take care of the car. The problem seems to be even clearer in a consumer context because the seller may not be liable unless negligence on his part is proved. In this sense, the approach taken by the contractual liability theory in Korean law and CISG seems to give a more plausible suggestion to the problem in question.

2.2.2.2. External evaluation

As discussed above, the disputes in Korean law as to the relevant time when a defect must exist basically rely upon the matter of the nature of the seller's guarantee liability. Given that the external evaluation in the last chapter has proved that the nature is a contractual one because the dual liability system is inferior to the unified liability system due to its complexities and uncertainty and the only vehicle to unify the dual liability system is a contract,⁵³³ it seems natural to assert that the time of passage of risk supported by the contractual liability theory would lead to more efficient results in their transaction. Furthermore, although it appears to be theoretically possible from the perspective of economists that the buyer may not want the relevant time to be that of the passage of risk insofar as he gets value for money in a sense that a higher risk bearing⁵³⁴ is compensated by a lower price, most buyers who are assumed risk-averse in general may be prepared to pay more not to take the higher risk.

⁵³² The position may be same as the legal liability theory in Korean law, according to which the damage that occurs after the time of contract is governed by the general liability which is based on the fault principle.

⁵³³ See *supra* n. 372 and accompanying texts.

⁵³⁴ *I.e.*, taking the risk of a defect after the time of contract.

The next discussion concerns with whether the passage of risk should be linked with the transfer of property or the handing over of goods. The parties' preference seems that they would try to effectively allocate the unforeseen risks to the more efficient risk bearer who could better prevent the risks from occurring or who could better insure against a realised risk.⁵³⁵ In this light, the superior risk bearer seems to be generally the one who takes physical control over the goods rather than the one who takes control over the property. Thus, the relevant time should be connected to the time of handing over of the goods. In this way, the parties as rational maximizers of their self-interest minimise the transaction cost and in turn maximise the joint profit.⁵³⁶

2.3. Burden of proof

2.3.1. Comparative accounts

According to the traditional rules governing the burden of proof as to the existence of a defect, it will bear the buyer if he invokes the seller's guarantee liability in Korean law.⁵³⁷ The same is

⁵³⁵ Cf. *Supra* n. 35-36 and accompanying texts.

⁵³⁶ Cf. Another issue to be discussed is related to the matter of distance sales in a consumer context. For instance, a consumer found goods defective when they were handed over from a postman, but it was proved that the goods were not defective at all and well packaged in a condition to be capable of surviving the anticipated carriage when they were posted. In this case, most law would say that the seller are not liable for the defective goods because once he puts the goods in the hands of an independent carrier, the risk is deemed to have been transferred to the consumer and he is released from the liability for the defective goods. See CISG Art. 67(1); Bradgate and Twigg-Flesner, *supra* n. 425; Sang-yong Kim, *supra* n. 93, at 54 ff.; Kyung-hak Jang, *Chae-kwon-chong-ron (General Rules in Obligatory Law)*, (1992), at 48 ff.; Jung-pyung Im, *supra* n. 94, at 70 ff. The question arises whether this result reflects the consumer's interest. Although it is theoretically possible that the risk in transit may be born by the consumer if it can be compensated by the lower price, the assumption of the consumer being risk-averse, *i.e.*, he is most interested in defect-free goods in his actual hands, seems to result in that the seller is the one who may take the risk in transit. Therefore, it is suggested that the Directive that does not stipulate the rules as to delivery should be interpreted that the relevant time should be at the time of the buyer's actual possession of the goods in relation to distance sales. *Accord*; Bradgate and Twigg-Flesner, *id.*

⁵³⁷ Dae-jeong Kim, *supra* n. 392, at 20.

also true in English law so that the buyer must prove that one of the implied terms specified in the SGA has been broken at the time of the passage of risk.⁵³⁸ The position in CISG is far from clear about who bears the burden of proof; it may be on the buyer⁵³⁹ or the seller.⁵⁴⁰ Like Korean law and English law, the Directive also seems to be based on the burden of proof on the buyer. However, unlike English law and Korean law, it has an expressive legal presumption of the existence of a defect providing for a partial reversal of the burden of proof regarding the moment of the existence of a defect in favour of the consumer for a short period of six months after delivery.⁵⁴¹ Therefore, insofar as the Directive is concerned, it is up to the seller to rebut the presumption of the existence of a defect until a six months period as from delivery is exhausted, but afterwards it lies with the consumer to establish the existence upon delivery.⁵⁴² It should be, however, noted that it would not be applied if the presumption of the existence of a defect were incompatible with the nature of the goods or the nature of the lack of conformity.⁵⁴³ In that case the burden of proof is passed on to the consumer to prove the existence upon delivery, in which he might find not easy to do. It is not clear if there is such specific reversal of the burden of proof in CISG. However, it could be derived from the analogical interpretation of art. 36(2) in the case of a guarantee of durability.⁵⁴⁴ That is, if after the passing of risk the

⁵³⁸ Green Paper, *supra* n. 277, at 44.

⁵³⁹ Enderlein and Maskow, *supra* n. 432, at 149 f; Bianca, Bianca/Bonell (ed.), *supra* n. 221, at 287 f.; Welser, “Die Vertragsverletzung des Verkäufers und ihre Sanktion”, in Doralt (ed.), *supra* n. 432, at 110 (quoted in Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 288).

⁵⁴⁰ Huber, “Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge”, *Rabels Z.* 43 (1979), at 479 f. (quoted in Enderlein and Maskow, *supra* n. 432, at 149) See also Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 288 f. (once the buyer has given notice as to non-conformity, the seller has to prove that the goods are conformed with the contract at the time of the passage of risk, but if the buyer accepted the goods without notice, then the burden of proof is reversed).

⁵⁴¹ Directive(99/44) Art. 5.3.

⁵⁴² Explanatory Memorandum to the first Draft COM (95) 520 final, at 12.

⁵⁴³ Directive(99/44) Art. 5.3.

⁵⁴⁴ The guarantees of durability in art. 36(2) may be ‘expressly or impliedly’ given to the buyer. See Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 293; Schlechtriem, *supra* n. 307, at 68. An implied guarantee may arise either from the interpretation of the contract, and hence from the actual but

lack of conformity becomes apparent that the goods do not conform with a guarantee of durability given by the seller, it is said, *prima facie*, that a defect existed at the time of the passage of risk, accordingly, the burden of proof is passed onto the seller to prove that the defect was attributed to an external impact which is outside of his sphere of responsibility.⁵⁴⁵

In English law, although there is no comparable provision as to the legal presumption in the SGA,⁵⁴⁶ it is submitted that the qualifications to the presumption make the current legal position in English law more or less the same, in which a *de facto* presumption often exists,⁵⁴⁷ since the provision simply makes an express legal presumption out of what would, in any event, have been a *de facto* presumption.⁵⁴⁸ The position in Korean law would be similar to English law.⁵⁴⁹

2.3.2. Evaluating accounts

Although there is no difference in the relevant rules, the introduction of a genuine legal presumption may be of assistance to the consumer in surmounting any initial resistance by the seller to accept the consumer's complaint on the ground of non-existence of a defect upon delivery, preventing the seller shifting the cost of proof on to the consumer, in particular, where it is very hard in technical terms and expensive for the consumer to prove the existence of a

unmentioned wish of the parties, or from legal guarantees deduced from the presumed or fictitious wish of the parties. See Ghestin's speech in *O.R.* at 313. *Contra*; Enderlein and Maskow, *supra* n. 288, at 150. For the further discussion in detail as to this matter, *O.R.* at 312 ff.

⁵⁴⁵ Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 292, 294; probably Schlechtriem, *supra* n. 432, at 6-26; Enderlein and Maskow, *supra* n. 288, at 151; Honnold, *supra* n. 218, at 265.

⁵⁴⁶ Cf. The SGA s. 14(2B)(e) durability can be considered as a factor of quality.

⁵⁴⁷ The presumption will come into play only when the goods are of a type where one would not expect such a defect to occur within six months, unless the goods had been defective on delivery, or had been subsequently damaged or abused, and when the defect is not likely to have been caused by damage or abuse in light of the nature of the defect. See Beale and Howells, *supra* n. 257, at 31.

⁵⁴⁸ 10th Report by Select Committee, *supra* n. 277, at 17; Beale and Howells, *supra* n. 257, at 31. The Select Committee suggested that the presumption would not produce major change in English law. See 10th Report by Select Committee, *supra* n. 277, at 32.

⁵⁴⁹ No provision for the legal presumption in KCC, but see Eun-young Lee, *supra* n. 167, at 219.

guarantee liability where one would have discovered the defect had he taken reasonable care.⁵⁵⁴ There are no straightforward rules as to when the buyer was negligent in failing to discover the defect. It should be individually determined by having regard to the practices between the contractual parties, the nature and state of the goods in question and *etc.*⁵⁵⁵ One must note that, unlike defects in quality, the buyer who wants to raise the seller's guarantee liability for discrepancies in quantity need only show that he was unaware of the discrepancies at the time of contract, irrespective of his negligence in failing to discover the discrepancies in quantity.⁵⁵⁶

3.1.1.2. English law

The corresponding rules in English law can be found in the SGA s. 14(2C). The buyer cannot rely on the implied terms of satisfactory quality in the following cases. The first case is where any matter making the quality of goods unsatisfactory is specifically drawn to the buyer's attention before the contract is made.⁵⁵⁷ The second case is where the buyer's actual examination of the goods before the contract is concluded ought to reveal the unsatisfactory quality.⁵⁵⁸ The third case is where, in the case of a sale by sample, the unsatisfactory quality would have been apparent on a reasonable examination of the sample.⁵⁵⁹ It should be noted that the requirements are applied only to the implied term of satisfactory quality, but not to the other implied terms of correspondence with description, fitness with a particular purpose, correspondence with sample, and not to the seller's duty to deliver the correct quantity. However, the requirement of the buyer's reasonable reliance incorporated into the terms in ss.

⁵⁵⁴ Eun-young Lee, *supra* n. 167, at 221; Hyung-bae Kim, *supra* n. 67, at 340; Yun-jik Kwak, *supra* n. 74, at 246. Note that this requirement does not necessarily demand the buyer's duty to examine the goods.

⁵⁵⁵ Eun-young Lee, *supra* n. 167, at 221; Sang-kwang Lee, *supra* n. 167, at 311.

⁵⁵⁶ KCC Art. 572(3). This is derived from the result that the cases as to discrepancies in quantity are correspondingly governed by the rules as to discrepancies in title.

⁵⁵⁷ The SGA s. 14(2C)(a).

⁵⁵⁸ The SGA s. 14(2C)(b). Note that there is no buyer's duty to examine at all. See Bradgate, *Commercial Law*, 2nd ed., (1995), at 235.

defect.⁵⁵⁰ In this way it may more efficiently redress the information gap between the merchant seller and the consumer, keeping low-cost, routinised redress procedures.

3. The buyer's ignorance and the absence of negligence

3.1. Comparative accounts

3.1.1. The buyer's ignorance and the absence of negligence

3.1.1.1. Korean law

Another requirement is the buyer's ignorance as to the existence of a defect and absence of negligence in failing to discover the defect. The underlying principle of this requirement is that in the case where the buyer purchases the goods which show noticeable or apparent defects, he is deemed to have agreed to the seller's proposal as determined by the effective state of the goods so that he cannot rely on the defects to invoke the rules of the seller's guarantee liability.

In Korean law, it is required that the buyer be unaware of the defect at the time of contract,⁵⁵¹ which must amount to actual ignorance of the defect.⁵⁵² In addition, even if the buyer was not genuinely aware of the defect, he must not be negligent in failing to discover the defect at the time of sale.⁵⁵³ Accordingly, the buyer may not be able to rely on the rules of the seller's

⁵⁵⁰ See 10th Report by Select Committee, *supra* n. 277, at 32. See also Bradgate, *supra* n. 466.

⁵⁵¹ It is of the overwhelming view as to the relevant time of the buyer's ignorance and the absence of negligence. See Eun-young Lee, *supra* n. 167, at 221; Hyung-bae Kim, *supra* n. 67, at 340; Yun-jik Kwak, *supra* n. 74, at 246. Cf. Dae-jeong Kim, *supra* n. 392, at 20 ff. (argues that the relevant time should be at the time of delivery).

⁵⁵² KCC Art. 580(1).

⁵⁵³ *Id.* German law is more generous to the buyer than Korean law in that the buyer is required not to be in 'gross negligence' in discovering the defect and the requirement is not applied to the cases where the seller has fraudulently concealed it and he has guaranteed that the goods are free from it. BGB §460.

13 and 14(3) seems to explain, in effect, the buyer's ignorance and the absence of negligence.⁵⁶⁰ That is, if the circumstances show either that a defect was drawn to the buyer's attention or that the buyer was in a reasonable position to appreciate that there is a defect, the buyer may not be able to rely on the implied terms of ss. 13, 14(3) because it is unlikely to be said that the buyer relied on the absence of a defect or it was reasonable for the buyer to rely on the absence. In turn, most cases in those circumstances may fall within the situations in Korean law where the buyer cannot invoke the seller's guarantee liability because it may be held that the buyer was aware of the existence of a defect or negligent in failing to discover the defect at the time of contract.

3.1.1.3. The Directive

In the Directive the requirements of the buyer's ignorance and the absence of negligence are stipulated in art. 2.3. The consumer may not be able to invoke the rules as to conformity with the contract in art. 2 in the following cases; at the time of contract, where the consumer was aware of the lack of conformity, where he could be reasonably aware of the lack of conformity, or where the lack of conformity has its origin in materials supplied by the consumer.⁵⁶¹ It is uncertain whether the meaning of 'could be reasonably aware of' extends to mere negligence or more than gross negligence on the part of the consumer.

3.1.1.4. CISG

CISG provides that the seller is not liable for any lack of conformity under art. 35(2) if the buyer knew or could not have been unaware of the lack of conformity at the time of contract.⁵⁶²

⁵⁵⁹ The SGA s. 14(2C)(c).

⁵⁶⁰ Bradgate, *supra* n. 466; Bradgate and Twigg-Flesner, *supra* n. 425. For the requirement of reasonable reliance, see *supra* n. 405-406, 417 and accompanying texts.

⁵⁶¹ It does not seem to impose on the consumer the duty to examine the goods, but if required in the practice, he should take a reasonable care to discover a defect.

⁵⁶² CISG Art. 35(3).

Although there is uncertainty as to the meaning of ‘could not have been unaware of’, it is submitted that it is more than gross negligence and it merely amounts to serve to ease the burden of proof where it is very difficult to prove the actual knowledge.⁵⁶³ That is, there seems to be no practical difference between ‘knowledge’ and ‘could not have been unaware of’.⁵⁶⁴ As the wording of art. 35(3) states, it must be noted that the requirements under art. 35(3) are applied only to the cases of lack of conformity under art. 35(2), but not to the cases related to those characteristics of the goods explicitly required by the contract.⁵⁶⁵ Irrespective of art. 35(3), the latter cases are rather open questions to be decided by interpretation of each case as to which characteristics were actually agreed: the quality actually agreed may be the lack of conformity of which the buyer was aware, or the quality which under the contract the seller must produce by remedying the lack of conformity.⁵⁶⁶

3.1.1.5. Comparative view

⁵⁶³ Honnold, *supra* n. 218, at 260 f.; Schwenger, Schlechtriem (ed.), *supra* n. 218, at 285; Hyland, “Conformity of Goods to the Contract under the United Nations Sales Convention and the Uniform Commercial Code”, in: Schlechtriem (ed.), *Einheitliches Kaufrecht und nationales Obligationenrecht*, (1987), at 325. For the scholars interpreting the wording in the sense of gross negligence, Stump, Herber/Czerwenka, Magnus, Karollus, Reinhart; probably also Bianca, Honsell, Heilmann (quoted in Schwenger, Schlechtriem (ed.), *supra* n. 218, at 285, n. 102). Cf. Bianca, Bianca/Bonell (ed.), *supra* n. 221, at 279; Schlechtriem, *supra* n. 432, at 6-23. Note that it does not raise the buyer’s obligation to examine the goods before the conclusion of the contract. Honnold, *id.*; Schwenger, *id.*; Enderlein and Maskow, *supra* n. 288, at 148; Hyland, *id.*; Bernstein and Lookofsky, *Understanding the CISG in Europe*, (1997), at 59.

⁵⁶⁴ Honnold, *id.*

⁵⁶⁵ Secretariat’s Commentary, *O.R.*, at 32, Art. 33, No. 14; Bianca, Bianca/Bonell (ed.), *supra* n. 221, at 280; Schlechtriem, *supra* n. 432, at 6-23; Bernstein and Lookofsky, *supra* n. 563, at 59; Schwenger, Schlechtriem (ed.), *supra* n. 218, at 286. See also *O.R.*, at 426 ff., No. 5 ff. (a proposal by Norway to include art. 35(1) within the scope of art. 35(3) was rejected at the Diplomatic Conference. Cf. For the theory behind inapplicability of art. 35(3) to art. 35(1), see UNCITRAL Yearbook IV, A/CN.9/SER.A/1973, (1974), at 46, para. 74. *Contra*; Enderlein and Maskow, *supra* n. 288, at 147 f.; Hyland, *supra* n. 563, at 326; Welser, in Doralt (ed.), *supra* n. 432, at 109 f. (quoted in Enderlein and Maskow, *id.*).

⁵⁶⁶ Schwenger, Schlechtriem (ed.), *supra* n. 218, at 286; Schlechtriem, *supra* n. 432, at 6-23 f.

As examined above, each jurisdiction generally requires the buyer's ignorance as to the existence of a defect and absence of negligence in failing to discover the defect at the time of contract. There is no doubt in that the requirement of the buyer's ignorance is the same in each jurisdiction. However, the extent to which the relevant requirement as to the absence of negligence in CISG is applied seems quite different from the one in English law and Korean law; the former requires more than gross negligence, whereas the latter mere negligence.⁵⁶⁷ Insofar as an implied term of satisfactory quality in English law is concerned, one must note that, unlike Korean law, the requirement as to the absence of negligence in English law is applied only if the buyer actually examines goods.

Another difference is in that the requirements in CISG and English law are exclusively related to the cases where the goods are not in conformity with the legal guarantees,⁵⁶⁸ those in Korean law and the Directive seem to be applicable even to the cases where the goods are not in conformity with those characteristics explicitly required by the contractual guarantees.⁵⁶⁹ Accordingly, CISG and English law seem to significantly narrow the impact of the requirements of the buyer's ignorance and the absence of negligence on the buyer's protection afforded by the seller's guarantee liability.

3.1.2. Burden of proof

It seems to be similar in each jurisdiction regarding the burden of proof; when the seller wants

⁵⁶⁷ Cf. Bridge, *supra* n. 434, at 82 (the test in CISG is somewhat more generous to the buyer who carelessly examines the goods than is English law). The position in the Directive seems unclear because the adoption of a similar phrase used in CISG does not necessarily mean that it must be interpreted in an identical way and consequently it might be left to the Member States' own interpretation.

⁵⁶⁸ CISG Art. 35(2); the SGA ss. 14(2C), 14(3) and 15(2)(c). Cf. Note that the requirement of reasonable reliance regarding the implied term of correspondence with description in English law is rather related to the matter of whether a description is a contractual term so that, once it is deemed to be a contractual term in the first place, the seller who delivers the goods being not correspondent with the description may not be able to avoid his liability for the breach of s. 13.

⁵⁶⁹ In the Directive, this is derived from the wording of art. 2.3. which links to all the provisions of art. 2. Cf. *Supra* n. 388 (the Korean Supreme Court Case, 5/11/1968, 68 Da 1832).

to rely on the buyer's awareness or negligence, it is for him, because he is relying on an exception to the general rule, to prove that.⁵⁷⁰

3.2. Evaluating accounts

3.2.1. Internal evaluation

As was found, CISG seems quite in favour of the buyer compared to the others. First, given that the meaning of 'could not have been unaware of' in art. 35(3) merely serves to ease the burden of proof so that it is not practically different from 'knowledge', it produces much more room for the buyer to rely on the seller's guarantee liability than the other systems.⁵⁷¹ Second, it is also buyer-friendly in that, unlike the other systems, the requirements in art. 35(2) do not apply to the cases of contractual guarantees.

With regard to the former point, the question arises if it could be justified in the case, *e.g.*, where a second hand car dealer as a specialist purchases a used car from a private seller who has no special knowledge at all about the car and later the dealer sues the seller on the basis of a defect which a reasonable person in his profession should have discovered by a reasonable examination.⁵⁷² In addition, a similar problem arises even between merchants where a buyer is normally supposed to examine goods, but negligently fails to discover a defect of which one ought to have discovered by due examination. It seems that CISG does not warrant that the buyer in the above cases loses his rights under art. 35(3).⁵⁷³ Insofar as an implied term of

⁵⁷⁰ Eun-young Lee, *supra* n. 167, at 222; Hyung-bae Kim, *supra* n. 67, at 340; Yun-jik Kwak, *supra* n. 74, at 246; Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 289.

⁵⁷¹ See *supra* n. 563-564 and accompanying texts.

⁵⁷² The dealer is in practice supposed to examine a car, *e.g.*, a test drive, checking engine or external condition and *etc.* Note that although CISG is mainly centred on business transactions between merchants, the application of CISG is not limited in terms of the status of the parties.

⁵⁷³ Cf. Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 285 (the seller may be arguably devoid of his liability according to the circumstances of the particular case, *e.g.*, the nature of the goods, the skill, and experience of each party and the reasonableness of an examination).

satisfactory quality is concerned, the position in English law as to the problem raised above seems rather the same as CISG because the requirement of absence of mere negligence is applied only if the buyer actually examines the goods.⁵⁷⁴ Another question is whether the requirement of absence of mere negligence in Korean law which appears somehow in favour of the seller could be justified in a consumer context. It seems true that the requirement is open textured so that it is unlikely to impose on the consumer any duty of examination in most cases and even if it would do so in exceptional cases, any negligence on the consumer's part would be hardly found because it cannot be required of a consumer the same standard of examination as required of a specialist dealer. However, given that most consumers decide to purchase the goods relying on the name of brand and the reputation of the retailer even without looking at the goods and they do not know whether they are supposed to examine the goods at the time of purchase, the position in English law and CISG seems more supportive.

Regarding the latter point, a practical difference arises, *e.g.*, where a seller specifically states to deliver 'A' quality goods to a buyer who is aware of 'B' quality in fact at the time of sale. In CISG parlance, this may be a matter of which quality was actually agreed by the parties in each case by interpretation; first, it may be 'B' quality that the buyer was aware of where there is no possibility to secure 'A' quality, second, it may be 'A' quality even though the buyer was aware of 'B' quality in fact because the seller was supposed to remedy its absence of 'A' quality.⁵⁷⁵ In the first case, there seems to be no difference between CISG, Korean law and English law in substance because in any event the buyer may not be allowed to claim 'A' quality.⁵⁷⁶ However,

⁵⁷⁴ The first problem raised above as to the sale of a second hand car does not arise in English law since an implied term of satisfactory quality does not take place unless the seller sells goods in the course of a business.

⁵⁷⁵ Cf. Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 286.

⁵⁷⁶ In CISG, it may find that 'B' quality was actually agreed by interpretation without relying on art. 35(3). On the other hand, Korean law may at the first instance reject the buyer's claim for 'A' quality on the basis of the buyer's awareness of the existence of a defect and then find 'B' quality was actually agreed between the parties. English law would turn down the buyer's claim for 'A' quality on the basis of that the buyer did not rely on the seller's statement so that it did not form a contractual term.

in the second case, it is doubted whether the interpretation of KCC and the Directive gives a resort for the buyer to rely on 'A' quality.⁵⁷⁷ Insofar as it is understood that the requirements of the buyer's ignorance and the absence of negligence apply even to the characteristics explicitly required by the contract, it seems to be unreasonable for the buyer who in good faith relied on the specific guarantee by the seller who will remedy the defect.⁵⁷⁸ Therefore, as long as the contractual guarantees are concerned, it is suggested either that the requirements in question are not applied, or at least that they should be interpreted to apply only to the cases where no remedy is possible and the buyer was aware of such impossibility.

3.2.2. External evaluation

In relation to the extent to which the relevant requirement as to the absence of negligence is applied, it seems that extending it to mere negligence is more plausible than limiting it to the buyer's actual state of mind about the existence of a defect insofar as the requirement of absence of mere negligence is in open texture to be flexibly applied according to all the circumstances to be taken account of. The reason for that is that if the requirement is limited only to the buyer's actual state of mind, there is little incentive for the buyer to inspect for obvious defects at the time of purchase even if such inspection is beneficial to both parties because it may avoid the additional costs that arise from the buyer subsequently discovering that a defect exists, or incurring additional damages and seeking an appropriate remedy from the seller. In addition, the limited requirement may result in imposing unnecessary losses on the seller that could have been easily avoided by the buyer informing the seller of the defect or at least refusing to make the purchase. At the end it may distort the efficient operation of market

⁵⁷⁷ The Korean Supreme Court Case, 5/11/1968, 68 Da 1832 (even in the case of the seller's specific guarantee, it questioned whether there was the buyer's good faith or negligence; see *supra* n. 388); Directive(99/44) Art. 2.3. (the wording of this art links to all the provisions of art. 2 including the compliance with description).

⁵⁷⁸ Unlike Korean law, English law would find that the buyer could claim for 'A' quality because it may be arguably said that the buyer reasonably relied on 'A' quality.

in a way that decreases the wealth of society as a whole because it may prevent the optimal flow of the goods. However, it is doubted whether the position is also true in a consumer context. Although the requirement of absence of mere negligence is open textured so that in most consumer cases no negligence may be found, uncertainty inherent in the open texture may be often used rather for the seller to strengthen his power against consumers who often have insufficient sophistication and bargaining power and it may interfere with low-cost, routinised redress procedures that are essential for consumers who are often reluctant to proceed to courts due to their ignorance.⁵⁷⁹ In addition, assuming that most consumers are risk-averse, they may not want the requirement of absence of negligence. Therefore, in the absence of clear guidelines to clarify the test of negligence, the consumer should not lose his rights as to defects unless the defects were specifically drawn to his attention before the time of purchase.

As regards the difference about whether the requirements are applied to the cases of those characteristics explicitly required by the contractual guarantees, the approach taken by Korean law and the Directive does not seem to properly reflect the parties' intention which may increase the transaction cost for the parties to redress the approach. This is because, as shown above in the second case in the internal evaluation,⁵⁸⁰ there is a danger that the seller may be devoid of his liability even if a certain aspect of quality is deemed to be contractually agreed by the parties and it was specifically guaranteed by the seller. It may defeat the true bargain made by the parties as rational maximizers of their self-interest.

4. The seller's fault

4.1. Comparative accounts

Traditionally, under Korean law a general view is that there is no requirement of the seller's

⁵⁷⁹ See *supra* n. 52-55 and accompanying texts.

⁵⁸⁰ See *supra* n. 575, 577-578 and accompanying texts.

fault in order for the buyer to pursue the seller's guarantee liability.⁵⁸¹ There seems to be no doubt that the requirement is unnecessary from the point of view of the legal liability theory in the context that the liability is imposed on the seller by the law for the purpose of protecting the buyer's reliance on the transaction made for consideration and striking a balance in terms of value for money in the event of the seller's delivery of defective goods.⁵⁸²

On the other hand, the contractual liability theory is questioned on the basis whether it is logical to say that it should not require the seller's fault because the theory understands that the seller's guarantee liability is in the contractual nature.⁵⁸³ Nevertheless, all the scholars agreeing with this theory seem to consent to the opinion that there is no requirement of the seller's fault.⁵⁸⁴ Their reason for no requirement of the seller's fault is in that, first, the seller's guarantee liability is in the nature of the objective institution which is different from the general liability being the subjective institution,⁵⁸⁵ second, if it was consistent with a contractual one and accordingly required fault, there would be no way to protect the buyer in good faith where the seller proves the absence of fault as to the delivery of defective goods.⁵⁸⁶ The thing to note in relation to the seller's fault is that the scope of damages the buyer can recover within the special regime for the seller's guarantee liability may be closely connected with the existence of the seller's fault.⁵⁸⁷

⁵⁸¹ Cases also provide that it is a non-fault-based liability. See the Korean Supreme Court Cases, 30/10/1957, 4290 Min-Sang 552; 30/6/1995, 94 Da 23920. Cf. the Korean Supreme Court Case, 14/4/1992, 91 Da 17146.17153.

⁵⁸² See *supra* n. 158 and accompanying texts.

⁵⁸³ Dae-jeong Kim, *supra* n. 512, at 25.

⁵⁸⁴ See *supra* n. 199-200 and accompanying texts. *Contra*; Joo-soo Kim, *supra* n. 125, at 214.

⁵⁸⁵ Hyung-bae Kim, *supra* n. 94, at 242. This reason is similarly submitted by the legal liability theorists that the seller's guarantee liability as an objective institution aims to strike a balance in terms of value for money regardless of the subjective factor regarding the seller's fault.

⁵⁸⁶ Kyu-chang Cho, *supra* n. 136, at 262 ff.; Kwang-min Seo, *supra* n. 193, at 31.

⁵⁸⁷ As it will be examined later, there are opposing views as to the scope of damages the buyer can recover within the special regime, which are closely related to the requirement of the seller's fault. For instance, the buyer's reliance, expectation and consequential loss without the seller's fault; only the buyer's reliance loss without the seller's fault (the other losses covered in the general liability for non-

In English law, the Directive and CISG, there is also no requirement of the seller's fault with respect to the seller's guarantee liability.⁵⁸⁸ This is due to their understanding that the seller's guarantee liability is imposed on the seller as implied contractual obligations and all contracts are treated as promises leading to a claim for 'breach of contract' if the promised result is not produced by the seller.⁵⁸⁹

4.2. Evaluating accounts

Since there is no particular difference found, it appears that there is nothing to be discussed in the evaluating accounts. However, one must recall the arguments raised in the last chapter that all the problems Korean law suffers in the area of the seller's guarantee liability are partly caused by its artificial distinction between fault and non-fault liability; all the remedies under the general liability is governed by the fault principle, whereas those under the seller's guarantee liability exist irrespective of the principle.⁵⁹⁰ In this light, it was argued that, in order

performance with the requirement of the seller's fault); the buyer's reliance loss without the seller's fault, but the buyer's expectation loss with the requirement of the seller's fault (the consequential loss covered under the general liability with the requirement of the seller's fault). It should be noted that the buyer's reliance loss is, in any view, covered regardless of the seller's fault. For more detail, see *infra* pp. 217 ff.

⁵⁸⁸ Cf. English law: see *Frost v. Aylesbury Dairy Co.* [1905] 1 KB 608 (the seller was held liable despite the fact that he had taken all reasonable precautions to ensure that the milk was pure); *Daniels v. White & Son* [1938] 4 All ER 258 (a retailer was held liable even though it was impossible for him to discover the defect). Cf. CISG: see art. 45(1) which sets forth the no-fault starting point. However, there is a limited exception to the starting point in which the obligor may be exonerated from liability for damages to the extent that non-performance is attributable to an impediment beyond his control and unforeseeable and avoidable (art. 79). Despite the exception, one must bear in mind that it does not necessarily render an exceptional fault rule based on culpable breach with regard to a damages claim since the obligor may not be exempted merely by proving that he was not at fault, but by proving that it was due to the effect of an impediment outside his control. See Bernstein and Lookofsky, *supra* n. 563, at 98; Schlechtriem, *supra* n. 307, at 101; Tallon, Bianca/Bonell (ed.), *supra* n. 221, at 572 f.; Stoll, Schlechtriem (ed.), *supra* n. 218, at 603. The further thing to note is that there is an uncertainty as to whether the exception pursuant to art. 79 can be applicable to the cases of defective goods. For more detail, see *infra* n. 1092-1094 and accompanying texts.

⁵⁸⁹ See *supra* n. 312-315 and accompanying texts.

⁵⁹⁰ See *supra* n. 354-358 and accompanying texts.

to settle those problems, the requirement of fault should depend upon which remedy the buyer seeks to claim rather than on which liability his claim is based.⁵⁹¹

5. Time limit

5.1. Comparative accounts

5.1.1. Korean law

In Korean law the buyer's rights conferred by the rules of the seller's guarantee liability must be exercised within the certain period from the time when he became aware of a defect in the goods; six months as to discrepancies in quality,⁵⁹² one year as to discrepancies in quantity.⁵⁹³ There are two opposing views as to the interpretation of the time limit. The majority of scholars maintain that it means the period within which the defect in the goods entitles the buyer to institute legal proceedings before the court, and after which he may lose his rights.⁵⁹⁴ On the other hand, the minority view and the cases take the view that it is the period within which discovery of the defect entitles the buyer to rely on the seller's guarantee liability.⁵⁹⁵ Accordingly, once the buyer is deemed to exercise his rights under the seller's guarantee liability outside the court during the period of six months or one year, he may institute his legal proceedings in the court within the extinctive prescription period of ten years.⁵⁹⁶

Insofar as commercial sales are concerned, the relevant period is connected with the buyer's

⁵⁹¹ See *supra* n. 359-365 and accompanying texts.

⁵⁹² KCC Art. 582.

⁵⁹³ KCC Art. 573.

⁵⁹⁴ Yun-jik Kwak, *supra* n. 74, at 247; Ki-sun Kim, *supra* n. 135, at 145; Joo-soo Kim, *supra* n. 125, at 216; Seok-woo Kim, *supra* n. 135, at 195; Sang-yong Kim, *supra* n. 392, at 240; Eun-young Lee, *supra* n. 167, at 222 f.; Hyung-bae Kim, *supra* n. 67, at 342.

⁵⁹⁵ See the Korean Supreme Court Cases, 21/4/1964, 63 Da 691; 12/11/1985, 84 DaKa 2344; Dae-jeong Kim, "Mae-do-in-eoi Ha-ja-dam-bo-chaek-im-ae-kwan-han Pan-rae-eoi-dong-hyang (The Trend of Cases as to the Seller's Guarantee Liability)", (1997) 15 *Min-sa-bup-hak* 264, at 284 f.

notice requirement in that the buyer who fails to notify within a period of six months the seller of a defect, which could not be immediately discoverable, may lose all his rights based on the defect.⁵⁹⁷ The period begins from the date on which the buyer took the seller's delivery.⁵⁹⁸

5.1.2. English law

Under English law the buyer's action based on contractual liability must be brought before the court within the period of six years from the time of breach of the contract, generally the time of delivery in a sale case.⁵⁹⁹ However, this period concerns only the buyer's action for damages, but not for his action to repudiate the contract. Insofar as the claim for the repudiation of the contract is concerned, the buyer may rely on the seller's liability as to implied conditions only for a brief time after delivery of the goods by virtue of the rules as to acceptance, which does not necessarily deal with the period within which an action must be before the court.⁶⁰⁰

5.1.3. The Directive

The Directive stipulates a period of two years from the time of delivery during which the seller is liable for any lack of conformity which existed at the time of delivery of the goods.⁶⁰¹ This period must not be confused with the period within which the buyer must bring an action before the court. The consumer may be allowed to invoke the seller's guarantee liability during at least the two-year period as from the time of delivery. However, this period is not mandatory provided that such a period in the Member States is longer than two years from the time of delivery or where the starting time of the limitation period is not the time of delivery in the

⁵⁹⁶ KCC Art. 162(1). See Dae-jeong Kim, *supra* n. 595, at 284 f.

⁵⁹⁷ KCmC Art. 69(1). Cf. For the scope of the application of this period, see *infra* n. 619-622 and accompanying texts.

⁵⁹⁸ *Id.*

⁵⁹⁹ Limitation Act 1980, s. 5.

⁶⁰⁰ The SGA s. 35. For more detail as to the rules of acceptance, see *infra* pp. 205 f.

⁶⁰¹ Directive(99/44) Art. 5.1. Note that the period does not imply that all goods have to last for at least two years.

Member States, the total duration of the period is not shorter than two years from the time of delivery.⁶⁰²

5.1.4. CISG

The time limit in CISG is clearly linked to the buyer's notice requirement in that the buyer may lose the rights to rely on a lack of conformity if he does not inform the seller of the lack of conformity at the latest within a preclusive two-year period from the time when the goods were actually handed over to the buyer.⁶⁰³ This two-year time limit is not applicable if it is inconsistent with a contractual period of guarantee.⁶⁰⁴ The thing to note is that the buyer may be allowed to invoke the seller's liability for the lack of conformity during the two-year time limit which one must not confuse with the limitation period within which the buyer must bring his action before the court in order to enforce his existing claims.⁶⁰⁵

5.1.5. Comparative view

Given that the limitation period regarding the buyer's action before the court is left aside from our concern, the ensuing discussion could be focused on the following aspects; the objects dealt with in the time limit, its length, and the time when it begins to run. With regard to the first aspect, Korean law, the Directive and CISG deal with all the remedies, whereas English law deals with only the right to repudiate the contract under its special rules as to acceptance. In relation to the second aspect, Korean law provides six months for discrepancies in quality in non-commercial sales, one year for discrepancies in quantity in non-commercial sales and six months for discrepancies both in quality and quantity in commercial sales. The Directive and

⁶⁰² Directive(99/44) Art. 5.1. and Recital 17.

⁶⁰³ CISG Art. 39(2).

⁶⁰⁴ *Id.*

⁶⁰⁵ In that regard, the UN Convention on the Limitation Period in the International Sale of Goods of 14 June 1974 applies, which fixes a general limitation period of four years (art. 8) as from the date when the goods were actually handed over to the buyer (art. 10(2)).

CISG provide two years without distinguishing between discrepancies in quality and quantity.⁶⁰⁶ English law dealing only with the right to repudiate the contract, produces only a brief time according to the rules as to acceptance. Regarding the third aspect, the time limit in the Directive, CISG and Korean commercial law is based on delivery, whereas that in KCC dealing with non-commercial sales on discovery.

5.2. Evaluating accounts

5.2.1. Internal evaluation

As examined above, each jurisdiction provides a certain time limit with regard to the seller's guarantee liability. The rationale for the time limit is submitted that it serves to provide the seller with certainty that he does not need to reckon with claims after a certain period and that he may close a ledger as complete.⁶⁰⁷ However, the problem arises in the cases of, *e.g.*, machinery, where some defects are hardly discoverable on a reasonable examination by the buyer within a certain fixed period. Although the time limit is not mandatory, it is questioned whether the rationale could be justified in the above cases of machinery where a buyer finds a defect only after the period expires so that he loses all the remedies. On the other hand, KCC when dealing with non-commercial sales and English law seem to show a flexible approach in a sense that the buyer in such cases may be still entitled to claim for any defect existed at the time of delivery, although in Korean law his claim for the defect may be restricted by the short limitation period of six months or one year as from the time of discovery, and in English law his claim for damages is subject to the limitation period of six years as from the date of breach.

⁶⁰⁶ The period of two years is produced as a compromise. Examples of the time limit in domestic law; BGB §§477-479 (six years after delivery); Swedish Sales Act s. 54 (one year); Swiss Code of Civil Art. 210 (one year limit on action); Mexican Commercial Code Art. 383 (five days from receipt as to quality and quantity, and thirty days from receipt as to latent defects).

⁶⁰⁷ Schwenger, Schlechtriem (ed.), *supra* n. 218, at 316.

5.2.2. External evaluation

The matter of time limit is a difficult issue if it must be specified into a certain fixed time limit running from the time of delivery. This is because there is diversity in the types of the goods. Therefore, any fixed time limit running from the time of delivery whether it is short or long may be often arbitrary and face a criticism that it does not pay sufficient regard to the diversity in the goods and may operate to inefficient results in many cases. For instance, there is a possibility that a single arbitrary fixed time limit running from delivery may not produce efficient results where some defects in machinery are hardly discoverable by due examination until the time limit expires. In such a situation, the specified time limit excludes in effect a risk for which most buyers as being risk-averse might have been prepared to pay more to insure by having an extended time limit in the contract. In this context, the approach taken by KCC dealing with non-commercial sales that the time limit is based on discovery seems to be more plausible.⁶⁰⁸

6. The buyer's duty to examine the goods and to give the notice of defects

6.1. General

The primary object of imposing on the buyer the duty to examine the goods and to notify the seller of any defect of the goods⁶⁰⁹ is to establish certainty for the seller that he does not need to reckon with claims at any particular time and that he may consider the contract to be

⁶⁰⁸ It seems to secure at least that the seller will be held liable until discovery. One must note that the discovery statute of time limit should not make the seller liable for defects in the goods indefinitely. In the procedure to determine the existence of breach, it should be relevant of the reasonable useful life of the goods, the reasonable period for discovery and other reasonable circumstances including the duration taken by the buyer for his claim from the time of discovery or the time when it could have been discovered.

⁶⁰⁹ It is inappropriate to call this a duty because it is a kind of indirect duty in a sense that it is in the buyer's own interest to observe, in which he may lose his rights on account of the defect if he cannot examine and notify the defect. Therefore, breach of the duty does not lead the buyer to take any responsibility to the seller for the consequences of the failure to examine and give notice.

completed.⁶¹⁰ In this way it may prevent the possibility of the buyer speculating at the cost of the seller.⁶¹¹ In addition, it may place the seller in a position in which he may redress a defect in the goods, as the case may be, by delivering the missing goods or a substitute or by repair, or reduce the buyer's loss in some other way.⁶¹² Furthermore, it may also give the seller an opportunity to prepare for any negotiation or dispute with the buyer regarding the defect and to take the necessary steps for a claim against his supplier.⁶¹³

Having said that, Korean law provides an express duty on the buyer to examine the goods and to notify the seller of the defects of the goods, although such a duty is restricted to the cases where both parties are merchants and a transaction is a commercial act for both parties.⁶¹⁴ In CISG it stipulates the buyer's duty to examine the goods and to give notice of the defects of the goods.⁶¹⁵ The Directive also expressly stipulates the buyer's duty to notify the seller of the defect, although it does not provide the buyer's duty to examine the goods and the notice requirement is imposed only if a Member State decides to take the option for the buyer's notice duty.⁶¹⁶ On the other hand, English law has no express provision similar to the combination of the buyer's duty to examine the goods⁶¹⁷ and to notify the seller of the defects. It is explained rather by the principle that the failure to inspect the goods and to give timely objection may bar the buyer from rejecting the goods but this does not preclude the buyer from claiming for

⁶¹⁰ Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 301; Ki-su Lee, *Sang-bup-hak (Commercial Law Study)*, Book I, (1997), at 194; Lak-hoon Cha *et al.*, *Joo-seok-sang-bup (Commentary on Commercial Law)*, Book I, (1977), at 322.

⁶¹¹ Lak-hoon Cha *et al.*, *id.*

⁶¹² Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 301. Cf. Secretariat's Commentary, *O.R.*, at 34 f.

⁶¹³ *Id.*

⁶¹⁴ KCmC Art. 69(1).

⁶¹⁵ CISG Arts. 38, 39.

⁶¹⁶ Directive(99/44) Art. 5.2. The Member States must inform the Commission of their use of this option, and the Commission must monitor its effect, reporting on the use made by the Member States until 7th January 2003.

⁶¹⁷ Cf. Note that the SGA s. 34 confers on the buyer a 'right' to examine the goods.

damages.⁶¹⁸

6.2. The requirements for the application of the buyer's notice duty

6.2.1. The scope of the application

6.2.1.1. Comparative accounts

6.2.1.1.1. Korean law

The notice duty in Korean law is restricted to the cases where both parties are merchants whose transaction is a commercial act for both of them,⁶¹⁹ that is, the sale being related to their commercial business.⁶²⁰ Therefore, if a car dealer purchases furniture for his home, the

⁶¹⁸ See the SGA ss. 34, 35.

⁶¹⁹ KCmC Art. 69(1). *Contra*; Hong-keun Im, *Sang-haeng-we-bup (Commercial Acts Law)*, (1989), at 444 (he contends that, insofar as one of the contractual parties is a merchant, the case is governed by the commercial law on the ground of KCmC Art. 3. Accordingly, if a consumer purchases goods from a merchant, he is under the obligation to examine without delay and immediately notify a defect to the merchant (KCmC Art. 69(1))). However, the majority view is that art. 69 is applied only in the cases all the contracting parties are merchants so that there is no notice requirement because art. 69(1) expressly deals with the cases between merchants and consequently it is deemed to be an exception of art. 3. See Joo-chan Son, *Sang-bup (Commercial Law)*, Book I, (1986), at 177; Beom-chan Lee, *Sang-bup-gang-eoi (Lecture in Commercial Law)*, (1976), at 72; Hee-cheol Jeong, *Sang-bup-hak-won-ron (Principles of Commercial Law)*, Book I, (1980), at 144. Cf. A merchant in Korean law may be an individual, a commercial partnership, or a company. See Ki-soo Lee, *supra* n. 610, at 38. Cf. The position in German law is same as in Korean law. See HGB §377.

⁶²⁰ Ki-su Lee, *supra* n. 610, at 194; Dong-seok Kim, *supra* n. 104, at 96; Beom-chan Lee & June-sun Choi, *Sang-bup-gae-ron (An Introduction to Commercial Law)*, (1995), at 137. Cf. A commercial act can be divided into 3 categories; a basic commercial act, an incidental commercial act and a quasi-commercial act. The basic commercial act is one of transactions enumerated in KCmC Art. 46 which is conducted by the merchant in the course of a business for the purpose of making a profit (for instance, a trader's purchase of a computer to resell or hire out). The incidental commercial act is a transaction to supplement the basic commercial act or the quasi-commercial act either in a direct way or in an indirect way, which could be any purchase of some essential item for the business or any other purchases for the

purchase is not deemed to be a commercial act so far as he is concerned. Consequently, he is not placed under the examination and notice duty because the case is concerned with a non-commercial sale. However, if he purchases a computer for his office, it may well fall within a commercial act so that he is obliged to notify the seller of any defect because it may come under an incidental commercial act to supplement his basic commercial act of the car dealing.

In relation to the aspects of defects, it is limited to the cases of defects in quality and deficiency in quantity.⁶²¹ Therefore, the cases of *aliud* and excess delivery in quantity are out of the scope of the application of the buyer's duty to give notice.⁶²²

6.2.1.1.2. English law

In English law, although there is no corresponding procedure as to the notice duty, it seems to require the buyer in effect to give the notice as to lack of conformity in a way that intimates his rejection in order not to be deemed to have accepted the goods so that he may not lose his right to repudiate the contract.⁶²³ The intimation requirement of rejection is irrelevant to the status of the parties and applied in both commercial and consumer sales. Regarding the aspects of defects, it applies to all the cases of defects including the cases of the delivery of an *aliud*⁶²⁴ or

efficient conduct of the business (*e.g.*, the purchase of salt by a restaurant or of a fax machine by a travel agent). The quasi-commercial act is a transaction conducted by a merchant by appearance, that is, an act conducted in a similar manner to one of the basic commercial acts enumerated in art. 46 (*e.g.*, producing a computer software). See Ki-su Lee, *supra* n. 610, at 38 ff., 137 ff. Thus, as long as the transaction falls within one of the above commercial acts, not only a basic commercial act but also an incidental commercial act satisfy to impose on the buyer the duty to examine the goods and to notify the seller of the defects.

⁶²¹ Ki-su Lee, *supra* n. 610, at 194.

⁶²² Dong-seok Kim, *supra* n. 104, at 100 f. In contrast, German law imposes the notice duty on the buyer even in these cases unless the delivered goods(*aliud* or excess or shortage in quantity) are as obviously different as expected not to be consented to the goods delivered by the buyer. HGB §378.

⁶²³ The SGA s. 35. For an indirect application of the notice philosophy, see *Panchaud Frères v. Ets General Grain Co.* [1970] 1 Lloyd's Rep 53; Bridge, *supra* n. 434, at 95.

⁶²⁴ See *supra* n. 401-419 and accompanying texts. The matter of *aliud* is treated as non-compliance with description. See *supra* n. 403-406, 442 and accompanying texts.

of wrong quantity.⁶²⁵

6.2.1.1.3. The Directive

Since the buyer's duty to give notice under the Directive is not mandatory in the context that the Member States can decide whether they impose the duty on the buyer,⁶²⁶ the ensuing discussion may be conducted on the basis of two different cases; first, the case of a Member State taking the option of notice duty, second, the case of a Member State not taking the option.

In the former case, the consumer must notify the seller of any lack of conformity within a period of two-months in order to claim his rights conferred under the Directive, so far as a transaction is within the scope of the Directive.⁶²⁷ In the case of a Member State not taking the option, the notice duty is left to domestic laws so that there may be no notice duty in most Member States that do not take the option.⁶²⁸ However, it is possible that some Member States may still impose the notice duty on the consumer without taking the option specified in the Directive.⁶²⁹ In this case, one must note that the relevant notice rules of domestic law are subject to the minimum two-month notice period.⁶³⁰ Thus, even if a consumer is required to give notice either by a domestic law or the Directive, he has at least a period of two-months as long as a transaction is within the scope of the Directive. In order for the sale to be the one within the scope of the Directive, it must be a transaction between consumer and seller. A "consumer" is defined "any natural person who, in the contracts covered by this Directive, is

⁶²⁵ See *supra* n. 420-421 and accompanying texts.

⁶²⁶ Directive(99/44) Art. 5.2. and Recital 19.

⁶²⁷ Italy and Portugal that have a notice duty within eight days and thirty days respectively are likely to fall within this case. See Green Paper, *supra* n. 277, at 40 ff.

⁶²⁸ Germany, Belgium, Spain, France, Greece, Ireland, and United Kingdom, which have no notice duty in consumer sales, are unlikely to take the option. See Green Paper, *supra* n. 277, at 40 ff.

⁶²⁹ This may be the case of Denmark, Netherlands and Luxembourg which have a notice duty within a reasonable period or within a brief period. See Green Paper, *supra* n. 277, at 40 ff.

⁶³⁰ Recital 19. Therefore, those countries are required to ensure the minimum period of two-months in their own legislation.

acting for purposes which are not related to his trade, business or profession”.⁶³¹ In light of the intentional omission of the word, ‘directly’, in the definition of consumer that was inserted in the previous draft Directive,⁶³² it seems to exclude all purchases either directly or indirectly connected to his trade, business or profession.⁶³³ A “seller” is defined “any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession”.⁶³⁴ It is not absolutely clear whether a sale “in the course of his trade, business or profession” under the Directive is extended to the cases of a seller’s any incidental or one-off sale.⁶³⁵

In relation to the aspects of defect, it does not deal with the matter of wrong quantity at all.

6.2.1.1.4. CISG

Although CISG does not apply solely to sales of a commercial character,⁶³⁶ the exclusion of goods bought for personal, family or household use⁶³⁷ limits its sphere of application *de facto* to

⁶³¹ Directive(99/44) Art. 1.2(a).

⁶³² *Accord*; Bradgate and Twigg-Flesner, *supra* n. 425. Cf. EC Draft Directive (COM(95) 520) Art. 1.2(a). The word ‘directly’ had been interpreted as only excluding goods that a sole trader was going to resell or hire out and therefore a trader purchasing items of equipment to be used as a part of the business would be included. In addition, it was submitted that any purchase which is intended to be a main or essential part of the business should be excluded because it would be directly related to the trade. See Beale and Howells, *supra* n. 257, at 27 f.

⁶³³ *E.g.*, a car dealer purchasing a computer for his office is out of the scope of the Directive. Cf. It appears that a company or other legal person however small is excluded from the definition of consumer. This seems to be derived from the clear wordings for the definition of seller specifying ‘any legal person’.

⁶³⁴ Directive(99/44) Art. 1.2(c).

⁶³⁵ It is submitted that the incidental or one-off sale is out of the scope of the Directive based on its use of languages of “in the course of ‘his’ business” instead of “in the course of ‘a’ business” so that, for instance, only if a car dealer sells a car, it is a transaction in the course of ‘his’ business falling within the scope of the Directive, but if he sells an old fax machine in his office, it may be hardly within the scope. Bradgate and Twigg-Flesner, *supra* n. 425. Cf. *Stevenson v. Rogers* [1999] 1 All ER 613 (in this case, any sale by a business, whatever incidental or one-off, is deemed to be a transaction in the course of a business).

⁶³⁶ CISG Art. 1(3).

⁶³⁷ CISG Art. 2(a).

commercial purchases.⁶³⁸ Therefore, the requirement of examination and notification seems to be conditional upon the goods being purchased for commercial purposes⁶³⁹ so that the requirement in the case of a purchase for other than commercial purposes is mostly left with domestic sales laws. One must note that its limitation to commercial purchases does not necessarily exclude private sales as long as a buyer's purchase from a private seller is for his commercial purposes; a used car dealer who purchases a person's own used car may be still obliged to give notice.⁶⁴⁰

Regarding the aspects of defect, the buyer's notice duty is applied to all cases of defects within the meaning of art. 35 including the delivery of an *aliud* and wrong quantity.⁶⁴¹

6.2.1.1.5. Comparative view

The scope of the application of the notice duty under Korean law is different from that under CISG in that it is required to raise the notice duty in Korean law that both the seller and the buyer be a merchant whose transaction is a commercial act from the point of view of not only the buyer but also the seller, whereas the only concern in CISG is whether a transaction is for a commercial or professional purpose from the point of view of the buyer, but not of the seller.⁶⁴² This difference seems to explain that CISG is broader than Korean law in the following cases. First, the notice duty in Korean law may not be applied to the case where a buyer purchases goods from a private seller whose transaction is not regarded as a commercial act even if the buyer, being categorised as a merchant, purchases the goods relating to one of his commercial

⁶³⁸ E.g., the purchase of a dictionary by an author or wet-weather clothing by a maritime pilot, of a camera by a professional photographer, or of a soap by a business man for his employees. Herber, Schlechtriem (ed.), *supra* n. 218, at 31 f.

⁶³⁹ The application of CISG is relied upon the purpose of the purchase at the time of entering into the contract. Honnold, *supra* n. 218, at 47.

⁶⁴⁰ Herber, Schlechtriem (ed.), *supra* n. 218, at 32. Cf. *supra* n. 471.

⁶⁴¹ See *supra* n. 431-440 and accompanying texts.

⁶⁴² In the Directive, the nature of transaction for both parties is the decisive factor. The decision of the nature of transaction plays an important role to ensure a minimum notice period of two months

purposes. In contrast, CISG may raise the duty in that case provided that the buyer's purchase is for one of his commercial or professional purposes. Second, any purchase for a professional use in CISG is deemed to be within the scope for the notice duty,⁶⁴³ whereas some of the purchases for a professional use in Korean law may be out of the scope for the notice duty because some of the buyers are not technically categorised as merchants (*e.g.*, a lawyer, a doctor and an artist) on the basis of that their activities are not regarded as commercial acts traditionally in Korean law.⁶⁴⁴

Another difference between CISG and Korean law is that unlike Korean law, there is an excuse in CISG for the seller to avoid his liability based on the buyer's failure to give notice where he was neither aware of the buyer's intention to purchase the goods for personal use nor ought to have known of such intention.⁶⁴⁵

Insofar as the buyer's right to repudiate the contract is concerned, English law is most demanding in a context that the buyer's notice duty to intimate his rejection arises no matter what the status of the parties is, or whether the nature of transaction is for commercial or private purposes.

Regarding the scope of the application of the notice duty in light of the aspects of defect, Korean law is narrower than English law and CISG because it is not applied to the cases of the delivery of an *aliud* and the excess delivery in Korean law, whereas it is in English law and CISG.

6.2.1.2. Evaluating accounts

6.2.1.2.1. Internal evaluation

As discussed above, the scope of the application of the notice duty in Korean law is narrower

throughout the Community whether the duty is imposed by either domestic laws or the Directive.

⁶⁴³ Secretariat's Commentary, *O.R.*, at 16, Art. 2, No. 2; Huber, Schlechtriem (ed.), *supra* n. 218, at 31 f.

⁶⁴⁴ Ki-su Lee, *supra* n. 610, at 42, 143 f.; Beom-chan Lee & June-sun Choi, *supra* n. 620, at 57.

than CISG in two aspects; unlike CISG, first, some purchases for a professional use are out of the scope because some professionals (*e.g.*, artists or doctors) are not categorised as merchants on the basis of their activities being not recognised as commercial acts, second, the commercial nature of transaction is decisive not only for the buyer but also for the seller. The problem as to the first case is in that a buyer who is not recognised as a merchant by commercial law in Korea does not need to give any notice at all even if his purchase is directly related to his profession; *e.g.*, an artist's purchase of a painting brush or a doctor's purchase of a medical appliance.⁶⁴⁶ As stated earlier, the primary object of imposing the notice duty on the buyer is to provide the seller with certainty and to prevent the buyer from speculating at the cost of the seller.⁶⁴⁷ In light of the object, the position in Korean law does not seem to clearly explain why their professional purchases are excluded from the application of the notice duty. Another problem is related to the second case, in particular, where a merchant buyer purchases goods relating to his commercial purposes from a private seller whose transaction is not regarded as a commercial act; why should it be conditional upon the nature of transaction from the point of the seller's view? In view of the object of imposing the notice duty, the question is 'is it reasonable not to impose the notice duty on the buyer in such a case, even though it seems apparent that the sellers in the case need more certainty than do others because they lack speciality in the goods sold?' The consequence of not imposing the notice duty would be that the buyer in that case who is deemed to be a specialist would have more opportunity to speculate at the cost of the seller. On the other hand, CISG does not seem to face this matter because it does not take into account the status of the seller as does in Korean law.

As regards the aspects of defect, another problem in Korean law is in non-application of notice duty in the case of *aliud*. It seems needless to emphasise the matter concerning *aliud*

⁶⁴⁵ CISG Art. 2(a).

⁶⁴⁶ Cf. *Supra* n. 644.

⁶⁴⁷ See *supra* n. 609-613 and accompanying texts.

particularly in the borderline cases as discussed before.⁶⁴⁸

6.2.1.2.2. External evaluation

The problematic cases found above in Korean law where no notice duty is imposed may increase the likelihood that the buyer's claim for a defect which is discoverable by due examination is based on a supervening event, the risk of which is not allocated in the contract.⁶⁴⁹ The buyer's opportunistic behaviour may result in the seller who has believed in the buyer's acceptance incurring more expenses than he is supposed in the most efficient situation; *e.g.*, it may cost more for the seller to cure the defect due to the buyer's delayed claim and the depreciation in value of the goods due to the defect while the goods are in the buyer's hand may cause the seller to spend the greater settlement or litigation costs in attempting to avoid the buyer's claim.⁶⁵⁰ Another thing to note is that it may distort the efficient operation of market in a way that decreases the wealth of society as a whole; *e.g.*, it may prevent the optimal flow of the goods because the seller may lose the best opportunity to resell the goods and may suffer an unreasonable economic loss from the depreciation in value of the goods due to the defect while the goods are in the buyer's hands. All these things seem to explain that the notice duty in those problematic cases may generally encourage the most efficient result, which minimises joint costs in a way that the parties as rational maximizers of their self-interest would have resolved it had they provided for it explicitly in the contract.

Having said that, the question arises whether or not the policies behind the notice duty are relevant to consumer sales. Given that most consumers are ignorant of the duty, it may distort the optimal operation of consumer market in the context that they may misjudge the costs and benefits of transaction they are contemplating due to their ignorance of the duty.⁶⁵¹ In this light,

⁶⁴⁸ Accord; Dong-seok Kim, *supra* n. 104, at 100 f. Cf. *Supra* n. 476-477 and accompanying texts.

⁶⁴⁹ Cf. Priest, *supra* n. 31, at 975, 988.

⁶⁵⁰ Cf. *Id.*, at 984 ff., 988 ff.

⁶⁵¹ Cf. Miller, "Consumer Issues and the Revision of UCC Article 2" (1994) 35 *W.&M. L. Rev* 1565, at 1587; Rosmarin, "Consumers-R-US: A Reality in the UCC Article 2 Revision Process", (1994) 35 *W.M.*

the position in the Directive that allows the Member States an option to impose a notice duty on the consumer seems unfortunate.⁶⁵²

6.2.2. The goods being delivered to the buyer

6.2.2.1. Comparative accounts

In Korean law, another requirement for the buyer's notice duty is that the goods must have been handed over to the buyer in a state he can examine the goods and the buyer must have taken the goods handed over to him.⁶⁵³ That is, the buyer's actual possession of the goods is required, accordingly, for example, the tender of a bill of lading, a warehouse receipt or a consignment sheet is not sufficient to satisfy this requirement.⁶⁵⁴ As regards the documentary sales, KCC remains silent about the notice duty as to defective documents and does not seem to raise the notice duty as to defects in the goods apparent on documents until the goods being actually taken by the buyer.⁶⁵⁵

In a similar way to Korean law, English law seems to require that the buyer must have taken the seller's delivery of the goods. The correctness of this position is derived from the criteria to decide whether the buyer has lost his right to reject; first, whether the goods have been handed over to the buyer, and second, whether he has had a reasonable opportunity to examine the goods.⁶⁵⁶ That is, the reasonable opportunity of examination seems to logically stand on the assumption that the buyer has taken delivery. In the case of international sales dealt with

& *Mary L.Rev.* 1593, at 1624; Beale and Howells, *supra* n. 257, at 32 f.

⁶⁵² Directive(99/44) Art. 5.2.

⁶⁵³ KCmC Art. 69(1). See also Hee-cheol Jeong, revised by Yang, Seung-kyu, *Sang-bup-hak-won-ron* (*Principles of Commercial Law*), Book I, (1986), at 148; Dong-seok Kim, *supra* n. 104, at 97 f. Cf. BGB §377(1) (requiring that the goods be handed over to the buyer).

⁶⁵⁴ Hee-cheol Jeong, *supra* n. 653, at 148; Dong-seok Kim, *supra* n. 104, at 97 f.

⁶⁵⁵ Cf. *Id.*

⁶⁵⁶ See the SGA s. 35(2), (+) and (5).

documents, the buyer is also obliged to give notice to reject documents after tender of them because he has two distinct rights of rejection; rejection of the documents and rejection of the goods themselves.⁶⁵⁷ Where one of shipping documents appears to state an apparent defect in the goods,⁶⁵⁸ the buyer must give notice to intimate his rejection of the document in order not to be treated as the goods having been accepted⁶⁵⁹ because otherwise he may be subsequently deprived of the right to reject the goods on the basis of such defect.⁶⁶⁰

Although the position in CISG is uncertain, it seems to be required that the goods be handed over to the buyer.⁶⁶¹ However, there may be a case in which the buyer under a documentary sale has to notify the seller of any defect apparent on the documents even before the goods are actually handed over to the buyer.⁶⁶²

In the Directive, although there is no relevant wording in the provision for the notice duty, it

⁶⁵⁷ See *Kwei Tek Chao v. British Traders & Shippers Ltd.* [1954] 2 QB 459, 487-8.

⁶⁵⁸ E.g., a bill of lading indicating the goods shipped in bad condition.

⁶⁵⁹ However, there may be no right to reject a document because the document which reveals a defect in the goods is not in itself a defective document (*Tradax Internacional S.A. v. Goldschmidt S.A.* [1977] 2 Lloyd's Rep 604). He will be rather entitled to reject the goods if, for example, a certificate of quality indicates that the goods suffer from a defect that amounts to a breach of condition and either the goods actually suffer from such a defect or the certificate is conclusive as to their quality or description under a certification clause (*Tradax Export S.A. v. European Grain & Shipping Co.* [1983] 2 Lloyd's Rep 100). In addition, he may be also entitled to reject the document because it reveals a defect in the goods which justifies rejection of the goods, but not because it is in itself defective. This position seems to be assumed in *Vargas Pena Apeztegui y Cia v. Peter Cremer G.m.b.h* [1987] 1 Lloyd's Rep 394, 396-8. See Treitel, Guest (ed.), *supra* n. 515, at para. 19-128.

⁶⁶⁰ See *Panchaud Frères v. Ets General Grain Co.* [1970] 1 Lloyd's Rep 53; *Bremer v. Vanden Avenne-Izegen* [1978] 2 Lloyd's Rep 109; *Bremer v. C Mackprang* [1979] 2 Lloyd's Rep 220. It seems to be quite controversial as to the question of on what ground the buyer loses his right to reject the goods: Is it a matter of waiver, or estoppel, or solely the effect of s. 35?

⁶⁶¹ Cf. CISG Art. 39(2) requiring the buyer to give notice at least within two years from the date on which the goods were actually handed over to him. Cf. Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 315 f.

⁶⁶² Accord; Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 307; Enderlein and Maskow, *supra* n. 288, at 160. The correctness of this position is inferred from the wording of art. 39(1) requiring the buyer to give notice as to a defect in the goods within a reasonable time after he has discovered it or ought to have

seems that the consumer's duty to notify the seller of any defect is imposed on the assumption that the goods are actually handed over to the consumer. The Directive does not deal with the documentary sales.

Overall, there seems to be no difference in that the notice duty is raised on the condition that the goods are handed over to the buyer. However, as far as the documentary sales are concerned, the buyer is, in English law and CISG, obliged to give his notice even prior to the goods being handed over to the buyer if a shipping document shows an apparent defect in the goods, whereas Korean law seems silent on this point.

6.2.2.2. Evaluating accounts

6.2.2.2.1. Internal evaluation

When one considers the rationale of imposing the notice duty on the buyer is to provide the seller with certainty, to give the seller an opportunity to redress a defect in the goods, and to prevent the buyer from speculating at the cost of the seller,⁶⁶³ it seems to become clear that the buyer in a documentary sales should be required to give his reasonable notice even before the seller's delivery of the goods if the buyer upon receiving documents gained awareness that the goods were defective at the time of shipment. Therefore, the silence as to documentary sales in Korean law should be resolved in this light.

6.2.2.2.2. External evaluation

The parties may intend that a defect apparent on the documents should be notified to the seller even before the goods are actually handed over to the buyer. Otherwise it may increase the possibility of the buyer to opportunistically behave on the basis of supervening events between the time when the buyer establishes the defect and the time when the goods are actually handed

discovered it, which is not necessarily relevant with the actual handing over of the goods to the buyer.

⁶⁶³ See *supra* n. 609-613 and accompanying texts.

over. In addition, it may increase the transaction costs due to the buyer's delayed claim; it may cost more for repair, and for litigation or settlement because the seller may make more efforts to avoid the buyer's claim because the value of the goods has diminished.

6.2.3. The existence of a defect or delivery of wrong quantity

It is needless to mention that there must exist a defect in the goods or the delivery of wrong quantity⁶⁶⁴ in order to raise the buyer's duty to give notice. The matters of the existence of a defect have been discussed above.⁶⁶⁵

6.2.4. The absence of the seller's bad faith

6.2.4.1. Comparative accounts

There must be also the absence of the seller's bad faith to raise the notice duty in Korean law.⁶⁶⁶ The absence of the seller's bad faith means that he was unaware of the existence of a defect in the goods at the time of delivery of the goods.⁶⁶⁷ It does not necessarily require his intention to deceive as to the existence of a defect in the goods.⁶⁶⁸ In CISG, it requires that there must not exist any lack of conformity of which he knew or could not have been unaware and which he did not disclose to the buyer.⁶⁶⁹ Compared to Korean law, it seems that CISG is more generous to the buyer in the following aspects. First, it does not raise the notice duty not only when the seller knew the existence of a defect, but also when he could not have been unaware

⁶⁶⁴ As discussed above, the buyer's notice duty in Korean law is only concerned with the shortage in quantity, whereas the one in English law and CISG deals with all the matters of the delivery of wrong quantity.

⁶⁶⁵ See *supra* pp. 82 ff.

⁶⁶⁶ KCmC Art. 69(2).

⁶⁶⁷ Ki-su Lee, *supra* n. 610, at 195; Dong-seok Kim, *supra* n. 104, at 101 f.

⁶⁶⁸ *Id.* Cf. BGB §377(5) (requiring that the seller wilfully deceive the buyer as to the existence of a defect).

⁶⁶⁹ CISG Art. 40.

of the defect. However, it is submitted that there is no practical difference between the wordings that refer to facts that ‘he knows’ and ‘he could not have been unaware’ because the use of the wordings only intends to lighten the burden of proof with regard to knowledge which would otherwise be difficult to prove.⁶⁷⁰ Second, as regards the relevant time for the absence of the seller’s bad faith, although there is no reference to the time in CISG, it is submitted that it should be the time at which the period the buyer should give notice normally expires.⁶⁷¹

In English law and the Directive, there is no equivalent of the requirement of absence of the seller’s bad faith.

6.2.4.2. Evaluating accounts

6.2.4.2.1. Internal evaluation

In light of the spirit and purpose of the buyer’s notice duty, the requirement of absence of the seller’s bad faith appears natural in a sense that if the seller already knew the existence of a defect, there would not be any need for the buyer’s notice.⁶⁷² The position in the Directive and English law in not having such requirement seems to be doubted in this view. However, one must note that English law could be justified because the policy behind the notice duty is different from the other jurisdictions in that it is mainly to establish certainty for the seller that

⁶⁷⁰ Honnold, *supra* n. 218, at 260 f.; Schwenger, Schlechtriem (ed.), *supra* n. 218, at 321 f. *Contra*; Schlechtriem, *supra* n. 307, at 70 (requiring gross negligence); Enderlein and Maskow, *supra* 288, at 164 (requiring only simple negligence).

⁶⁷¹ Schwenger, Schlechtriem (ed.), *supra* n. 218, at 323. *Contra*; Enderlein and Maskow, *supra* 288, at 164 (the time at which the goods are handed over to the buyer). Cf. It could be less generous to the buyer than Korean law where the period expires before the actual handing over of the goods, *e.g.*, the buyer becomes aware of a defect in the goods through a shipping document proving the goods shipped in a bad condition while the goods are still in transit.

⁶⁷² The reason for that is that once he knew of it, he would as a matter of course think of the possibility of disputes so that a purpose of notice duty concerning certainty could not stand and he would be deemed to be already given an opportunity to remedy a defect so that another purpose of notice duty to give the opportunity could not be sustained.

he does not need to reckon with the buyer's claim for rejection.

In respect of the relevant time of the seller's bad faith, a careful consideration of the spirit and purpose of the buyer's notice duty would reveal that 'the time when the period the buyer should give notice expires' is more plausible than 'the time of delivery', even though cases where the seller gains awareness of a defect after the delivery otherwise than through the buyer's notice seem rare.⁶⁷³

6.2.4.2.2. External evaluation

On the assumption that the seller learns of the existence of a defect, not to impose a notice duty on the buyer would not increase the transaction costs in a way that distorts the optimal operation of market because the seller as a rational maximizer of his interests would know what he should do upon the awareness of the existence of a defect. In addition, it can be hardly said that in such a situation the buyer is opportunistically behaving at the seller's cost as long as he knew of the existence of a defect.

The time when the reasonable period of notice for the buyer expires can be defined as the most optimal point for the parties to be able to minimise the transaction costs.⁶⁷⁴ Thus, it seems natural to say that the relevant time of the seller's bad faith should be connected with the optimal point which is the moment when the reasonable notice period expires.

6.2.5. No contrary agreement

The provision as to the notice duty is not a mandatory rule in Korean law. The parties, therefore, may agree in the contract that it does not apply at all.⁶⁷⁵ The position in CISG and

⁶⁷³ *E.g.*, a design defect affecting an entire type of manufactured cars could be known by other customers. See Schwenger, Schlechtriem (ed.), *supra* n. 218, at 323.

⁶⁷⁴ Cf. The optimal point can be decided by balancing the cost to the buyer of discovering the defect with the cost to the seller of delay in discovery. See Priest, *supra* n. 31, at 976 f.

⁶⁷⁵ However, the effectiveness of such agreement is governed by the Korean Act on Regulation of Standard Terms of 1986.

English law is the same as Korean law.⁶⁷⁶ It is also true in the Directive because any contrary agreement to exempt the notice duty does not appear to fall within the cases where it is detrimental to a consumer in a way that waives or restricts the consumer's rights.⁶⁷⁷

6.3. The contents of the buyer's duty to examine the goods and notify the defects

6.3.1. The buyer's duty to examine the goods

6.3.1.1. The method of examination

In Korean law, the principle regarding the method of examination is as follows. First of all, it is primarily determined by the parties' agreement. In the absence of the agreement, the buyer must examine the goods in a reasonable manner which takes account of their nature, amount, packaging, and all other circumstances.⁶⁷⁸ The reasonable manner must be in a nature as to disclose recognisable defects, due regard being had to a trade usage in question, the circumstances in the previous transaction between parties, and all other relevant circumstances.⁶⁷⁹ The examination does not necessarily need to be one that would reveal every possible defect.⁶⁸⁰ The buyer must bear the consequences of a defective examination other than an examination in a reasonable manner, which may cause the failure of notice and, in turn, may lose his rights conferred under the seller's guarantee liability. This principle seems to be more or less the same in CISG⁶⁸¹ and English law.⁶⁸² Since the method of examination in each

⁶⁷⁶ CISG Art. 6.

⁶⁷⁷ Directive(99/44) Art. 7.1.

⁶⁷⁸ Ki-su Lee, *supra* n. 610, at 42; Dong-seok Kim, "Mae-soo-in-eoi Gum-sa/Tong-ji-eoi-moo-eoi Nae-yong (The Contents of the Buyer's Duty to Examine the Goods and to Give Notice)", (1989) 16(1) *Ko-shi-yeon-koo* 131, at 138.

⁶⁷⁹ *Id.* Cf. For the examples of reasonable manner, see Schwenger, Schlechtriem (ed.), *supra* n. 218, at 304 f.

⁶⁸⁰ Dong-seok Kim, *supra* n. 678, at 139.

⁶⁸¹ Schwenger, Schlechtriem (ed.), *supra* n. 218, at 303 ff.

jurisdiction is a matter of fact as to decide what is a reasonable manner, there is little to discuss in a comparative context.

6.3.1.2. The period for the examination

6.3.1.2.1. The determination of period

6.3.1.2.1.1. Comparative accounts

In Korean law, the buyer must examine the goods ‘without delay’ after the buyer takes the seller’s delivery of the goods.⁶⁸³ Due to the extreme diversity of the cases, the wording of ‘without delay’ for the determination of the period for examination should be in flexible terms, taking account of the circumstances of the individual case and the parties’ reasonable opportunities.⁶⁸⁴ Included amongst those circumstances are, for instance, the type of the goods,⁶⁸⁵ the quantity of the goods, the place of delivery of the goods,⁶⁸⁶ the kind of packaging used,⁶⁸⁷ the usage of the transaction in question and *etc.*⁶⁸⁸ However, personal impediments

⁶⁸² In English law, it is also required that an examination be carried out in a reasonable manner because the notice of rejection to be given within a reasonable time presupposes that a corresponding examination be carried out in a reasonable manner. Cf. Reynolds, Guest (ed.), *supra* n. 515, at para. 12-048. For instance, if the buyer examines the goods beyond what is necessary, he may find that he has accepted the goods so that he may lose his right to reject. See *Harnor v. Groves* [1855] 15 CB 667; *Heilbutt v. Hickson* [1872] LR 7 CP 438, 451. In the Directive, it used to be assumed that the wording of “ought normally to have detected it” in the previous draft made it incumbent upon the consumer to take normal care in examining the goods after the reception of the goods. See Explanatory Memorandum to the first Draft COM (95) 520 final, at 14. However, the deletion of this phrase in the present Directive is deemed that there is no examination duty imposed on the consumer.

⁶⁸³ KCmC Art. 69(1). German law requires ‘immediate’ examination after the delivery by the seller to the extent that this is practical in the ordinary course of business. BGB §377(1).

⁶⁸⁴ Dong-seok Kim, *supra* n. 678, at 138; Ki-su Lee, *supra* n. 610, at 195.

⁶⁸⁵ *E.g.*, perishable goods or durable goods, single pieces or mass-produced articles.

⁶⁸⁶ *E.g.*, technical facilities, experts, or a general strike.

⁶⁸⁷ *E.g.*, container, tin, or no packaging.

⁶⁸⁸ Dong-seok Kim, *supra* n. 678, at 138; Ki-su Lee, *supra* n. 610, at 195.

relating to the buyer or to his employees are not relevant in deciding the period except general and objective impediments.⁶⁸⁹

The examination in English law must be carried out ‘within a reasonable time’.⁶⁹⁰ The duration of ‘within a reasonable time’ must be decided by having regard to the nature of the goods and all the circumstances of the case.⁶⁹¹ CISG requires the examination to be carried out ‘within as short a period as is practicable in the circumstances’.⁶⁹² The duration for the examination depends upon the circumstances of each case taking account of the principle of reasonableness.⁶⁹³

As it appears in the wording used for the duration of examination, it seems that Korean law requires a shorter period than the other jurisdictions.⁶⁹⁴ However, given that the duration in each jurisdiction is quite flexible in terms of that it takes account of all the circumstances of each case on the basis of the principle of reasonableness, there seems to be no particular differences in its determination of the duration.

6.3.1.2.1.2. Evaluating accounts

Although there has been no difference found in the above comparative study, the wording used in Korean law, ‘without delay’, may increase the transaction costs for the parties to clarify the meaning of the wording of ‘without delay’ and to adapt it into a reasonableness test because it generally gives the impression of an inflexible rule of prompt examination compared to the other jurisdictions.

⁶⁸⁹ *Id.*

⁶⁹⁰ Reynolds, Guest (ed.), *supra* n. 515, at para. 12-041 and 12-054.

⁶⁹¹ Williston, *Sales*, (1974), §476; Reynolds, Guest (ed.), *supra* n. 515, at para. 12-041. See also *Heilbutt v. Hickson* [1872] LR 7 CP 438, 451.

⁶⁹² CISG Art. 38(1).

⁶⁹³ Enderlein and Maskow, *supra* n. 288, at 155; Bianca, Bianca/Bonell (ed.), *supra* n. 221, at 298 f.; Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 305 f.; Bernstein and Lookofsky, *supra* n. 563, at 61 ff.

⁶⁹⁴ ‘Without delay’ in Korean law appears a bit more demanding in its use of terminology than ‘within a reasonable time’ and ‘within as short a period as is practicable’.

6.3.1.2.2. The beginning of the period

6.3.1.2.2.1. Comparative accounts

In Korean law, the period within which the goods should be examined generally starts to run upon the buyer taking the seller's delivery.⁶⁹⁵ It normally occurs when the buyer himself or a carrier as his agent takes the goods at the place of delivery.⁶⁹⁶ However, in the case where an independent carrier is involved, the period does not embark until the buyer is deemed to take the seller's delivery, *i.e.*, until the goods are arrived at the destination.

The starting point for the period of examination in CISG is generally the time of delivery.⁶⁹⁷ However, in cases involving carriage, the period begins to run only upon their arrival at their destination.⁶⁹⁸ This rule is based upon the consideration of unreasonableness of examination by the buyer at the time of delivery, *i.e.*, upon the handing over of the goods to the first carrier, because an examination by the buyer at that time is normally impossible.⁶⁹⁹ Where the goods are redirected in transit or redispached, it begins only when the goods have arrived at their new destination on the condition that two requirements are satisfied; first, the buyer had previously no reasonable opportunity to examine the goods, second, the seller knew or ought to have known of the possibility of such redirection or redispach at the time of the conclusion of the contract.⁷⁰⁰

The position in English law seems to be similar to CISG. The *prima facie* rule as to the point

⁶⁹⁵ KCmC Art. 69(1). Cf. The period in German law begins to run after the delivery. BGB §377(1).

⁶⁹⁶ Dong-seok Kim, *supra* n. 678, at 140.

⁶⁹⁷ Schwenger, Schlechtriem (ed.), *supra* n. 218, at 306.

⁶⁹⁸ CISG Art. 38(2). It applies even where the buyer concluded the contract of carriage except the case where the handing over of the goods to the carrier constitutes delivery to the buyer and the carrier receives the goods as agent of the buyer. See Bianca, Bianca/Bonell (ed.), *supra* n. 221, at 299; Enderlein and Maskow, *supra* n. 288, at 156; Schwenger, Schlechtriem (ed.), *supra* n. 218, at 307.

⁶⁹⁹ Schwenger, Schlechtriem (ed.), *supra* n. 218, at 307.

⁷⁰⁰ CISG Art. 38(3).

of examination, so far as domestic sales are concerned, is that it starts when the goods are handed over to the buyer.⁷⁰¹ However, the rule is subject to the question of whether the buyer has had a reasonable opportunity of examining the goods at the place of delivery.⁷⁰² For instance, the point of examination in a c.i.f. contract is at the stage of complete delivery, *i.e.*, when the goods are handed over to the buyer at the destination because the reasonable opportunity to examine the goods usually arises at that stage.⁷⁰³ In the case of a f.o.b. contract, it is far from clear that any general rule can be laid down as to the point of examination even though delivery normally takes place when the goods are put on board. It may also depend upon the question whether the buyer has had a reasonable opportunity to examine the goods when the goods are put on board.⁷⁰⁴ In most f.o.b. contracts, it has been held that the point to examine the goods is at the time when the goods actually get into the hands of the buyer.⁷⁰⁵ As regards redirection or redispach of the goods by resale, it used to be held that the buyer was deemed to have done an act inconsistent with the seller's ownership if he resold the goods and forwarded them to a sub-buyer so that he might be deprived of his right to reject the goods even if he had not had a reasonable opportunity to examine the goods.⁷⁰⁶ However, the present law is that such a delivery to the sub-buyer no longer of itself amounts to an act inconsistent with the ownership of the seller unless he has had a reasonable opportunity to examine the goods.⁷⁰⁷ The

⁷⁰¹ *Perkins v. Bell* [1893] 1 QB 193; *Commercial Fibres (Ireland) Ltd. v. Zabaida* [1975] 1 Lloyd's Rep 27.

⁷⁰² The SGA s. 35.

⁷⁰³ In a c.i.f. contract, it has been said that there are three stages of delivery: a provisional delivery on shipment, a symbolic delivery on tender of documents, a complete delivery of the cargo when the goods are handed over to the buyer at the c.i.f. destination. *Schmoll Fils & Co. Inc. v. Scriven Bros & Co.* [1924] 19 LILR 118, 119. It is submitted that the buyer's opportunity to examine the documents arises when the documents are tendered. See Treitel, Guest (ed.), *supra* n. 515, at para. 19-136.

⁷⁰⁴ *J. W. Schofield & Son v. Rownson, Drew and Clydesdale Ltd* [1922] 10 LILR 480, 482.

⁷⁰⁵ *Scaliaris v. E. Ofverberg & Co.* [1921] 37 TLR 307; *Boks & Co. v. J. H. Rayner & Co.* [1921] 37 TLR 800; *Bragg v. Villanova* [1923] 40 TLR 154; *Obaseki Bros. V. Reif & Son Ltd* [1952] 2 Lloyd's Rep 364, 367. See Treitel, Guest (ed.), *supra* n. 515, at para. 20-094.

⁷⁰⁶ *Hardy & Co. v. Hillerns and Fowler* [1927] 2 KB 491.

⁷⁰⁷ The SGA s. 35(6)(b).

point to examine the goods in the cases of redirection or redispach by resale may be, thus, deferred until the goods are arrived at the new destination on the condition that, first, the buyer has not had a reasonable opportunity to examine the goods, and second, the seller was aware of that the goods are going further on.⁷⁰⁸

As examined above, although it appears at first sight different in the rules as to the starting time for examination, the comparative study has found no difference in its contents between Korean law, CISG and English law. The time when the buyer takes the delivery as the basic starting time in Korean law could be explained in a comparative way as follows; in the case of no independent carrier involved, the time of the buyer taking the delivery normally occurs at the time of delivery which is correspondent to the basic starting time in English law and CISG, but in the case of independent carrier involved, it generally occurs at the time when the goods are arrived at the destination which is complied with the moment until which the basic starting time in English law and CISG is deferred by virtue of the principle of a reasonable opportunity.

6.3.1.2.2.2. Evaluating accounts

As found above, the basic rule in English law and CISG is ‘from the time of delivery’ and then the principle of reasonable opportunity is brought in as to correct the lack of justification of the basic rule in some cases. The approach taken by English law and CISG could be arguably said that it is a detour to reach the same result, which Korean law achieves in a more direct manner. This seems to be partly attributed to that it ignores the fact that no examination can logically arise until the buyer takes delivery.⁷⁰⁹ In this light the consequence of taking the detour seems to unnecessarily increase the transaction costs for the parties to clarify the principle of a reasonable opportunity.

⁷⁰⁸ *Saunt v. Belcher & Gibbons* [1920] 26 Com Cas 115, 120, *per* Bailhache J. See also *Molling & Co. v. Dean & Son Ltd* [1901] 18 TLR 217; *Bragg v. Villanova* [1923] 40 TLR 154; *A. J. Frank & Sons Ltd v. Northern Peat Co. Ltd.* [1963] 39 DLR (2d) 721.

⁷⁰⁹ The duty of examination could be certainly raised before the buyer takes delivery if he unreasonably delays in taking delivery.

6.3.2. The buyer's duty to notify the defects

6.3.2.1. The content and form of notice

6.3.2.1.1. Comparative accounts

Regarding contents of notice, in CISG the notice must specify the nature of the lack of conformity.⁷¹⁰ When determining to what extent the buyer must specify the nature of the lack of conformity, mixed objective-subjective criteria should be applied, taking account of the respective commercial situation of the seller and the buyer, any cultural differences, but above all the nature of the goods.⁷¹¹ No more than 'not in order', 'unsatisfactory quality', 'non-conformity with sample', 'complaint from customer', 'defective quality or delivery of wrong goods', 'inferior and poor quality', 'non-conformity with our specifications and cannot be sold to customers',⁷¹² 'poor workmanship and improper fitting'⁷¹³ does not specify the defects alleged with sufficient precision.⁷¹⁴ Although there is no such requirement in Korean law, it is generally recognised by scholars.⁷¹⁵ On the other hand, there seems to be no specific requirement to specify the nature of the lack of conformity in English law.⁷¹⁶ The requirement

⁷¹⁰ CISG Art. 39(1).

⁷¹¹ Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 312.

⁷¹² See OLG München, 7U2070/97, 9-7-1997, reported in UNILEX D.1997-11 (also seen at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970709g1.html> and <http://www.uncitral.org/en-index.htm> (CLOUT No.273)).

⁷¹³ See LG München, 17HKO3726/89, 3-7-1989, reported in UNILEX D.1989-2 (seen also at <http://www.uncitral.org/en-index.htm> (CLOUT No.3)).

⁷¹⁴ Cf. Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 312.

⁷¹⁵ Dong-seok Kim, *supra* n. 678, at 143; Ki-su Lee, *supra* n. 610, at 196. Cf. German law requires the buyer to give his notice with precise details. See Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 312.

⁷¹⁶ Carter, *Breach of Contract*, (1991), at para. 1016. In English law, the buyer must have made notice for an effective rejection of the goods which must show an unequivocal indication that they are not accepted. See *Lee v. York Coach and Marine* [1977] R.T.R. 35 (where it was held that the buyer did not have a right to reject a defective car because his solicitors asked the seller to remedy the defects or offer a

in the Directive is left with domestic laws.

There is, in general, no requirement as to the form of the notice of lack of conformity in each jurisdiction. It could be, thus, made by the use of fax, telex, telegram, ordinary post, or by telephone, taking account of the trade usage or custom in question.

6.3.2.1.2. Evaluating accounts

6.3.2.1.2.1. Internal evaluation

Given that the notice duty is intended to give the seller the opportunity to know there is a defect, to prepare any possible disputes by securing necessary evidence, to redress a defect, or to have recourse to his supplier, it seems reasonable to require the buyer to specify the nature of a defect.⁷¹⁷ However, one must ask whether the requirement is an inevitable one for the purposes of the notice duty in light of an age of electronic communication.⁷¹⁸ That is, as long as the buyer gives a notice showing his dissatisfaction, it could be arguably said that the purposes have been more or less achieved in certain circumstances although the notice is not specific enough because it may be left with the seller to make inquiries with the buyer to learn of what is the nature of a defect. Furthermore, the requirement seems more unreasonable in a consumer context; it may be harsh for the consumer if he loses his right to claim for a defect only because he does not give enough specification as to the defect in his notice, *e.g.*, “this t.v. set is not of satisfactory quality”. In such a circumstance, it might be rather expected of the seller to make

refund and did not therefore unequivocally reject the car). Cf. If the ground stated in the notice does not in law justify termination, the notice may nevertheless be valid insofar as a ground which does justify termination actually exists. See *Taylor v. Oakes, Roncoroni & Co.* [1922] 38 TLR 349.

⁷¹⁷ In this light, it appears that the position in English law is unreasonable. However, one must note that the policy behind the notice duty in English law is slightly different from the other jurisdictions in that it is mainly to establish certainty for the seller that he does not need to reckon with the buyer’s claim only for rejection. Namely, it is primarily to let the seller know the position of the buyer as to rejection or acceptance of the goods.

⁷¹⁸ Honnold, *supra* n. 218, at 279.

inquiries with the consumer after the non-specific notice of the defect.

6.3.2.1.2.2. External evaluation

It seems true that the requirement of specification of the nature of a defect may function to minimise the transaction costs for both parties because in any event the seller needs to ascertain what is the nature of a defect and consequently the seller's awareness of the nature will enable him to act in a rational way to minimise the transaction costs. However, assume that a buyer give non-specific notice, it does not seem to increase the possibility of the buyer to behave opportunistically on the basis of supervening events the risk of which is not allocated in the contract since he is deemed of running the risk of losing all his rights at his cost, but not the seller's. What of the situation where the seller does not make any inquiry as to the nature of a defect even if the buyer's greater cost could have been avoided with a minimum effort on the seller's cost, *e.g.*, a simple telephone call? In such a situation, it might arguably increase the likelihood of the seller speculating at the buyer's cost in a way that increases the transaction costs and distorts the optimal operation of market. This is particularly true in a consumer context where most consumers are deemed unaware of the requirement of specific notice.

6.3.2.2. The period for giving notice of a defect

6.3.2.2.1. Comparative accounts

The buyer's notice in Korean law must be 'immediately' given to the seller if he discovers any defect in the goods.⁷¹⁹ Although the use of 'immediately' seems to literally require prompt notice and losing no time in notifying, it is submitted that it should be interpreted in a similar way to 'without delay' for the period of examination, which takes account of the custom or usage of trade in question.⁷²⁰ When determining the period of 'immediately', all the

⁷¹⁹ KCmC Art. 69(1). Cf. BGB §377(1) (requiring 'without delay' notice if a defect is found).

⁷²⁰ Ki-su Lee, *supra* n. 610, at 195 f.; Dong-seok Kim, *supra* n. 678, at 140 f.

circumstances of the specific case must be taken into account on the basis of reasonableness.⁷²¹ Among other things, regard must be had to whether the buyer's delay in notice causes any economical harm to the seller.⁷²²

In CISG, the notice specifying a defect in the goods must be sent to the seller 'within a reasonable time' after the buyer discovered or ought to have discovered it.⁷²³ As in Korean law, the period for notice should be decided by giving due regard to all the circumstances of the specific case⁷²⁴ including the perishable nature of the goods and the remedies the buyer is invoking, the need for impartial sampling or testing and the possibility of cure by the seller.⁷²⁵

In English law, although there is no relevant specific provision in the SGA, it is apparent from the cases that the buyer must exercise his right to reject 'within a reasonably short period of

⁷²¹ *Id.*

⁷²² For instance, any disadvantage by fluctuation of price, by loss of possibility of repair or replacement, by shrinkage in values, by impossibility to gather or preserve evidence for use in any possible dispute with the buyer over the alleged defect in the goods regarding burden of proof, and *etc.* Dong-seok Kim, *supra* n. 678, at 141.

⁷²³ CISG Art. 39(1).

⁷²⁴ UNCITRAL Yearbook III, A/CN.9/SER.A./1972, (1973), at 87, para. 78; Honnold, *Documentary History of the 1980 Uniform Law for International Sales*, (1989), at 104. Cf. Enderlein and Maskow, *supra* n. 288, at 159 f. (arguing that the reasonable time is in any case a short period (just like in art. 39, ULIS) and 'reasonable' will mean, in many cases, giving notice immediately); Rb Roemond, 920150, 06-05-1993, reported in UNILEX 1993-14 (a Dutch case involving the buyer's delay in notice of three months after discovering defects in electric kettles says that 'reasonable time' mean 'as soon as possible').

⁷²⁵ Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 314 f.; Honnold, *supra* n. 218, at 280; Sono, Bianca/Bonell (ed.), *supra* n. 221, at 309; Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, (1994), at 308, 323 ff.; Rohwer & Coe, "The 1980 Vienna Convention on the International Sale of Goods and the UCC – Peaceful Coexistence?", in: Campbell & Rohwer (ed.), *Legal Aspects of International Business Transactions*, (1984), at 272 f. Cf. Enderlein and Maskow, *supra* n. 288, at 160 (regarding the remedies the buyer is seeking, they contend that there is no reason why one requires prompt notice only in the case of rejection, but not in the case of damages because, even in the case of damages, reasonable timely notice is required, and no prompt notice in the case of damages may underestimate the difficulties to prove a non-conformity which grow as time goes by).

time' once he realised the existence of a defect.⁷²⁶ It has been submitted in a commercial context that he is entitled during that time to consider what he will do after he becomes aware of a breach of a condition precedent by the seller, and his failure to notify the rejection at once does not deprive him of his right as long as he exercises it 'within a reasonable time'.⁷²⁷ When deciding what period of retention is reasonable, regard must be given to all the relevant facts in each case;⁷²⁸ the goods were perishable, expert opinion could have been obtained earlier, the buyer appears to rely on his right to damages, he tries to negotiate for a reduction in price or he asks adjustments to the goods.⁷²⁹

Assuming that the consumer in the Directive is obliged to give notice,⁷³⁰ he has at least a period of two months from the date of when he detected a lack of conformity in which to notify the seller of the lack of conformity.⁷³¹ Therefore, no matter what the circumstances of the case, he can give his notice anytime within the period of two months or longer.

The above comparison seems to show that the rules to decide the notice period in each jurisdiction are more or less the same in that all the jurisdictions except the Directive take account of all the relevant circumstances of each case based on the principle of reasonableness although 'a reasonable period' in English law and CISG can be hardly equated in literal terms with the requirement of 'immediate notice' in Korean law.⁷³²

⁷²⁶ See *e.g.*, *Flynn v. Scott* [1949] SC 442 (where it was held that rejection could not be made 3 weeks after a van had broken down when it should have been made within a very few days).

⁷²⁷ *Fisher, Reeves & Co. Ltd v. Armour & Co. Ltd* [1920] 3 KB 614, 624, *per* Scrutton L.J.; *Bremer Handelsgesellschaft m.b.H. v. Deutsche Conti-Handelsgesellschaft m.b.H.* [1981] 1 Lloyd's Rep 112, 116.

⁷²⁸ The SGA s. 59 states that what is a reasonable time is a question of fact.

⁷²⁹ Reynolds, Guest (ed.), *supra* n. 515, at para. 12-055; Goode, *Commercial Law*, (1995), at 377. Cf. Hwang, "Time for Rejection of Defective Goods", (1990) *L.M.C.L.Q.* 334.

⁷³⁰ For the cases where the consumer has the notice duty, see *supra* n. 627-630 and accompanying texts.

⁷³¹ Directive(99/44) Art. 5.2. and Recital 19.

⁷³² Even though one must depend on the facts of each case, a period of approximately 20 days at least is adopted as a rough average in Korean law (Ki-su Lee, *supra* n. 610, at 196), one month in CISG (Schwenzer, Schlechtriem (ed.), *supra* n. 218, at 315). English law would be more or less the same because it seems to be clear from the rejection of proposals to create a long term right. See Law Com.

6.3.2.2.2. Evaluating accounts

6.3.2.2.2.1. Internal evaluation

The minimum period of two-months in the Directive is no doubt an improvement in some Member states that have a shorter period⁷³³ and it may be enough only in some cases from the perspective of consumer. However, what of the situation where it takes a consumer more than two-months? It seems to be easily conceivable that there may be many cases where consumers take more than two-months to appreciate they have a legal right and to prepare themselves for a claim.⁷³⁴ The inappropriateness of the two-month period may become even more apparent when one considers cross-border claims that may arise from European consumers' cross-border shopping in the single market.⁷³⁵

6.3.2.2.2.2. External evaluation

Although the above comparative study in relation to the rules to decide the notice period has shown no particular difference, the wording used in Korean law, 'immediate notice', does not seem to satisfy the requirement of certainty in terms of efficiency in that it may increase the transaction cost for the parties to clarify the meaning of 'immediate notice' and to adapt it to the standard of 'a reasonable period' taken by English law and CISG. This is because the wording of 'immediate notice' generally gives the impression of an inflexible rule of prompt notice compared to the other jurisdictions.

As regards the position in the Directive fixing the minimum period of two-months, the question arises whether it reflects the parties' preference in most cases. Given that most consumers are unaware of the notice requirement, it may distort the optimal operation of

No. 160, (1987), para. 5.6. ff.

⁷³³ E.g., Italy (eight days), Portugal (thirty days).

⁷³⁴ Cf. Beale and Howells, *supra* n. 257, at 32 f.

consumer market in that they may misjudge the costs and benefits of the transaction they are contemplating due to their ignorance of the notice requirement.⁷³⁶ Even if they are aware of the existence of the notice requirement and also the period for notice, it may increase the transaction costs for the parties to exclude or amend the period where it is conceivable that it takes more than two months.

6.3.2.3. The cut-off period

In Korean law, the buyer must give his notice as to a defect at the latest within six months in the case in which the defect was not immediately discoverable.⁷³⁷ A buyer who fails to notify a seller of a defect in the goods before the period expires may lose all his rights based on the defect, however latent or discoverable the defect may later prove to be. The period begins from the date on which the buyer took the seller's delivery.⁷³⁸ It is applicable to the cases where the defect could not be discovered on a reasonable examination and in fact the buyer did not establish it upon his receipt of the seller's delivery,⁷³⁹ but not applicable if the contract expressly sets forth a cut-off period of shorter or longer duration.⁷⁴⁰

The buyer's notice in CISG must be dispatched at the latest by a date that would enable the seller to receive the notice within a period of two-years, or he may lose his right to rely on a lack of conformity.⁷⁴¹ It applies where a lack of conformity is not discernible upon a proper examination and the buyer did not subsequently discover the lack of conformity and ought not

⁷³⁵ *Id.*

⁷³⁶ Cf. *Supra* n. 651. For the aspects of consumer market failure due to the lack of information, see *supra* n. 50.

⁷³⁷ KCmC Art. 69(1).

⁷³⁸ *Id.*

⁷³⁹ Dong-seok Kim, *supra* n. 678, at 141 f.

⁷⁴⁰ An unreasonable short period is governed by the Korean Act on Regulation of Standard Terms of 1986 so that the period clause in the contract may be invalid.

⁷⁴¹ CISG Art. 39(2).

to have discovered it.⁷⁴² The two-year cut-off period begins when the goods were actually handed over to the buyer, and it may be ruled out if it is inconsistent with a contractual period of guarantee.⁷⁴³

In the Directive, although there is no specific provision for cut-off period linked with the buyer's notice duty, there is a two-year cut-off period as from the date of delivery during which the seller is liable for any lack of conformity which existed at the time of delivery of the goods.⁷⁴⁴ The provision makes, in effect, that the buyer's notice cannot be in any event over the period of two-years as from the date of delivery, or he may lose all his rights based on the lack of conformity.

In contrast, there is no such cut-off period in a way of fixing a certain period in English law as far as the buyer's notice requirement coupled with his right to reject and acceptance rules is concerned.⁷⁴⁵

6.4. The consequences of failure to give any or proper notice

6.4.1. Comparative accounts

In Korean law, CISG, and the Directive, the buyer may lose all the rights he can rely on in the event of the seller's delivery of defective goods if he does not give notice in timely and proper fashion.⁷⁴⁶ However, the buyer in CISG may at least retain the right to claim a price reduction and damages (except damages for loss of profit) should he have a reasonable excuse for failing

⁷⁴² This rule also applies even where the buyer had a reasonable excuse for the failure to notify the seller of the non-conformity (CISG Art. 44). Therefore, he may lose his possible rights to claim reduction in the price and damages that may be allowed for him where he has a reasonable excuse.

⁷⁴³ CISG Art. 39(2).

⁷⁴⁴ Directive(99/44) Art. 5.1.

⁷⁴⁵ However, there is a limitation period as to damage claims, which has nothing to do with the notice requirement. See *supra* n. 599 and accompanying texts. The cut-off periods in each jurisdiction have been evaluated above when the time limits were examined and there are no further things to be discussed here. See *supra* pp. 131 ff.

to give notice.⁷⁴⁷ Although it seems vague to see what the reasonable excuses for failure to give the required notice are,⁷⁴⁸ it has been submitted that it indicates the applicability of more individualised considerations than would be relevant under the more objective standard of art. 39(1).⁷⁴⁹ This provision is of particular importance to the international traders from developing countries who are illiterate about machinery or other highly technical equipment, or whose domestic law or local practices are unfamiliar with the examination and notice requirement.⁷⁵⁰ As the notice requirement in English law is only concerned with the right to reject and terminate

⁷⁴⁶ KCmC Art. 69(1); CISG Art. 39(1); Directive(99/44) Art. 5.2.

⁷⁴⁷ CISG Art. 44. This provision was drafted as a concession to certain developing countries who said that their merchants could not live with the provisions on notice and the loss of all remedies in case of failure to give proper notice. Cf. *O.R.* at 320 ff.; Kritzer, *supra* n. 725, at 327; Date-Bah, “Problems of the Unification of International Sales Law from the Standpoint of Developing Countries”, in: *Problems of Unification*, (1980), at 47 ff.

⁷⁴⁸ Cf. Schlechtriem, “Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany”, *Juridisk Tidskrift*, (1991/92), at 1-28: <http://www.cisg.law.pace.edu/cisg/text/schlechtriem44.html>; Schlechtriem, “Recent Developments in International Law”, (1983) 18 *Israel L. Rev.* 309, at 325; Ziegel, “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods”, (1981), at 103: <http://cisgw3.law.pace.edu/cisg/wais/db/articles/english2.html>; Schneider, “The Seller’s Right to Cure under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods”, (1989) 7 *Ariz. J. Int’l & Comp. L.* 69, at 80 (arguing that ‘a reasonable excuse’ for the failure to give notice has been already considered as a factor to decide ‘a reasonable time’ under art. 39(1)).

⁷⁴⁹ Honnold, *supra* n. 218, at 283; Reitz, “A History of Cut-off Rules as a Form of Caveat Emptor: Part I - The 1980 UN Convention on the International Sale of Goods”, (1988) 36 *Am. J. Com. L.* 437, at 461. Cf. For the criteria to establish whether there is a reasonable excuse under art. 44, see Huber, Schlechtriem (ed.), *supra* n. 218, at 350.

⁷⁵⁰ *Id.*, at 349; Sono, Bianca/Bonell (ed.), *supra* n. 221, at 326. In addition, it may be frequently useful for the traders in the developed countries as experience in Germany has shown. Huber, Schlechtriem (ed.), *supra* n. 218, at 349; Schlechtriem, *supra* n. 748 (*Juridisk Tidskrift*), at 1-28. Cf. Prof. Date-Bah finds that it is most useful for the purpose of avoiding an unfair total loss of the buyer’s remedies whenever an examination of the goods has been done within a reasonable time that cannot be qualified as short. Date-Bah, “The Convention on the International Sale of Goods from the Perspective of the Developing Countries, in: *La Vendita Internazionale*, (1981), at 31 f. (quoted in Garro, “Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods”, (1989) 23 *International Lawyer* 443, as reproduced at “<http://www.cisg.law.pace.edu/cisg/biblio/garro1.html>”)

the contract, the failure to give notice may deprive the buyer of only the right to reject and terminate the contract.

6.4.2. Evaluating accounts

6.4.2.1. Internal evaluation

One of the problems as to the consequences of the failure to give proper notice in Korean law and the Directive is that it might be harsh on the buyer in the context that a minor oversight by the buyer should lead to the loss of all his rights in respect of defects in the goods even if the oversight was understandable and there was no substantial prejudice to the seller. For instance, where the buyer ordered packing papers with a certain design, but as a result of a mistake by the seller, the papers supplied were about 1.5-2 mm excessive, the buyer kept them in his stock without further examination, relying on the fact that the seller had correctly performed his order, and then he found the defect only after two months when he used them in the process of packing his products.⁷⁵¹ In this case, it would be held in Korean law that the buyer's claim for any remedy is dismissed on the basis of the buyer's failure to examine the goods and to give timely notice of defects, whereas CISG would arguably hold that there was a reasonable excuse for the failure of notice so that the buyer might at least claim for a price reduction and damages except those for loss of profit.⁷⁵² Although the buyer's conduct in this case was not correct in itself and not in accordance with the rules as to the notice requirement, it seems that the buyer deserves to be accorded a degree of understanding and leniency. The harshness of the consequences for the failure of notice is even more serious in a consumer context. For example, assuming an English

⁷⁵¹ This case are based on the facts in the Korean Supreme Court Case, 21/7/1987, 86 DaKa 2446, but the matter of the buyer's reliance is purely assumed for the present discussion. Cf. For the case where the reliance is deemed to exist, see BGH WM 1975, 562 = NJW 1975, 2011 = LM §HGB No 15 (cited in Huber, Schlechtriem (ed.), *supra* n. 218, at 350).

⁷⁵² For more specific cases which would lead the buyer to a reasonable excuse, see Huber, Schlechtriem (ed.), *supra* n. 218, at 350 f.

consumer who is not familiar with the notice requirement and its consequences at all purchased a Walkman during his travels in Italy where it is expected to take the option to impose a two-month notice requirement, the consumer found a defect in the remote control later but kept using it until the two-months notice period expired. Is it understandable to deprive the consumer of all his rights, even if he is ignorant about the notice requirement and its consequences in Italy and he has a reasonable excuse?

6.4.2.2. External evaluation

The notice requirement has been explained in terms of efficiency that it may prevent the likelihood of the buyer's claim based on the supervening events the risk of which is not allocated in the contract and it may also function to prevent the parties inefficiently increasing the transaction costs in a way that distorts the optimal operation of market. In this light, it has been assumed that the parties generally prefer to impose the notice duty on the buyer. The remaining question is whether the parties would have mutually agreed that the failure of notice may result in no remedies at all for the buyer so that in some cases he must pay the full price for defective goods of no value in the market, even if he has a reasonable excuse for the failure. In such a situation, on the assumption that the parties are generally risk-averse, the buyer would have said that he wants to have an exception in order to secure at least a reduction although he is asked to pay more for the exception.

7. Concluding remarks

7.1. "Dual liability system vs. Unified liability system" and "Legal liability vs. Contractual liability"

Further to the previous discussions in Chap. II, this study has examined how the problems Korean law has suffered by having the dual liability system and by adopting the legal liability theory are unfolded in the substance of the rules as to the requirements of the seller's guarantee

liability and the examination of the rules showed inferiority of the dual liability system and the legal liability theory.

As to the problems of the dual liability system, it was found that the separate treatments based on the artificial distinction between ‘non-performance’ and ‘defective performance’ that while delivery of *aliud* and non-conformity both in quantity in the sale of generic goods and in packaging are governed under the general liability, non-conformity both in quantity in the sale of specific goods and in quality is governed under the seller’s guarantee liability, are themselves unreasonable in light of the practicability and appropriateness of the rules, comparative study, the parties’ preference and the rules’ certainty.⁷⁵³ This is because, although all these aspects of non-conformity are interrelated each other, the treatments may produce substantial differences in the requirements and the remedies available.⁷⁵⁴

Regarding the problems in the legal liability theory, two points were proved. First, the subjective criterion theory to judge the existence of non-conformity based on the parties’ intention which is supported by the contractual liability theorists is superior to the objective criterion theory based on an ordinary standard alone regardless of the parties’ intention which is supported by the legal liability theorists in terms of history and logic, comparative study and the parties’ preference.⁷⁵⁵ Second, the relevant time when non-conformity must exist should be at the time of the passage of risk, as argued by the contractual liability theory in light of comparative study and the parties’ preference.⁷⁵⁶

7.2. Protecting the reasonable expectations of the parties?

The study also investigated how effectively each law protects the reasonable expectation of the parties; the main question was posed in whether the rules reflect the different interests of consumer and commercial buyers as well as those of private and business sellers, and even if an

⁷⁵³ See *supra* pp. 97 f., 102 ff.

⁷⁵⁴ *Id.*

⁷⁵⁵ See *supra* pp. 100 f., 105 f.

issue is not related to the particular interests of consumers or private sellers, whether they reflect the common interests of all the parties.

7.2.1. Private sellers' interests

The study found that Korean law and CISG seems to fail to reflect the private sellers' interests, which may be distinguished from business sellers' because, unlike English law, the rules as to the existence of a defect under the seller's guarantee liability are unexceptionally applied to sales even between private seller and commercial buyer, even if in many cases the extent of liability of the private seller may be considerably different from that of the business seller.⁷⁵⁷

7.2.2. Consumers' interests

It also showed various aspects in which each law fails to reflect consumers' interests which may be differentiated from commercial buyers'.

First, English law is open to criticism because of its separate treatment of breaches of quality duties and quantity duties which results in the absolute ban on the business seller's attempt to exclude or limit his liability in consumer sales not applying to the matter of quantity.⁷⁵⁸

Second, Korean law, English law and CISG, which do not take account of public statements made by the producer or his representative as a factor to decide the existence of non-conformity, do not seem to reflect the interests of consumers, who often rely on the statements in making their decision to purchase.⁷⁵⁹

Third, Korean law, which requires the absence of negligence on the buyer's part in failing to discover non-conformity at the time of contract, does not seem to reflect the interests of consumers, whose purchase decision often rely on the name of brand and the reputation of retailer even without having a look at the goods and do not know whether they are supposed to

⁷⁵⁶ See *supra* pp. 112.

⁷⁵⁷ See *supra* pp. 102, 106 f.

⁷⁵⁸ See *supra* pp. 99, 105.

examine the goods at the time of purchase.⁷⁶⁰ The uncertainty in this matter under the Directive should be resolved in this light.

Fourth, the Directive that allows the Member States an option to impose a notice duty on the consumer and, its minimum period of two-months seems against the interests of consumers who are normally unaware of the duty and even if they are aware of it, it may often take more than two-months for them to appreciate they have a legal right and to prepare themselves for a claim.⁷⁶¹

7.2.3. Common interests

Where the issue was not directly related to the interests of consumers or private sellers as opposed to those of commercial buyers or sellers, the study showed in what aspects each jurisdiction is inappropriate to reflect the common interests of all the parties.

First, the separate treatment between non-conformity in quality and in quantity and its consequences under Korean law may not reflect the contractual parties' preference, given that the matter of quantity is, in its nature, generally similar to that of description as to quality.⁷⁶²

Second, the position in English law that the passage of risk, which is the relevant time when non-conformity must exist, is connected with the transfer of property rather than the handing over of the goods does not reflect the parties' preference because they may put the risk of damage on who is in a better position to take care of the goods. This is rather more closely related to the matter of delivery than to the transfer of property.⁷⁶³

Third, insofar as the requirements as to ignorance of the existence of non-conformity and absence of negligence in failing to discover non-conformity are applicable even to the cases of the contractual guarantees in Korean law and the Directive, it is likely to interfere with the basis

⁷⁵⁹ See *supra* pp. 101 f., 106.

⁷⁶⁰ See *supra* pp. 122 f., 124 f.

⁷⁶¹ See *supra* pp. 141 f., 159 f.

⁷⁶² See *supra* pp. 98 f., 104.

⁷⁶³ See *supra* pp. 112 f., 114.

of bargain the parties have agreed where a buyer genuinely relies on a specific contractual guarantee by a seller who is supposed to remedy a non-conformity.⁷⁶⁴

Fourth, a fixed two-year period in CISG and the Directive running from the time of delivery after which the buyer may not rely on any lack of conformity for his claim may frequently confront a criticism that it does not take account of the diversity in the goods and any arbitrary time limit may run counter to the parties' intentions in some cases where non-conformity is hardly discoverable until the expiry of the time limit.⁷⁶⁵

Fifth, the position in Korean law which does not impose the notice duty in the following two cases seems inappropriate to reflect the parties' interests; (a) where some of professionals (*e.g.*, artists or doctors who are not categorised as merchants) purchase goods relating to their profession, (b) where a merchant buyer purchases goods relating to his commercial purposes from a private seller whose transaction is not regarded as a commercial act.⁷⁶⁶ This is because the sellers in those cases are most likely to demand the duty to prevent the buyers, who are professional, from speculating at the expense of the sellers and to establish certainty that they do not need to reckon with claims at any particular time.⁷⁶⁷

Sixth, Korean law, which is silent as to the earliest time when the notice duty could emerge in documentary sales, should consider that most sellers in the documentary sales are likely to require the duty even before the delivery of the goods if the buyer learns of non-conformity of the goods upon receiving documents.⁷⁶⁸

Seventh, the seller's ignorance at the time of delivery of the existence of non-conformity as a requirement to raise the notice duty in Korean law does not fully reflect the parties' intention because the parties may prefer the time being at the time when the reasonable period for a notice expires rather than at the time of delivery in light of the purposes of imposing the notice

⁷⁶⁴ See *supra* pp. 123 f., 125.

⁷⁶⁵ See *supra* pp. 131 f.

⁷⁶⁶ See *supra* pp. 139 ff.

⁷⁶⁷ *Id.*

⁷⁶⁸ See *supra* pp. 144 f.

duty.⁷⁶⁹

Eighth, Korean law and CISG that require the buyer to specify the nature of non-conformity in his notice seems inadequate in light of a modern age of electronic communication because, given that a notice of mere dissatisfaction may more or less achieve the essential purpose of notice to prevent the buyer's opportunistic behaviour, it should be the seller who makes inquiries with the buyer to learn of what is the nature of non-conformity by a simple phone call.⁷⁷⁰

Finally, depriving the buyer of all the rights he can rely on where he fails to give notice in timely and proper fashion in Korean law and the Directive is inappropriate to reflect the parties' intention since it may be harsh on most buyers in the context that a minor oversight would mean the loss of all their rights as to non-conformity even if the oversight was understandable and does not cause any substantial prejudice to the seller.⁷⁷¹

⁷⁶⁹ See *supra* pp. 146 f.

⁷⁷⁰ See *supra* pp. 155 f.

⁷⁷¹ See *supra* pp. 163 f.

IV. Effects of the Seller's Liability for Non-conforming Goods

1. General Remarks

The courses of action open to the buyer who is aggrieved by the seller's failure to deliver conforming goods may be divided at a broad level into three series of remedies. First, he may be able to claim specific performance by either repair or replacement. Second, he may be allowed to claim monetary relief which may involve the claim for damages or reduction of the contract price. Third, he may be entitled to terminate the contract or simply to suspend to perform his part of the contract insofar as the seller's failure to deliver conforming goods continues.

The following discussions will deal with the question of, first, how the broad threefold division of the courses of action is recognised in each jurisdiction, second, what are the exact conditions in which each remedy is available, and third, what are the precise effects of the remedy if granted. The discussions will be executed in a comparative way in light of the ultimate purpose of this thesis to investigate if there is any need to introduce a unified liability system into Korean law and how effectively the rules protect the reasonable expectations of the parties.

2. Suspending performance

2.1. General

In the event of the seller's delivery of defective goods, the buyer may be reluctant to accept the goods and part with the money if he has not yet paid. In this case, the law may entitle him to suspend his part of the contract so long as the seller's failure to deliver non-defective goods continues. This is a kind of 'dilatory plea' which does not terminate the contract but merely allows the buyer for a while to maintain his refusal to perform his part until the seller either performs or offers to do so; it is purely in the nature of defence against non-performance of his

duty based on the sales contract being deemed of the synallagmatic nature in a sense that failure by one party to perform his part of the promised exchange will justify the other party's refusal to perform.⁷⁷²

The ensuing discussions deal generally with whether and how each jurisdiction recognises the right of suspension and in what circumstances the right is restricted.

2.2. Comparative accounts

2.2.1. Korean law

The right to suspend performance is not specifically provided for in the rules for the seller's guarantee liability in KCC. The recognition of this right under the seller's guarantee liability must be examined in light of one's understanding of whether the seller is assumed to take a contractual duty to deliver non-defective goods in the sale of specific goods. Thus, this matter is, at the end, linked with the disputes as to the nature of the seller's guarantee liability.

According to the legal liability theory, it is natural to say that the buyer has no right to suspend his performance in the sale of specific goods on the basis of the *specific goods dogma*⁷⁷³ because once the seller delivers the goods as they were at the time of contract, it is assumed that performance of the seller's contractual duty has been completed.⁷⁷⁴ In the case of the sale of generic goods, there also seems to be no such right insofar as the generic goods are specified because of their understanding that once the generic goods are specified, they are treated as specific goods so that the seller's delivery of the goods as they were at the time of specification may amount to complete performance of the seller's duty.⁷⁷⁵

In contrast, the contractual liability theory argues that the buyer certainly has the right of

⁷⁷² This is known in civil law systems as the *exceptio non adimpleti contractus*. Cf. Treitel, *supra* n. 421, at 245 ff.

⁷⁷³ See *supra* pp. 33 f.

⁷⁷⁴ Yun-jik Kwak, *supra* n. 62, at 486.

⁷⁷⁵ See *supra* n. 149 and accompanying texts.

suspension.⁷⁷⁶ This is based on their idea that the seller has a contractual duty to deliver non-defective goods in the sale of both specific and generic goods.⁷⁷⁷

Insofar as the right of suspension in Korean law is conferred upon the buyer where the seller delivers defective goods, the availability of the right depends upon whether a defect affects an important or trivial part of the goods as a whole.⁷⁷⁸ Thus, the buyer may not be able to rely on the right if his exercise of the right would be contrary to the principle of good faith, having regard in particular to the relatively slight or trivial nature of the defect.⁷⁷⁹

2.2.2. English law

In general, the first step to examine the buyer's remedies for the seller's breach of contract is to categorise contractual terms into conditions, warranties or innominate terms.⁷⁸⁰ This is because the remedy of rejection and termination is only available to the buyer when the seller's breach of contract goes to the root of the agreement, *i.e.*, either because it is a breach of condition or because of the nature or consequences of a breach of an innominate term, whereas if the term broken by the seller is merely a warranty, the buyer will only have a remedy in damages.⁷⁸¹ Insofar as the seller's liability for defects in quality is concerned, the implied terms stipulated in ss. 13-15 are all classified as conditions, and any breach of condition may entitle the buyer to reject the goods and terminate the contract.

⁷⁷⁶ Hyung-bae Kim, *supra* n. 67, at 311 ff., 342 f.; Choon-soo Ahn, *supra* n. 148, at 432 ff. See also KCC Arts. 536, 588. But this right in the case of specific goods is limited to the cases where a defect can be repairable without unreasonable costs and inconvenience. *Id.*, at 434.

⁷⁷⁷ See *supra* pp. 42 ff.

⁷⁷⁸ Hyung-bae Kim, *supra* n. 67, at 152; Yun-jik Kwak, *supra* n. 62, at 106 f.

⁷⁷⁹ *Id.* Cf. BGB §320(2).

⁷⁸⁰ Its understanding that a contractual term must be either a condition or a warranty is based on the wording of statute in the SGA s. 11(3) which distinguishes between conditions and warranties. *Wallis, Son & Wells v. Pratt & Haynes* [1910] 2 KB 1003. For the authority there being an innominate term as the third category notwithstanding the SGA s. 11(3) recognizing condition and warranty as the only classifications of contractual terms, see *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *The Hansa Nord* [1976] QB 44.

Having said that, the recognition of the buyer's right of suspension in English law seems to depend upon the question of whether or not the breach of condition confers on the buyer the right to treat the contract as repudiated and terminate it separately from the right to reject. The current position seems not entirely clear from both the SGA and the case law.⁷⁸² It can be divided into two opposing views; first, the right to reject is treated as if it were merely a component of the general right to terminate a contract for breach,⁷⁸³ and second, it is separate from the right of termination.⁷⁸⁴ According to the latter view, rejection involves the buyer refusing to perform his primary duty to accept the goods in a sense that it is a specific example of the right of suspension.⁷⁸⁵ This is based on the idea that 'condition' stated in the SGA is a description for a term which defines a party's duty to perform, compliance with which is a condition precedent to the other party's duty to accept the performance.⁷⁸⁶ In this light, the seller's delivery of the goods in accordance with the terms of the contract is the pre-condition of the buyer's duty to accept and pay in exchange for that.⁷⁸⁷ Therefore, a failure by the seller to

⁷⁸¹ The SGA ss. 11(3), 61(1).

⁷⁸² For an explanation of the unclear position in terms of legislation and case law, see Bradgate and White, "Rejection and Termination in Contracts for the Sale of Goods", in: Birds and Bradgate (ed.), *Termination of Contracts*, (1995), at 57 f.; Jafarzadeh, *The Buyer's Remedies for Seller's Non Conforming Delivery: A Comparative Study under English Law, the UN Convention on Contracts for the International Sale of Goods and Shi'ah Law*, Doctoral thesis in Univ. of Sheffield, (1998), at 33 ff.

⁷⁸³ See *Kwei Tek Chao v. British Traders & Shippers Ltd.* [1954] 2 QB 459, 480, *per* Devlin J; *The Hansa Nord* [1976] QB 44, 83-84, *per* Ormerod LJ. Cf. For non-sale of goods cases, *Wickman Machine Tools Sales Ltd. v. Schuler A.G.* [1972] 1 WLR 840, 850, *per* Lord Denning MR; *Photo Production Ltd. v. Securicor Ltd.* [1980] AC 827, 849, *per* Lord Diplock. See also Carter, *supra* n. 716, at para. 628, 940; Treitel, *The Law of Contract*, (1991), at 690.

⁷⁸⁴ Atiyah and Adams, *supra* n. 421, at 449; Beale, *supra* n. 25, at 20, 80; Bradgate and White, *supra* n. 782, at 57, 61 f.; Bradgate, *supra* n. 558, at 245; Furmston, *Sale and Supply of Goods*, (1995), at 158 f.; Goode, *supra* n. 729, at 362 f.; Treitel, *The Law of Contract*, (1995), at 670, 704; Bridge, *The Sale of Goods*, (1997), at 162 f.; Reynolds, Guest (ed.), *supra* n. 515, at para. 12-028.

⁷⁸⁵ Bradgate and White, *supra* n. 782, at 57 ff.; Bradgate, "Termination for Breach", in: Birds and Bradgate (ed.), *Termination of Contracts*, (1995), at 45 ff.; Bradgate, *supra* n. 558, at 245. Cf. Beale, *supra* n. 25, at 18 ff., 28 ff.

⁷⁸⁶ Bradgate and White, *id.*

⁷⁸⁷ Cf. The SGA ss. 27, 28.

comply with the implied conditions will justify the buyer in suspending performance of his duty to accept the goods.⁷⁸⁸

Assuming that a separate right to suspend performance is admitted in English law, any breach of condition specified in ss. 13-15 may, in principle, confer on the buyer the right of suspension without terminating the contract whether or not the consequence of breach is serious. However, one must note that it does not apply in non-consumer sales where the breach is so slight that it would be unreasonable for the buyer to exercise the right.⁷⁸⁹ Similarly, in relation to the buyer's right to reject all the goods delivered in the event of either deficient or excess quantity delivered, the business buyer may not be allowed to reject the whole if the deficiency or excess is so slight that it would be unreasonable to reject the whole.⁷⁹⁰

2.2.3. The Directive

The Directive does not deal with the right of suspension, although it may possibly be deducible from the provision as to the right to require repair or replacement.⁷⁹¹ It seems that the right is left to domestic laws.

2.2.4. CISG

The right of suspension in the event of the seller's actual delivery of defective goods is not clearly provided for in CISG, although it clearly confers on the buyer the right in the cases of the seller's prospective non-performance.⁷⁹² However, it is submitted that an analogical

⁷⁸⁸ From the point of this view, the buyer's right to terminate the contract is a separate right which must be justified on another ground. See *infra* n. 846-853 and accompanying texts.

⁷⁸⁹ The SGA s. 15A(1).

⁷⁹⁰ The SGA s. 30(2A).

⁷⁹¹ Directive(99/44) Art. 3.3.

⁷⁹² CISG Art. 71. Under this provision, the buyer is given the right where it becomes apparent that the seller will not perform a substantial part of his obligation; it does not concern where the seller has performed his duty to deliver the goods in a way that do not correspond with the contract. Cf. For the buyer's right to refuse to take delivery in the event of the seller's early or excess delivery, see CISG Art.

interpretation of arts. 30, 53, and 58 has impliedly recognised a right to refuse to take delivery where the goods delivered do not accord with the contract terms and CISG; the buyer is not bound to pay and take delivery so long as the seller has not fulfilled his duty to deliver the goods which are conformed to the contract and CISG.⁷⁹³ Suspending his performance to pay and take delivery, he may require the seller to deliver substitute goods or to repair non-conformity under art. 46(2) or (3).

Although it is not clear what degree of lack of conformity may entitle the buyer to suspend his performance, it is submitted that the buyer does not necessarily have to show that the lack of conformity has amounted to a ‘fundamental breach’ defined in art. 25⁷⁹⁴ which is only related to the right of termination⁷⁹⁵ and of requiring substitute goods.⁷⁹⁶ Minor lack of conformity should not allow the buyer to refuse to take delivery when one considers the principle of good faith provided in art. 7(1).⁷⁹⁷

2.2.5. Comparative view

Where the seller delivers defective goods, each jurisdiction has no specific provision or case as to the buyer’s right to suspend his performance to pay and take delivery. Nevertheless, each jurisdiction has tried to recognise the right in their own way, having regard to their own particular liability system, on the basis of the sales contract being deemed of the synallagmatic nature. Although the recognition of the right seems arguable in each jurisdiction, the contractual liability theorists in Korean law, some scholars in English law and CISG have

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⁷⁹³ Maskow, Bianca/Bonell (ed.), *supra* n. 221, at 389 ff.; Enderlein and Maskow, *supra* n. 288, at 229 ff.; Huber, Schlechtriem (ed.), *supra* n. 218, at 367. Cf. For further details, see Jafarzadeh, *supra* n. 782, at 116 ff.

⁷⁹⁴ For the definition of ‘fundamental breach’, see *infra* n. 879-889 and accompanying texts.

⁷⁹⁵ CISG Arts. 49(1)(a), 51(2), 73.

⁷⁹⁶ CISG Art. 46(2). Cf. Jafarzadeh, *supra* n. 782, at 125 f.

⁷⁹⁷ Maskow, Bianca/Bonell (ed.), *supra* n. 221, at 392; Enderlein and Maskow, *supra* n. 288, at 230. Cf. CISG Arts. 46(2), (3), 71(1).

accepted that the buyer has the right in certain circumstances.

As to the circumstances to raise the right, they differ in that, while the right in English law seems so strict that any breach of implied conditions entitles the buyer to suspend his performance, Korean law and CISG seem to restrict the right by insisting that the buyer cannot rely on the right where a defect takes a relatively slight or trivial nature so that the buyer's exercise of the right would be contrary to the principle of good faith. However, one must note that, insofar as the matters of non-conformity with the implied terms specified in ss. 13-15 and of either deficient or excess quantity are concerned, the difference between them is not so substantial because the strict rule in English law is not applicable to the cases where the buyer does not deal as a consumer; it depends upon the test of whether the breach is so slight that it would be unreasonable for the buyer to exercise the right.⁷⁹⁸

2.3. Evaluating accounts

2.3.1. Internal evaluation

The right of suspension may play significant roles in practice in providing transactional justice for the parties where the seller has failed to perform his reciprocal contractual duties, and the buyer has not yet performed his part of the contract. First, the remedy is effective because it amounts to a kind of self-help remedy; it may enable the aggrieved buyer to lawfully suspend his performance without being sued by the seller and without recourse to legal proceedings.⁷⁹⁹ Second, it has a less drastic effect for the seller in that his failure allows the buyer to refuse to perform at least for so long as the failure continues without involving the more drastic step of terminating the contract.⁸⁰⁰ Third, it is conducive to the preservation and performance of bargains because the existence of the right may provide the seller with an incentive to cure; the

⁷⁹⁸ The SGA ss. 15A(1), 30(2A).

⁷⁹⁹ Treitel, *supra* n. 421, at 245; Beale, *supra* n. 25, at 16.

⁸⁰⁰ Treitel, *id.*

buyer's refusal to take delivery may cause delay in the seller's performance and in order to avoid the negative consequences of delay and to obtain payment the seller would strengthen his efforts to perform.⁸⁰¹ All these things seem to explain the importance of adopting the right of suspension in practice where the aggrieved buyer wants to keep the contract on foot and demand goods fully conforming with the contract, being protected from having to advance credit to the seller. In this light, the legal liability theory in Korean law and a view in English law which do not recognise the separate right of suspension are doubted.

As to non-recognition of the right in the legal liability theory, it seems true that the *specific goods dogma* as its theoretical background for non-recognition of the right may be justified insofar as it is only concerned with non-substitutable and non-repairable specific goods because it seems practically unnecessary to admit the right of suspension. However, the problem of the legal liability theory is in its unclear position as to whether the theoretical ground extends to substitutable and repairable goods.⁸⁰² Given that it is extended so, the buyer is obliged to pay and take the defective goods delivered even if they could be curable insofar as the goods delivered are as they were at the time of contract⁸⁰³ or specification⁸⁰⁴ because the delivery is deemed to be complete performance of the seller's duty on the basis of the *specific goods dogma*.⁸⁰⁵ Therefore, if he wants to demand the seller to cure, he may do so by virtue of the rules of the seller's guarantee liability,⁸⁰⁶ but only after fulfilling his duty to pay and take delivery. This view seems to produce unreasonable results for the buyer, for instance, in that the right of suspension in the sale of generic goods depends upon whether the goods are specified; the buyer certainly has the right to require the seller's cure under the general liability

⁸⁰¹ Hyung-bae Kim, *supra* n. 67, at 142; Maskow, Bianca/Bonell (ed.), *supra* n. 221, at 390.

⁸⁰² Cf. *Supra* n. 340-343 and accompanying texts.

⁸⁰³ Applied to the cases of specific goods.

⁸⁰⁴ Applied to the cases of generic goods.

⁸⁰⁵ See *supra* pp. 33 f. Certainly, the buyer is able to refuse to pay and take the goods if a defect is sufficient to trigger his right of rescission under the seller's guarantee liability. But one must note that this is different from the right of suspension.

⁸⁰⁶ For the right to demand the seller's cure in detail, see *infra* pp. 253 ff.

along with the right of suspension before the generic goods are specified, but once the goods are specified and delivered as they were at the time of specification, the buyer's right to require the seller's cure is available under the seller's guarantee liability but without the right of suspension so that he has to part with money and run a greater risk of non-performance by the seller.⁸⁰⁷ It seems hard to give any plausible reason for this different treatment.

As to the right of suspension where a defect is slight, the position in English law regarding commercial sales, Korean law, and CISG appears more reasonable than that in English law regarding consumer sales in that any attempt by the buyer to reject the goods cannot be justified where a defect takes a relatively slight or trivial nature. However, it is submitted that there is a danger in that some degree of unavoidable vagueness in stating the requirement of slight nature of a defect may be an undesirable element of uncertainty as to when a breach will entitle the buyer to reject the goods and to refuse payment.⁸⁰⁸ It seems, thus, crucial for the requirement to be set in clear guidelines to determine when a breach confers the right of suspension on the buyer. The clear guidelines are even more vital from the point of view of consumers because the uncertainty may be often used in favour of the seller who has a relatively stronger bargaining power than does the consumer who often has to drop his claim or accept less than he is supposed to be compensated even though what he really wants is perfect goods, not defective ones in his hands.⁸⁰⁹ Given that there is no such guidelines in practice, the risk of injustice for a few sellers due to the consumer's opportunistic behaviour seems the inevitable price that has to be paid in order to achieve a fair result for the overwhelming majority of consumers.⁸¹⁰

⁸⁰⁷ Cf. *Supra* n. 149 and accompanying texts.

⁸⁰⁸ Treitel, *supra* n. 421, at 350; Collins, *supra* n. 33, at 334 f.; Beale, *supra* n. 25, at 98 f.

⁸⁰⁹ Law Commission 160, *supra* n. 516, at para. 4.12. The Commission recommended the retention of the absolute right to rejection and termination on the ground of uncertainty inherent in 'minor defect' and the consumer's weaker bargaining position. *Id.*, at paras. 4.2. ff.

⁸¹⁰ *Id.*, at para. 4.12.

2.3.2. External evaluation

The right of suspension is likely to have economic benefits from society's perspective. Namely, it may assist resources in moving more swiftly to a higher value user because one of the goals of suspending performance is related to an information function in a sense that it may determine the likelihood that the risk of non-performance will materialise; *i.e.*, if termination of the contract is necessary in terms of efficiency,⁸¹¹ the information may help termination to take place at an earlier time than if the right of suspension was not available so that it ensures that the goods move more quickly to a higher value user.⁸¹² In light of this efficiency function of the right of suspension, it is submitted that the views in Korean law and English law which do not recognise the separate right of suspension should be reconsidered.

Regarding the right of suspension where a defect is slight, it seems that the approach taken by Korean law and CISG may be adequate to enhance efficiency if one can believe that courts will respond to a consumer's needs by a consistent and publicised manner to confer on him the right as a primary remedy.⁸¹³ Nevertheless, it is still doubted whether such an approach has properly worked for the consumer's interests in practice. Assuming that most consumers are risk-averse, they may prefer an absolute right to reject the goods because they generally want goods of the proper quality at the full price, not defective goods at a lower price.⁸¹⁴ In addition, in the absence of clear guidelines to clarify the test of slight nature of a defect, the absolute right of suspension seems crucial in consumer sales in order to redress a market failure caused by the information gap between business sellers and consumers. The reason for that is that the test in its open texture seems to inevitably render uncertainty and it may interfere with low-cost, routinised redress procedures that are essential for consumers who are often reluctant to proceed

⁸¹¹ For the discussions of efficient termination, see *infra* n. 939-941 and accompanying texts.

⁸¹² Carter, "Suspending Contract Performance for Breach", in: Beatson and Friedmann (ed.), *Good Faith and Fault in Contract Law*, (1995), at 487 ff.

⁸¹³ *Id.*

⁸¹⁴ Cf. Law Commission 160, *supra* n. 516, at para. 4.5.

to courts due to their ignorance.⁸¹⁵

3. Termination

3.1. General

If the buyer realises that he has not obtained the quality or quantity for which he has bargained in the contract, he may wish to put an end to further performance and as far as possible to be put back into the position he was in before performance on either side was begun. Each legal system, following this wish, provides him with a right to put an end to the contract. The right has been variously expressed in the use of terminology; ‘rescission’ in Korean law⁸¹⁶ and the Directive,⁸¹⁷ ‘avoidance’ in CISG,⁸¹⁸ and ‘electing to treat the contract as at an end’, ‘justifiable repudiation’, ‘cancellation’, ‘termination’, and probably most commonly ‘rescission’ in English law, being distinct from that of termination.⁸¹⁹ However, there seems to be no great merit in discussing this matter of different terminological use insofar as we are clear that it does not mean to put the contract at an end *ab initio*; the contract will remain to sort out the subsequent problems created by the breach of contract.⁸²⁰

The right of termination may play a role in providing protection for the buyer who may suffer hardship where non-conforming goods have to remain in his hands and in putting pressure on the seller to perform in accordance with the contract.⁸²¹ This remedy could be a prompt one for

⁸¹⁵ See *supra* n. 52-55 and accompanying texts.

⁸¹⁶ KCC Arts. 572(2), 574, 575(1), 580(1), 581(1). Cf. For the terminology in Germany, see *supra* n. 331.

⁸¹⁷ Directive(99/44) Art. 3.5.

⁸¹⁸ CISG Art. 49.

⁸¹⁹ Beale, *supra* n. 25, at 13. Prof. Treitel indiscriminately uses ‘rescission’ which may include to describe ‘rescission *ab initio*’. See Treitel, *supra* n. 421, at 320. Cf. For the discussion as to its use of terminology in English law, see Birds and Bradgate (ed.), *Termination of Contracts*, (1995), at 9 ff.

⁸²⁰ However, there are forceful arguments in Korea as to the question of whether termination operates *ex tunc* or *ex nunc*. See *infra* n. 990.

⁸²¹ Beale, “Remedies: Termination”, in: Hartkamp *et al.* (ed.), *supra* n. 218, at 349 f.; Treitel, *supra* n.

the buyer, as a form of self-help remedy, whereas other remedies such as a suit for performance or damages often require the courts to be involved.⁸²² In addition, it may be a useful means for the buyer to avoid a bargain which would have been a bad one even if conforming goods had been delivered; *e.g.*, where a buyer seeks to terminate the contract on a falling market or where he purchases the goods based on incorrect appraisal of the circumstances.⁸²³ Notwithstanding its useful functions and its attractive practical effects to the buyer, it cannot be available in every case of non-conformity because it could be a formidable remedy against the seller; *e.g.*, where the effect of termination throws back on him a risk which had been undertaken by the buyer in the contract on a falling market or where he has made transaction-specific investments in his attempts to perform the contract which will be wholly or largely wasted as a result of termination.⁸²⁴ All jurisdictions have tried to strike some balance between the competing interests at stake. A balance can be struck in a way that recognises the existence of the right of termination in principle for the sake of the buyer, but for the sake of the seller limits the right of termination in various aspects to certain cases.⁸²⁵ We will examine in what way each jurisdiction has developed the law to recognise the existence of the right of termination and how effectively each jurisdiction restricts the right in order to strike a proper balance between the conflicting interests.

3.2. Preconditions: Seriousness of a defect

3.2.1. Comparative accounts

3.2.1.1. Korean law

421, at 321; Collins, *supra* n. 33, at 332.

⁸²² Treitel, *supra* n. 421, at 322.

⁸²³ *Id.* See also Collins, *supra* n. 33, at 332.

⁸²⁴ *Id.*

⁸²⁵ *Id.*

The buyer's right of rescission under the seller's guarantee liability is generally dependent upon the question of whether or not he is still able to achieve the object of the contract in the event of the seller's delivery of defective goods.⁸²⁶ Thus, if he cannot achieve the object that he was intended to obtain from the contract, he may declare the contract rescinded. The object is neither necessarily contained in the contract nor actually known to the seller. However, the buyer's subjective intention is not enough to be said to be the object of the contract.⁸²⁷ It should be determined objectively, taking account of the circumstances of the contract at the time of contract, the nature of the goods, *etc.*⁸²⁸ In the case of a shortage in quantity, the buyer is given a right of rescission only where he would not have entered into the contract had he known of the shortfall at the time of contract.⁸²⁹ One must note that this is the case only in the sale of specific goods because the seller's guarantee liability does not deal with the matter of shortage in quantity of the generic goods.⁸³⁰ His right of rescission for shortage in quantity in the sale of generic goods is governed under the general liability as to partial impossibility or delay that is subject to the principle of fault.⁸³¹ The right is dependent on whether or not the object of the contract can be achieved in the event of such impossibility or delay.

In relation to the situation where there is a curable defect and its relationship with a right of rescission, it is not clearly dealt with by KCC. However, it is generally understood among scholars that, on the basis of the principle of good faith, the buyer may not be able to declare the rescission of the contract where a defect can be cured without causing the buyer unreasonable expense and inconvenience because such a defect may not amount to a breach which may

⁸²⁶ KCC Arts. 575(1), 580(1), 581(1).

⁸²⁷ Yun-jik Kwak, *supra* n. 74, at 246; Hyung-bae Kim, *supra* n. 67, at 340 f.; Sang-yong Kim, *supra* n. 392, at 239; Joo-soo Kim, *supra* n. 125, at 214 f.; Seok-woo Kim, *supra* n. 135, at 194 f.

⁸²⁸ *Id.*

⁸²⁹ KCC Art. 572(2).

⁸³⁰ See *supra* n. 397-398 and accompanying texts.

⁸³¹ See *supra* n. 73-75, 90-91 and accompanying texts. Insofar as the seller is generally deemed to be in fault in the event of the shortage in quantity of the generic goods, there seems to be no particular difference between them. However, there may be some cases where the seller is not in fault, *e.g.*, an

prevent him from achieving the object of the contract.⁸³² In this way it is assumed that the seller has a right to cure before or even after the contractual delivery date insofar as it could be exercised without causing the buyer unreasonable expenses and inconvenience.⁸³³

As regards the situation where a part of the performance is not in accordance with the contract in terms of quality, there is no such express provision in KCC. It is, however, generally understood that the buyer may have a right of rescission as to such a part under the seller's guarantee liability if the goods can be quantitatively speaking separable and the object of the contract cannot be partially achieved.⁸³⁴ The buyer's right to rescind the contract in its entirety is not allowed as long as the object of the contract can be achieved as a whole even though there exists a partial defect.⁸³⁵ Similar rules apply to a shortage in quantity of the specific goods; a right of rescission in its entirety is conferred on the buyer only where he would not have entered into the contract had he known of the shortage at the time of contract. In the same manner, the buyer of generic goods may be restricted to partially rescinding the contract regarding the shortage by virtue of the rules of the general liability⁸³⁶ insofar as the shortage does not affect the buyer's achievement of the object of the contract as a whole. However, he may rescind the

embargo, war, and etc. See Eun-young Lee, *supra* n. 68, at 533.

⁸³² *Id.* See also Sang-kwang Lee, *supra* n. 167, at 304 f.; Dae-jeong Kim, *supra* n. 206, at 269 f.; Dong-seok Kim, "Boo-jeok-hap-mool-in-do-ae-dae-han Mae-soo-in-eoi Koo-jae (The Buyer's Remedies for Non-conforming Delivery)", (1988) 177 *Wol-kan-ko-shi* 61, at 65 f.; Dae-jeong Kim, *supra* n. 595, at 302; Eun-young Lee, *supra* n. 68, at 794; Choon-soo Ahn, *supra* n. 148, at 434.

⁸³³ Hyung-bae Kim, *supra* n. 67, at 340 f.; Sang-kwang Lee, *supra* n. 167, at 304 f.; Choon-soo Ahn, *supra* n. 148, at 434. Cf. For the view that the buyer has a right to enforce the seller to cure the defect, but no right of rescission until the seller fails to cure, see Dae-jeong Kim, *supra* n. 206, at 269 f.; Dae-jeong Kim, *supra* n. 595, at 302; Dong-seok Kim, *supra* n. 832, at 65 f.; Eun-young Lee, *supra* n. 68, at 533, 800 f.

⁸³⁴ Yun-jik Kwak, *supra* n. 74, at 246; Sang-yong Kim, *supra* n. 392, at 239; Joo-soo Kim, *supra* n. 125, at 215; Seok-woo Kim, *supra* n. 135, at 195; Dong-seok Kim, *supra* n. 832, at 66.

⁸³⁵ *Id.*

⁸³⁶ Again, the matter of the shortage in the sale of generic goods is not dealt with in the seller's guarantee liability. See *supra* n. 397-398 and accompanying texts.

contract in its entirety only if it prevents him achieving the object of the contract as a whole.⁸³⁷ The above rules as to a partial default are deemed to extend to a single instalment so that the buyer's right of rescission as to the entire instalment may be governed by those rules in the event of a partial default in the relevant instalment.

Although the matter of an instalment contract which provides for delivery in instalments is not clearly stated in Korean law, it is submitted that he is generally given a right of rescission as to the particular defective instalment insofar as the preconditions for the right of rescission examined above are satisfied.⁸³⁸ However, if any defective instalment prevents the buyer achieving the object of the contract as a whole, he may be entitled to rescind the contract in its entirety including past and future instalments.⁸³⁹ In addition, he may rescind the contract as to future instalments only where the breach in relation to the instalment clearly shows that such a defect will continue in respect to future deliveries.⁸⁴⁰

3.2.1.2. English law

As examined before in the right of suspension,⁸⁴¹ the right of termination in English law is rather complicated and uncertain because of its relationship with the right of rejection.⁸⁴²

⁸³⁷ See *supra* n. 73-75, 90-91 and accompanying texts.

⁸³⁸ Cf. Yun-jik Kwak, *supra* n. 74, at 281; Hyung-bae Kim, *supra* n. 67, at 353 f.

⁸³⁹ *Id.*

⁸⁴⁰ *Id.*

⁸⁴¹ See *supra* n. 782-788 and accompanying texts.

⁸⁴² The SGA does not seem to clearly define the relationship between rejection and termination and although the SGA s. 11(3) expressly stipulates that the breach of a condition may entitle the buyer to treat the contract as repudiated, the meaning of 'may' is controversial in a sense that it does not define the time when the buyer is entitled to terminate the contract. Cf. Reynolds, Guest (ed.), *supra* n. 515, at para. 10-028; Bridge, *supra* n. 784, at 162 f.; Bradgate and White, *supra* n. 782, at 69; Bradgate, *supra* n. 558, at 247; Jafarzadeh, *supra* n. 782, at 36 f. Case law as to this matter is also disputable. See Bradgate and White, *supra* n. 782, at 69 f; Jafarzadeh, *supra* n. 782, at 37 (for the judicial dicta where a breach of condition immediately confers the right of termination, see *Photo Production Ltd. v. Securicor Ltd.* [1980] AC 827, 849, *per* Lord Diplock; *Bunge Corpn. v. Tradax Export S. A.* [1981] 1 WLR 711, 724 f., *per* Lord Roskill; *The Naxos* [1989] 2 Lloyd's Rep 462, 478, *per* Butler Sloss L.J.)

According to the view that does not recognise the separate right of rejection, any breach of the statutory implied condition provided in ss. 13-15 may confer on the buyer the immediate right of termination, even if the consequences of the breach are not serious.⁸⁴³ However, the absolute right of termination is excluded in non-consumer cases where the breach is so slight that rejection would be unreasonable.⁸⁴⁴ The test of reasonableness is an objective one so that the buyer's motives for rejection are not intended to be regarded as relevant.⁸⁴⁵

In contrast, seeing that there are two separate remedies, there are two different opinions as to the immediate right of termination. This question is in turn connected with the seller's right to cure. On the one hand, it is argued that all cases of non-conforming delivery with a condition would render the seller in a breach of condition and confer a right of termination on the buyer immediately after he lawfully rejects the goods where the contract is non-severable.⁸⁴⁶ According to this view, the seller has no right to cure non-compliance with any condition regardless of whether the time for delivery has expired because it is always tantamount to a repudiation of the contract.⁸⁴⁷ On the other hand, some contend that as long as the time for delivery has not expired, non-conforming delivery of goods would not necessarily place the seller in a breach of condition so that the buyer would not be conferred an immediate right of termination because their understanding is based on the idea that the seller's duty is to deliver in

⁸⁴³ The SGA 15A(1)(a).

⁸⁴⁴ The SGA 15A(1)(b). The burden of proof is on the seller (the SGA s. 15A(3)).

⁸⁴⁵ Law Commission 160, *supra* n. 516, at para. 4.19, 4.21, n. 23.

⁸⁴⁶ Bradgate and White, *supra* n. 782, at 75 f.; Bradgate, *supra* n. 558, at 247 f.; Bridge, *supra* n. 784, at 162 f. and 197 ff.; Carter, *supra* n. 716, at paras. 308, 407, 569, 572; Atiyah and Adams, *supra* n. 421, at 445 f.; Reynolds, Guest (ed.), *supra* n. 515, at para. 10-027; Guest and Harris, Beale (ed.), *Chitty on Contracts*, (1999), at para. 43-042; Treitel, *supra* n. 421, at 259 ff., 361 ff. The use of 'may' in s. 11(3) is significant in that it is applicable to the cases where the contract is severable. See Reynolds, Guest (ed.), *supra* n. 515, at para. 10-028; Bradgate and White, *supra* n. 782, at 69; Bradgate, *supra* n. 558, at 247.

⁸⁴⁷ However, the seller may be entitled to the right to cure where a buyer elects to reject without terminating, and the right may be so available on the basis of the rules of mitigation of damages where a buyer lawfully terminates the contract and then seeks damages (*e.g.*, *Payzu Ltd. v. Saunders* [1919] 2 KB 581). See Bradgate and White, *supra* n. 782, at 76; Bradgate, *supra* n. 558, at 248.

compliance with condition within the contractual due time.⁸⁴⁸ Therefore, the seller is entitled to cure a non-conforming delivery until the expiry of the contractual time for delivery where the buyer lawfully rejects⁸⁴⁹ and the buyer will be allowed to terminate the contract in certain circumstances. First, the time for delivery which is of the essence of the contract has elapsed. Second, a reasonable additional time for the seller's conforming delivery set by the buyer has passed after the contractual time for delivery of which is not initially deemed of the essence of the contract.⁸⁵⁰ Third, a frustrating time has passed after the contractual time for delivery of which is not deemed of the essence of the contract.⁸⁵¹ Fourth, the seller's conduct is tantamount to a repudiation; *e.g.*, insisting on his first non-conforming delivery, refusing to cure, attempting to cure in a way that indicates his unwillingness or inability to perform his contract or in a way that destroys the buyer's confidence.⁸⁵² However, one must note that, no matter what one's interpretation as to the immediate right of termination is, the buyer's right of rejection and termination is not available in non-consumer cases where the breach is so slight that rejection

⁸⁴⁸ Goode, *supra* n. 729, at 362 f.; Beale, *supra* n. 25, at 90 ff.; Lord Devlin, "Treatment of Breach of Contract", (1966) *C.L.J.* 192, at 194; Apps, "The Right to Cure Defective Performance", (1994) *L.M.C.L.Q.* 525, at 534 ff.

⁸⁴⁹ For the cases submitted with the seller's right to cure, see *e.g.*, *Tetley v. Shand* [1871] 25 LT 658; *Borrowman Phillips & Co. v. Free & Hollis* [1878] 4 QBD 500; *Ashmore & Son v. C. S. Cox & Co.* [1899] 1 QB 436; *H. Longbottom & Co. Ltd. v. Bass Walker & Co. Ltd.* [1922] WN 245; *E. E. & Brian Smith (1928) Ltd. v. Wheatsheaf Mills Ltd* [1939] 2 KB 302; *McDougall v. Aeromarine of Emsworth Ltd.* [1958] 3 All ER 431; *Agricultores Federados Argentinos Sociedad Cooperativa Limitada v. Ampro S. A, Commerciale Industrielle et Financier* [1965] 2 Lloyd's Rep 157; *The Playa Larga* [1983] 2 Lloyd's Rep 171; *Wanganyi Motors (1963) Ltd. v. Broadlands Finance Ltd.* [1988] 2 NZBLC 103; *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391; *The Niizura* [1996] 2 Lloyd's Rep 66. Cf. For the arguments the above cases cannot be used as supporting the seller's right to cure in general, see Bradgate and White, *supra* n. 782, at 71 ff.; Bridge, *supra* n. 784, at 199 f.

⁸⁵⁰ *Raineri v. Miles* [1981] AC 1050; *Hartley v. Hymans* [1920] 3 KB 475, at 495, *per* McCardie J. For more detail about the notice procedure to set an additional time which makes time essential, see Carter, *supra* n. 716, at paras. 554 ff.

⁸⁵¹ *Universal Cargo Carriers Corp. v. Citati* [1957] 2 QB 401.

⁸⁵² Goode, *supra* n. 729, at 365 f.; Beale, *supra* n. 25, at 91 f.; Lord Devlin, *supra* n. 848, at 203.

would be unreasonable.⁸⁵³

As to the matter of discrepancy in quantity, the buyer may be given a right to reject all the goods delivered in the event of either deficient or excess quantity delivered.⁸⁵⁴ In the latter case, the buyer is at his option entitled to accept only the contractual quantity and reject the rest instead of rejecting the whole.⁸⁵⁵ However, the non-consumer buyer cannot exercise his right to reject the whole of the goods delivered where the shortfall or excess is so slight that it would be unreasonable to reject the whole.⁸⁵⁶ What is uncertain in this matter is whether the seller's contractual duty is treated as a condition breach of which entitles the buyer not only to reject the goods but also to terminate the contract. This is due to the fact that unlike any implied terms as to quality the duty to deliver the correct quantity is not expressly classified as a condition in the SGA. It is argued that the buyer's entitlement to reject the whole of the goods delivered in s. 30 means in substance that the seller's delivery of the wrong quantity is deemed a breach of condition.⁸⁵⁷ In contrast, some scholars contend that as long as it is not classified as a condition in the SGA, s. 11(3) cannot come into play so that the seller's delivery of the wrong quantity does not immediately allow the buyer to terminate the contract.⁸⁵⁸

As regards the matter of a partial defect in quality of the goods delivered, *i.e.*, where only some of the goods are affected by the breach, the buyer is empowered at his option (not his duty) to reject all of the goods, reject all of the goods affected by the breach and keep the rest, or reject some of the defective goods and keep the rest, including all those unaffected by the breach.⁸⁵⁹ However, this is subject to two rules; first, the overriding rule that a non-consumer buyer is not entitled to reject the goods if the breach is so slight that rejection would be

⁸⁵³ The SGA 15A(1).

⁸⁵⁴ The SGA s. 30(1), (2).

⁸⁵⁵ The SGA s. 30(2).

⁸⁵⁶ The SGA s. 30(2A). The burden of proof is on the seller (the SGA s. 30(2B)).

⁸⁵⁷ Atiyah and Adams, *supra* n. 421, at 109 f.; Beale, *supra* n. 25, at 36; Treitel, *supra* n. 421, at 364.

⁸⁵⁸ Bradgate and White, *supra* n. 782, at 75; Bridge, *supra* n. 784, at 199.

⁸⁵⁹ The SGA s. 35A(1). See Bradgate, *supra* n. 558, at 255.

unreasonable,⁸⁶⁰ and second, the rule that the goods accepted by the buyer should not form part of a commercial unit.⁸⁶¹ The right to reject some goods and accept others would extend to a particular instalment under a severable contract.⁸⁶²

Having already explained the rules where the contract is non-severable,⁸⁶³ it may be argued that they could extend to a single instalment under a severable contract,⁸⁶⁴ even though it is not clearly stated in the SGA.⁸⁶⁵ That is, the general principles applicable to non-severable contracts are extended to each instalment, and consequently, each non-conforming instalment in quantity or quality may empower the buyer to reject that particular instalment (subject to ss. 15A, 30(2A)).⁸⁶⁶ However, it must be noted that the buyer, if able to reject a particular instalment, is not necessarily empowered to terminate the contract as a whole. It is dependent upon whether the breach amounts to a repudiation of the whole contract.⁸⁶⁷ It may do so where the breach is 'so serious as to go to the root of the contract'.⁸⁶⁸ The criteria to test the seriousness of a breach are as follows; first, the quantitative ratio which the breach bears to the

⁸⁶⁰ The SGA s. 15A.

⁸⁶¹ The SGA s. 35(7). A 'commercial unit' is defined as 'a unit division of which would materially impair the value of the goods or the character of the unit'. *Id.*

⁸⁶² The SGA s. 35A(2).

⁸⁶³ A distinction between severable and non-severable contracts in English law is based on ss. 11(4), 31(2).

⁸⁶⁴ A severable contract is defined in s. 31(2) as a contract providing for 'the sale of goods to be delivered by stated instalments, which are to be separately paid for'. Cf. For the cases applying more flexible rules to hold severability of a contract, see *e.g.*, *Jackson v. Rotax* [1910] 2 KB 937 (a contract providing for delivery of the contract goods as required by the buyer); *Regent OHG v. Francesco of Jermyn Street* [1981] 3 All ER 327 (a contract providing for delivery of the contract goods in instalments to be determined by the seller); *H. Longbottom & Co. Ltd. v. Bass Walker & Co. Ltd.* [1922] WN 245 (a contract providing for delivery in instalments to be paid for by monthly account).

⁸⁶⁵ Bridge, *supra* n. 784, at 185 f.; Bridge, *supra* n. 434, at 21 ff.; Treitel, *supra* n. 421, at 376, 378; Atiyah and Adams, *supra* n. 421, at 454; Guest, Guest (ed.), *supra* n. 515, at para. 8-080.

⁸⁶⁶ As regards the buyer's right of partial termination in respect of a particular instalment, it may depend upon all the discussions above about the existence of separate remedies of rejection and termination and the relationship with the right to cure.

⁸⁶⁷ The SGA s. 31(2).

⁸⁶⁸ *Warinco AG v. Samor SPA* [1977] 2 Lloyd's Rep 582, 588, *per* Donaldson J.

whole contract, second, the probability that the breach will be repeated.⁸⁶⁹ Yet, it is uncertain whether the buyer is also allowed to reject goods delivered in previous instalments and already accepted. It is submitted that the language of s. 31(2) suggests that it is concerned with the subsequent instalments so that the buyer can refuse to perform outstanding obligation and his fulfilment of duties to accept previous conforming instalments cannot be undone.⁸⁷⁰ In contrast, it is argued that if the previous instalments accepted form part of an individual whole, the buyer will be allowed to reject them.⁸⁷¹

3.2.1.3. The Directive

Regarding the relevant rules for the seriousness of breach, the buyer's right of rescission in the Directive is not dependent upon whether non-conformity amounts to a certain degree of seriousness, although the right is excluded where it is minor.⁸⁷² However, it is wrong to say that the consumer has an absolute right to rescind the contract unless a lack of conformity is minor because, as will be examined below, his right of rescission is a secondary remedy which is subject to his primary remedies of repair and replacement.⁸⁷³ That is, the right of rescission is available only in two cases; where both repair and replacement are unavailable or where the seller has failed to provide those remedies 'within a reasonable time' or 'without significant inconvenience to the consumer'.⁸⁷⁴

It appears that its unique two-tier remedy scheme as described above explains how the Directive deals with the situation where there is a curable non-conformity and its relationship with a right of rescission. That is, the consumer cannot rescind the contract where there is a

⁸⁶⁹ *Maple Flock Co Ltd. v. Universal Furniture Products (Wembley) Ltd.* [1934] 1 KB 148, 157, *per* Lord Heward. See also *Robert A Munro & Co Ltd. v. Meyer* [1930] 2 KB 312; *Regent OHG v. Francesco of Jermyn Street* [1981] 3 All ER 327.

⁸⁷⁰ Atiyah and Adams, *supra* n. 421, at 455; Reynolds, Guest (ed.), *supra* n. 515, at para. 12-070.

⁸⁷¹ Guest, Guest (ed.), *supra* n. 515, at para. 8-078.

⁸⁷² Directive(99/44) Art. 3.6.

⁸⁷³ Directive(99/44) Arts. 3.3. and 3.5.

⁸⁷⁴ Directive(99/44) Art. 3.5.

curable non-conformity insofar as either repair or replacement is available and the non-conformity has been cured within a reasonable time and without causing him significant inconvenience. The availability of repair or replacement is decided on the grounds of either impossibility or disproportionality.⁸⁷⁵ The question arises here whether the seller has a general right to cure in the Directive. Even though it is not specifically provided for, it seems to grant in effect the seller a right to cure because the fact that the consumer is in the first instance forced to rely on the remedies of repair and replacement means to make a room in substance for the right to cure.⁸⁷⁶ One must, however, note that although it is interpreted that the seller has a right to cure, the choice between repair and replacement is placed not on the seller but on the buyer.⁸⁷⁷ Although there is also no specific provision as to whether a cure can be made before or after the contractual delivery date, it is presumed that the seller may cure any non-conformity before and even after the date provided that it is available and it can be done without unreasonable delay and inconvenience.⁸⁷⁸

The Directive does not deal with the matter of partial non-conformity and instalment contracts, which is left to domestic laws.

3.2.1.4. CISG

The rule in CISG for the seriousness of breach required for the buyer's right of avoidance is whether the breach is a fundamental one.⁸⁷⁹ A fundamental breach of contract is defined as one

⁸⁷⁵ *E.g.*, suppose the consumer purchases a second hand car which is found a major defect. Both repair and replacement are not available where it is very expensive to repair in comparison with the value of the car, and it is also impossible for the dealer to get a similar replacement car which could be offered as a replacement. See Bradgate and Twigg-Flesner, *supra* n. 425.

⁸⁷⁶ Cf. Williams & Hamilton, "The Impact in the U.K. of the E.U. Directive on the Sale of Consumer Goods and Associated Guarantees: Part 2", (2001) 12(1) *I.C.C.L.R.* 32, at 32 f.

⁸⁷⁷ Cf. *Infra* n. 1243-1250 and accompanying texts.

⁸⁷⁸ One must note that time rules are not governed by the Directive so that there may be cases where the seller has no right to cure after the contractual delivery date (*e.g.*, where the time for conforming delivery is the essence of the contract in English law).

⁸⁷⁹ CISG Art. 49(1).

which substantially deprives the injured party of the benefit for which he bargained under the contract unless the defaulting party did not foresee the breach and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.⁸⁸⁰ In order to ascertain whether there is a fundamental breach, the following questions are to be asked. First, did the aggrieved party suffer a detriment which is such ‘as substantially to deprive him of what he is entitled to expect under the contract’? In this question the decisive factor is the importance of the interest which is actually created for the promisee by the contract and its individual duties.⁸⁸¹ That is, it is whether the risk of a particular non-conformity was considered so serious by the parties that the materialisation of the risk would jeopardise the buyer’s interest in the performance of the contract regarding the goods.⁸⁸² One must note that the interest is estimated on the basis of the objective test so that any personal estimate made by the aggrieved party (*i.e.*, what he actually expected from the contract) is not necessarily relevant, but a legitimate estimate (*i.e.*, what he is entitled to expect from the contract).⁸⁸³ Second, has impairment of a material interest on the part of the aggrieved party been foreseeable by the defaulting party or a reasonable person of the same kind in the same circumstances? This is a subjective (foreseeability of the defaulting party himself) and an objective test (foreseeability of a reasonable person) which must be cumulatively assessed.⁸⁸⁴ Due to the failure in art. 25 to specify the relevant point in time at which the foreseeability standard is to be applied,⁸⁸⁵ it has

⁸⁸⁰ CISG Art. 25. This concept of ‘fundamental breach’ regarding the right of avoidance is also referred to in arts. 51(2), 64(1)(a), 72(1), 73. Cf. Arts. 70, 46.

⁸⁸¹ Schlechtriem, Schlechtriem (ed.), *supra* n. 218, at 177 f.

⁸⁸² Schlechtriem, *supra* n. 748, at 23.

⁸⁸³ *O.R.*, at 330. Cf. Enderlein and Maskow, *supra* n. 288, at 112 f.

⁸⁸⁴ For more detail, see Will, Bianca/Bonell (ed.), *supra* n. 221, at 216 ff. See also Schlechtriem, Schlechtriem (ed.), *supra* n. 218, at 179 f.; Bianca, Bianca/Bonell (ed.), *supra* n. 221, at 270. For the controversial issue on burden of proof, see Kritzer, *supra* n. 725, at 210 f.; Schlechtriem, Schlechtriem (ed.), *supra* n. 218, at 181 f.

⁸⁸⁵ The Secretariat Commentary on the 1978 Draft notes in this matter that “in case of dispute, that decision must be made by the tribunal”. Secretariat’s Commentary, *O.R.*, at 26. Cf. UNCITRAL Yearbook VIII, A/CN.9/SER.A/1977, (1978), at 31, para. 90 (the legislative history of the treatment of

been a matter of controversy amongst scholars. Some advocate that it should be the time when the contract was concluded.⁸⁸⁶ This is based on the fact that the parties determine what their fundamental interests are at the time of concluding the contract also fixes the conclusion of the contract as the relevant time for foreseeability.⁸⁸⁷ In contrast, others argue that it is not necessary to ignore post-formation developments.⁸⁸⁸ According to this view, it should be measured at the time of a wilful breach, but it must be limited to the cases where subsequent information could affect performance; where a material impairment was unavoidable by the time it became foreseeable to the defaulting party, it should not be fundamental.⁸⁸⁹

Regarding the situation where there is a curable non-conformity and its relationship with a right of avoidance, CISG expressly gives the seller the liberty to cure both before and after the contractual delivery date; the seller may cure any defect up to the delivery date insofar as the cure does not cause the buyer unreasonable inconvenience or expense,⁸⁹⁰ and also he may do so even after the delivery date whether delivery was early, timely or late only if the cure is

point in time in the 1978 Draft indicates that the Committee decided not to specify the point); *O.R.*, at 302 (A proposal at the Vienna Conference to specify the relevant point being ‘at the time when the contract was concluded’ was rejected and it was left to the adjudicating body). For more detail on this issue in light of legislative history, see Speidel, Book Review (on Honnold’s Uniform Law for International Sales under the 1980 United Nations Convention (1982)), (1983) 5 *Nw. J. Int. Law & Bus.* 432, at 442 ff.

⁸⁸⁶ Schlechtriem, Schlechtriem (ed.), *supra* n. 218, at 180 f.; Ziegel, “The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives”, in: Galston/Smit (ed.), *International Sales*, (1984), at 9-19 f. Other scholars with this view are cited in Will, Bianca/Bonell (ed.), *supra* n. 221, at 221.

⁸⁸⁷ Cf. See the statements of Feltham at the Vienna Conference, *O.R.*, at 302.

⁸⁸⁸ Honnold, *supra* n. 218, at 209; Flechtner, “Remedies under the New International Sales Convention: the Perspective from Article 2 of the U.C.C.”, (1988) 8 *J.L.&Com.* 53, at 75 ff.; Ghestin, “The Obligations of the Seller according to the Vienna Sale Convention of the 11th April 1980, on Contracts for the International Sale of Goods”, (1988) No.1 *Int’l Bus.L J.* 5, at 22. For the scholars who seem to reach the same result in a way that basically maintains the time of contract, but admit some exceptions in the cases where the defaulting party could still adapt itself to the subsequent information, see Enderlein and Maskow, *supra* n. 288, at 116; Will, Bianca/Bonell (ed.), *supra* n. 221, at 221.

⁸⁸⁹ Honnold, *supra* n. 218, at 209; Flechtner, *supra* n. 888, at 75 ff.

⁸⁹⁰ CISG Art. 37.

proceeded without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of the buyer's expenses.⁸⁹¹ Having said the seller's specific rights to cure, there is no consensus amongst scholars regarding its relationship with the buyer's right of avoidance;⁸⁹² in particular, the approach to prevent the buyer terminating the contract where there is the capacity and willingness of the seller to remedy the defect without unreasonable delay and inconvenience for the buyer. The various approaches can be differentiated by their understanding as to how to interpret the concept of 'fundamental breach'; does it amount to a fundamental breach where the seller is ready and able to reasonably cure the defect? On the one hand, the prevailing view argues that the concept must be interpreted dynamically taking account of the seller's capacity and willingness to cure the defect without unreasonable delay and inconvenience for the buyer.⁸⁹³ Therefore, even if there is a serious defect, it does not automatically amount to a fundamental breach insofar as, following the buyer's notice of a defect, the seller actually cures the defect by virtue of arts. 37 and 48 or at least he is ready to do that.⁸⁹⁴ However, the position will be different if time is of

⁸⁹¹ CISG Art. 48(1).

⁸⁹² This is because there is no clarification on this matter by the provisions of CISG and its legislative history, and consequently it remains open to interpretation of scholars. See Will, Bianca/Bonell (ed.), *supra* n. 221, at 347 f. Cf. Nicholas, "The Vienna Convention on International Sales Law", (1989) 105 *L.Q.R.* 201, at 224; Babiak, "Defining 'Fundamental Breach' under the United Nations Convention on Contracts for the International Sale of Goods", (1992) 6 *Temple Int'l & Com.L.J.* 113, at 127.

⁸⁹³ Schlechtriem, *supra* n. 307, at 78; Schlechtriem, Schlechtriem (ed.), *supra* n. 218, at 183; Huber, Schlechtriem (ed.), *supra* n. 218, at 408 ff.; Ziegel, *supra* n. 886, at 9-23; Honnold, *supra* n. 218, at 319 ff.; Kritzer, *supra* n. 725, at 430 f.; Enderlein and Maskow, *supra* n. 288, at 114; Bridge, *supra* n. 434, at 94; Treitel, *supra* n. 421, at 373. Cf. OLG Koblenz, 2U31/96, 31-01-1997, reported in UNILEX 1997-4 (also seen at <http://cisgw3.law.pace.edu/cisg/wais/db/case2/970131g1.html> and <http://www.uncitral.org/en-index.htm> (COULT No.282); CA Grenoble, RG93/4879, 26-04-1995, reported in UNILEX D. 1995-15 (also seen at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950426f2.html> and <http://www.uncitral.org/en-index.htm> (CLOUT No.152)); Pr. Locarno-C., 6252, 27-04-1992, reported in UNILEX D. 1992-10 (also seen at <http://www.uncitral.org/en-index.htm> (CLOUT No.56)). Cf. Secretariat's Commentary, *O.R.*, at 41, art. 45 (1) (a), No. 6; UNCITRAL Yearbook IV, A/CN.9/SER.A/1973, (1974), at 54 f.; Honnold, *supra* n. 724, at 131 f.

⁸⁹⁴ Huber, Schlechtriem (ed.), *supra* n. 218, at 408.

the essence of the contract or if the defective delivery destroyed the basis of trust between the parties.⁸⁹⁵ According to this view, once it is deemed a fundamental breach by due consideration, the buyer's right of avoidance should prevail over the seller's right to cure.⁸⁹⁶ On the other hand, some contend that the concept of 'fundamental breach' is the one which should be decided immediately without considering the seller's offer to cure so that if it is objectively serious, it amounts to a fundamental breach which may entitle the buyer to avoid the contract.⁸⁹⁷ With regard to the consequences of this approach, in particular, the status of the seller's right to cure, one takes the view that the role of the seller's right to cure is to supersede the buyer's right of avoidance in a way that suspends the right of avoidance insofar as the seller has a legitimate right to cure.⁸⁹⁸ Another view is that the provisions of CISG should be interpreted in light of the good faith canon so that any hasty avoidance by the buyer must be prevented where the seller has announced an intention to cure because the approach taken may limit the seller's right to cure to cases involving minor defects and it may make it futile in practice.⁸⁹⁹

As to the partial discrepancy in terms of either quantity or quality, the buyer may be entitled to treat the missing or non-conforming part as the subject of a separate contract for remedy purposes so that he may avoid a part of the contract if the discrepancy relates to that part and if the breach is fundamental with respect to that part.⁹⁰⁰ In the case where the seller delivers only

⁸⁹⁵ Schlechtriem, *supra* n. 307, at 78; Huber, Schlechtriem (ed.), *supra* n. 218, at 408, 410.

⁸⁹⁶ See *supra* n. 893. See also Babiak, *supra* n. 892, at 127; Schneider, *supra* n. 748, at 84.

⁸⁹⁷ Will, Bianca/Bonell (ed.), *supra* n. 221, at 349 ff., 356 ff. More scholars with this view are cited in Huber, Schlechtriem (ed.), *supra* n. 218, at 409, n. 43. This view is generally based on the fact that when applying art. 46(2) some conceptual difficulties arise as a result of the dynamic interpretation of 'fundamental breach'. Will, *id.*, at 356 f.

⁸⁹⁸ *Id.*

⁸⁹⁹ Neumayer/Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises. Commentaire*, (1993), at art. 48, note 4, art. 49, note 4: cited in Huber, Schlechtriem (ed.), *supra* n. 218, at 409, n. 48a. See also Bridge, *supra* n. 434, at 94.

⁹⁰⁰ CISG Art. 51(1). This provision is assumed that the goods are capable of being delivered in parts, but such parts need not be instalments. See Bennett, Bianca/Bonell (ed.), *supra* n. 221, at 536; Huber, Schlechtriem (ed.), *supra* n. 218, at 445. Cf. If the seller delivers more than that provided for in the contract, the buyer's right to refuse to take delivery is basically restricted to the excess part, but if he

a part of the goods sold, the buyer may also avoid irrespective of fundamental breach a part of the contract on account of the missing part if the seller fails to deliver that part within an additional period of time of reasonable length fixed by the buyer.⁹⁰¹ The buyer's right to avoid the contract as a whole is conferred only provided that the discrepancy amounts to a fundamental breach of contract in its entirety.⁹⁰² Although there is no specific provision, it is deemed that the above rules as regards the partial discrepancy supplement the rules on instalment contracts provided that an instalment is itself incomplete or partially defective.⁹⁰³ Therefore, the buyer's right to avoid the contract regarding the entire instalment on account of its partial discrepancy is dependent upon the existence of a fundamental breach as a whole,⁹⁰⁴ which is to be applied by analogy in that respect.⁹⁰⁵

In the case of instalment contracts,⁹⁰⁶ the buyer may avoid the contract with respect to an instalment if the seller's failure to perform any of his obligations amounts to a fundamental breach as to the instalment.⁹⁰⁷ He may do so as regards future instalments provided that the

takes delivery of all or part of the excess, he must pay for it at the contract rate (art. 52(2)). In exceptional circumstances, the seller's excess delivery may constitute a fundamental breach which may entitle the buyer to terminate the contract as a whole; *e.g.*, in the contract for 1,000 bags of sugar the seller tenders a bill of lading for 1,200 bags which requires the buyer either to accept or to reject the bill of lading as a whole. See Secretariat's Commentary, *O.R.*, at 44, Art. 48, No. 9; Schlechtriem, *supra* n. 307, at 80; Honnold, *supra* n. 218, at 348; Will, Bianca/Bonell (ed.), *supra* n. 221, at 381; Enderlein and Maskow, *supra* n. 288, at 201. Cf. Huber, Schlechtriem (ed.), *supra* n. 218, at 452 f. (submitting a view that the right to reject the entire delivery does not initially depend on a fundamental breach but on whether the buyer is required to consent to the delivery of the excess quantity).

⁹⁰¹ CISG Arts. 47(1), 49(1)(b) and 51(1).

⁹⁰² CISG Art. 51(2). Cf. ICC (Paris), 8128, (1995), reported in UNILEX D. 1995-34 (also seen at <http://cisgw3.law.pace.edu/cases/958128i1.html>); ICC (Paris), 7660, 23-08-1994, reported in UNILEX D. 1994-20; LG Berlin, 52S247/94, 15-09-1995, reported in UNILEX D. 1991-7 (also seen at <http://cisgw3.law.pace.edu/cases/947660i1.html>).

⁹⁰³ Huber, Schlechtriem (ed.), *supra* n. 218, at 446.

⁹⁰⁴ CISG Art. 51(2).

⁹⁰⁵ Huber, Schlechtriem (ed.), *supra* n. 218, at 446.

⁹⁰⁶ An instalment contract requires at least two deliveries to be made in different time. *Id.*, at 544.

⁹⁰⁷ CISG Art. 73(1).

seller's failure in respect of any instalment gives him 'reasonable grounds to conclude that a fundamental breach will occur with respect to future instalments'.⁹⁰⁸ In addition, he is empowered to avoid the contract as to not only the defective, and of future, but also past conforming deliveries if later conforming deliveries cannot be used for the purpose contemplated by the parties at the time of contract by reason of their interdependence with the defective one.⁹⁰⁹

3.2.1.5. Comparative view

As discussed above, the aspects about the seriousness of a defect and its supplementary rules in each jurisdiction as a precondition to terminate the contract are significantly distinct from the others, even though some general similarities are found between Korean law and CISG. The following investigates in which aspects each jurisdiction departs from the others.

First, the right of termination in Korean law and CISG demands a certain degree of seriousness to justify the buyer's termination of the contract, whereas that in English law and the Directive does not. In English law, it is rather a strict one so that any breach of implied conditions may lead the buyer to reject the goods and terminate the contract,⁹¹⁰ even though the commercial buyer is not permitted to reject the goods if it is so slight that it would be unreasonable to reject them.⁹¹¹ The right of termination in the Directive is not so strict as English law in that it is a secondary remedy which is subject to the primary remedies of repair and replacement⁹¹² and

⁹⁰⁸ CISG Art. 73(2). Cf. LG Ellwangen, 1 kFH O 32/95, 21-08-1995, reported in UNILEX D. 1995-20 (also seen at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950821g2.html>); CA Grenoble, RG/3275, 22-02-1995, reported in UNILEX D. 1995-7 (also seen at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950222f1.html> and <http://www.uncitral.org/en-index.htm> (CLOUT No.56)).

⁹⁰⁹ CISG Art. 73(3).

⁹¹⁰ The *priori* classifications of these terms into conditions are no doubt based on the assumption that the effect of non-performance of some terms is likely to be more serious than non-performance of others. However, one must note that this does not look at the result of breach.

⁹¹¹ The SGA s. 15A(1).

⁹¹² Directive(99/44) Art. 3.5.

also relies on whether the lack of conformity is minor.⁹¹³

Second, in the case of Korean law and CISG which has the minimum requirement as to the degree of seriousness, the concepts used for the requirement and their definitions seem at first sight significantly different; in Korean law, the relevant question is whether the buyer can achieve the object of the contract in the event of a defect in quality and whether he would have entered into the contract had he known of a shortage in quantity,⁹¹⁴ whereas in CISG it is dependent upon the ‘fundamentality’ question which can be measured by two tests of, first, whether the buyer suffered a detriment which is substantially to deprive him of what he is entitled to expect under the contract, second, whether the substantial detriment has been known or foreseeable by the seller or a reasonable person of the same kind in the same circumstances.⁹¹⁵ However, the closer examination of the relevant factors seems to reveal that there is no significant difference in that the decisive factors in Korean law and the first test in CISG is focused on, at the end, the same question of what was the primary object or interest of the contract which must be estimated on the basis of the objective test.⁹¹⁶ The residual matter to be compared is whether the second test of knowledge or foreseeability under CISG makes some departure from Korean law. It may be understood that the test provides the seller with a possible pretext on the basis of non-foreseeability or knowledge which has no specific counterpart in Korean law.⁹¹⁷ In this light, it seems plausible to say that the specific provision for the pretext may make difference in terms of burden of proof, which is argued by the prevailing view that the burden of proof of non-foreseeability or knowledge should be born by the seller who wants to invoke an excuse.⁹¹⁸ Yet, it is doubted how much difference it would make in practice compared to Korean law because it may be understood that the foreseeability

⁹¹³ Directive(99/44) Art. 3.6.

⁹¹⁴ See *supra* n. 826-831 and accompanying texts.

⁹¹⁵ See *supra* n. 879-889 and accompanying texts.

⁹¹⁶ See *supra* n. 828-831, 881-883 and accompanying texts.

⁹¹⁷ Will, Bianca/Bonell (ed.), *supra* n. 221, at 215; Enderlein and Maskow, *supra* n. 288, at 115; *O.R.*, at 295 ff.; Bridge, *supra* n. 434, at 85 f.; Bernstein and Lookofsky, *supra* n. 563, at 88.

test is instead relevant for the first test; that is, the former test is deemed to have a supplementary function as an aid to interpret the parties' intention as to their obligations.⁹¹⁹ Therefore, it is arguable that it is still on the buyer who must, foremost, prove the seller's knowledge or a reasonable person's foreseeability which may be crucial for interpreting the contract.⁹²⁰ In this light, it is submitted that the foreseeability test seems to be secured fairly enough in Korean law, which may also take account of the seller's knowledge or a reasonable person's foreseeability in interpreting the contract. In addition, even if the burden of proof is on the seller so that the buyer does not need to prove it, it seems that in practice the lack of foreseeability would be quite unlikely, which may result that being not much difference to Korean law.⁹²¹ However, the argument as to the relevant time of the foreseeability test in CISG may yield a significant departure from Korean law insofar as it is judged the time of breach rather than the time of contract on which Korean law is based.⁹²²

Third, regarding the situation where there is a curable defect and its relationship with the right of termination, all the jurisdictions seem more or less similar in that the buyer may not be allowed to terminate the contract where there is the seller's willingness and capacity to cure within a reasonable time and without causing the buyer unreasonable inconvenience, even though the approach to prevent the seller from terminating the contract varies according to each jurisdiction and the interpretations in each jurisdiction.⁹²³ In this regard, it was found that they could all recognise the seller's right to cure before and even after the contractual delivery date either by interpretation or specific provisions which may prevent the buyer exercising the right

⁹¹⁸ Will, *id.*, at 216 f.; Honnold, *supra* n. 218, at 319 ff.; Babiak, *supra* n. 892, at 121 f.

⁹¹⁹ Schlechtriem, Schlechtriem (ed.), *supra* n. 218, at 178 f., 181 f. Cf. Bridge, *supra* n. 434, at 86.

⁹²⁰ Schlechtriem, *id.*

⁹²¹ Bridge, *supra* n. 434, at 86.

⁹²² See *supra* n. 828-829, 885-889 and accompanying texts.

⁹²³ That is, it is based on the good faith principle in Korean law, the recognition of two separate rights and no immediate right of termination in English law, the two-tier remedial scheme in the Directive, and the specific provision for the seller's general right to cure and its various interpretations regarding the relationship with 'fundamental breach' in CISG.

of termination.⁹²⁴ However, as far as English law is concerned, all these similarities can be easily denied if it accepts neither that there are two separate rights of rejection nor that the breach of condition does not raise an immediate right of termination.⁹²⁵

Fourth, with respect to the matter of a partial default, all the jurisdictions (except the Directive, depending on the domestic law concerned) similarly understand that the buyer may be able to terminate the contract as to the relevant part provided that a partial default satisfies the requirements for termination in relation to the part. However, there seems to be a significant departure as to the right of termination in its entirety; the buyer in English law may exercise it instead of a partial termination at his option (but subject to ss. 15A, 30(2A) in non-consumer cases), whereas Korean law and CISG has no such option and the right is possible only if a partial default meets the requirements for termination as a whole.

Fifth, in the instalments contract, the rights to termination as to a particular instalment, future instalments, or whole instalments including the previous deliveries seem to be similarly conferred on the buyer in Korean law, English law, and CISG if a breach satisfies the relevant preconditions for termination,⁹²⁶ although the position in English law as to termination of the previous instalments is not clear.⁹²⁷ However, it is submitted that the termination may be possible in English law if the previous deliveries accepted form part of an individual whole, which would lead the same result as Korean law and CISG in most cases.⁹²⁸

⁹²⁴ Note that the right to cure in the Directive is not a genuine one in that the seller has no choice between repair and replacement.

⁹²⁵ See *supra* n. 841-853 and accompanying texts.

⁹²⁶ The preconditions are similar in each law that termination as to a particular instalment depends on the rules as to non-severable contract, termination as to future instalments on the probability that the breach will be repeated, and termination as to whole instalments on the impossibility in achieving the object of the contract as a whole in light of their interdependence.

⁹²⁷ See *supra* n. 870-871 and accompanying texts.

⁹²⁸ See *supra* n. 871.

3.2.2. Evaluating accounts

3.2.2.1. Internal evaluation

As we saw above, there are considerable conflicts of interests between parties concerning the right of termination.⁹²⁹ The requirement of a certain degree of seriousness can be said to be the most important single principle used to discourage the buyer's opportunism so that the right of termination is available only if a breach amounts to a certain degree of seriousness.⁹³⁰ In this light, Korean law and CISG having such requirements as 'fundamentality' or 'achievability of the object of contract' are likely to prevent such opportunism in most cases, whereas it is unlikely in English law and the Directive, although it appears that the requirement of a non-slight/minor defect in non-consumer sales in English law and in the Directive becomes a little closer to Korean law and CISG.⁹³¹

The seller's right to cure could also serve as a means to prevent the buyer's opportunism where there is a curable defect and the seller's willingness and capacity to cure within a reasonable time and without causing the buyer unreasonable inconvenience even if it is sufficient to meet the requirement of a certain degree of seriousness. In this light, the approaches taken by some scholars in English law who argue that there are no separate rights of rejection and termination, or who persist in their belief that a breach of condition raises an immediate right of termination, can be easily an issue of criticism.

The position in English law concerning the buyer's option to terminate as a whole for any partial default in non-severable contract seems also to attract some criticism in that it could be used for the buyer's opportunistic behaviour to avoid the situation which would have revealed a

⁹²⁹ See *supra* n. 821-825 and accompanying texts.

⁹³⁰ Treitel, *supra* n. 421, at 350; Collins, *supra* n. 33, at 334 f.; Beale, *supra* n. 821, at 352 f.

⁹³¹ In addition, the two-tier remedial system in the Directive making the right of termination subject to the primary remedies of repair and replacement goes even further to become closer to Korean law and CISG. However, note that the requirement of a non slight/minor defect in English law and the Directive can be never equivalent to Korean law and CISG.

bad bargain had it been duly performed. That is, the buyer may take advantage of the situation simply by terminating the whole contract where a partial default has caused him some loss only as to the particular part but without any substantial harm as a whole, although the right is still subject to ss. 15A, 30(2A) in non-consumer sales.

However, the question arises whether all the above arguments could be correspondingly applicable to consumer sales. Given that some degree of vagueness in stating the requirement of seriousness (either by ‘fundamental breach’ or ‘achievability of the object of contract’) and the seller’s right to cure after the contractual delivery time⁹³² is unavoidable,⁹³³ the similar arguments raised above in the right of suspension could be applied here;⁹³⁴ the vagueness has produced undesirable uncertainty as to when the buyer is entitled to the right of termination, and the uncertainty has been often used against the consumer, but in favour of the seller who has a relatively stronger bargaining position.⁹³⁵ Assuming that the requirement of seriousness and the right to cure after the delivery time is hard to be designed in clear guidelines to determine when a breach confers a right of termination on the buyer and that the consumer’s opportunistic behaviour is rare in general, it seems crucial for most consumers to have the absolute right of termination.⁹³⁶

As regards a possible difference in the factors to decide the existence of a serious breach between Korean law and CISG, in particular, where the view in CISG that the relevant time for the foreseeability test should be the time of breach is accepted, the view could be problematic when one takes account of the buyer’s opportunism. The reason for that is that the buyer may be able to pave the way to escaping a bad bargain simply by subsequently sending information where a breach would not have rendered a fundamental breach in the absence of such

⁹³² Cf. Treitel, *supra* n. 421, at 374 f.; Bradgate, *supra* n. 466; Bradgate and Twigg-Flesner, *supra* n. 425.

⁹³³ Consequently, the vagueness may produce a lowering of the overall level of fulfilling an effective function of the right of termination to put pressure on the seller to perform the contract according to its terms because of the uncertainty of seriousness requirement.

⁹³⁴ See *supra* n. 808-810 and accompanying texts.

⁹³⁵ Law Commission 160, *supra* n. 516, at para. 4.12.

information.⁹³⁷ It may well interfere with the basis of the bargain between the parties which was made at the time of contract.⁹³⁸

3.2.2.2. External evaluation

The question of when it is efficient to terminate the contract in economic terms can be answered by the comparison of allocative costs between two possible remedies of termination and damages; if the allocative costs of termination⁹³⁹ is less than the cheaper allocative costs of damages between when the buyer keeps the goods with some adaptation and when he disposes the goods and purchases the substitute goods,⁹⁴⁰ the parties would likely agree to termination.⁹⁴¹ Thus, if the rules as to termination are to produce the same result, they may enhance efficiency, reducing the transaction costs. It is not for sure that the implementation of the distinction based on ‘fundamentality’ under CISG or ‘achievability of the object of contract’ under Korean law is directly related to minimisation of costs.⁹⁴² Nonetheless, it seems arguable that the approach taken by CISG and Korean law gives more room to reach the efficient result than a perfect tender rule taken by English law because the courts under the former approach may be given a considerable discretion compared to those under the latter approach and consequently, only at a guess, they may decide the cases in the most efficient way as producing the efficient supplementary rules.

Another concern of efficiency is the consequences of termination which may throw back onto the seller the risk of a decline in market price or the risk of the inappropriateness of product

⁹³⁶ *Id.*

⁹³⁷ Schlechtriem, Schlechtriem (ed.), *supra* n. 218, at 180 f.

⁹³⁸ Bridge, *supra* n. 434, at 86.

⁹³⁹ Allocative costs of termination generally include the cost of returning the goods to the seller, the cost to the seller of reselling the defective goods, the buyer’s cost of purchasing substitute goods, and *etc.*

⁹⁴⁰ Allocative costs of damages are the buyer’s costs of adaptation, or his costs of disposal and cover, and the administrative costs of determining the buyer’s loss.

⁹⁴¹ Priest, *supra* n. 31, at 963 f.

⁹⁴² Cf. *Id.*, at 974.

choice which was originally placed on the buyer at the time of contract.⁹⁴³ The consequences may let the buyer easily evade the point of minimising allocative costs if he is allowed to terminate the contract in any case of defects, whether a defect is substantial or just minor, whether a defect is curable and there is the seller's clear willingness and capacity to cure without causing the buyer unreasonable inconvenience and within a reasonable time, or whether termination is based on the subsequent information sent to the seller after concluding the contract. In this light, if the legal rules allow termination in any case of defects as giving more chance to the buyer behaving opportunistically, it may reduce the joint value of the contract and of future contracts of the same type.⁹⁴⁴ Therefore, it is submitted that the termination rules relying on the seriousness of breach, the seller's right to cure, and the foreseeability at the time of contract may serve as a filter to prevent the opportunism.

The other concern of efficiency is in minimising distributive costs which consist of transfers of resources between the parties; *e.g.*, the parties' expenditure to minimise their personal share of the joint costs.⁹⁴⁵ This concern is of relevance of certainty issue because as long as the rules are uncertain the parties may expend more resources in negotiation or litigation in an attempt to obtain what they desire.⁹⁴⁶ In this regard it seems true that remaining unavoidable vagueness in Korean law and CISG may significantly increase the distributive costs so that they are greater than the savings achieved by choosing the remedy which otherwise would minimise allocative costs. It seems arguable that the matter of distributive costs may be sorted out as time goes on because as the cases are accumulated the rules may become clearer with the assistance of modern communications.⁹⁴⁷

The residual matter is in the consumer's needs for a clear right of termination. Given that

⁹⁴³ Cf. *Id.*, at 966 f.; Beale, *supra* n. 25, at 99.

⁹⁴⁴ *Id.*, at 103.

⁹⁴⁵ Priest, *supra* n. 31, at 966 f.; Beale, *supra* n. 25, at 99. Cf. It is particularly related to the case where there is a declining market because the parties will fight to obtain the outcome they want in order to avoid the loss caused by the declining market.

⁹⁴⁶ *Id.*

there are no clear guidelines to clarify the test of seriousness, the absolute right of termination is likely to produce more efficient results in consumer sales. The reasons for this are, first, the consumer who is assumed risk-averse may prefer an absolute right of termination because they generally want goods of the proper quality at the full price, not defective goods at a lower price,⁹⁴⁸ and second, the test of seriousness in its open texture and its inevitable uncertainty may hinder low-cost, routinised redress procedures that are essential for the consumer who is often reluctant to proceed to courts due to their ignorance.⁹⁴⁹

3.3. The option to terminate

Where the requirements for termination explained above are met, the buyer does not have to exercise this right, but it is entirely dependent upon his choice whether he wants to put an end to the contract or to keep the contract and claim damages or specific performance.⁹⁵⁰ That is, the seller's non-conforming delivery does not automatically terminate the contract. The option to terminate the contract is the same in all the jurisdictions.⁹⁵¹ When he exercises his option of termination, all the systems require the buyer to declare his intention by unequivocal words or conduct (except the Directive which leaves the issue to national laws) which does not need to be in a particular form or by a specific means of transmission.⁹⁵²

⁹⁴⁷ *Id.*, at 101.

⁹⁴⁸ Cf. Law Commission 160, *supra* n. 516, at para. 4.5.

⁹⁴⁹ Cf. See *supra* n. 52-55 and accompanying texts.

⁹⁵⁰ For the purpose of granting the buyer the choice, see Treitel, *supra* n. 421, at 381; Collins, *supra* n. 33, at 381.

⁹⁵¹ Treitel, *The Law of Contract*, (1999), at 783 f.; Treitel, *supra* n. 421, at 381; Carter, *supra* n. 716, at paras. 745, 1001; The SGA s. 11(3) (... may give rise to a right to treat the contract as repudiated.); CISG Art. 49(1) (...may declare the contract avoided...); Directive(99/44) Art. 3.5. (...may...have the contract rescinded:...); Hyung-bae Kim, *supra* n. 67, at 223; Yun-jik Kwak, *supra* n. 74, at 162 f. Cf. ULIS Arts. 25, 26, and 30 for an example of *ipso facto* termination.

⁹⁵² CISG Art. 26; Secretariat's Commentary, *O.R.*, at 27, art. 24, No. 4; Huber, Schlechtriem (ed.), *supra* n. 218, at 425; Hyung-bae Kim, *supra* n. 67, at 223 f.; Yun-jik Kwak, *supra* n. 74, at 163; Carter, *supra* n. 716, at para. 1015 f.; Treitel, *supra* n. 951, at 787 f.; McKendrick, *Contract Law*, (2000), at 386 f.; *Vitol SA v. Norelf Ltd* [1996] AC 800.

3.4. Loss of the right of termination

3.4.1. Comparative accounts

3.4.1.1. Korean law

Where the seller's delivery of defective goods satisfies the requirements for termination discussed above, the question arises whether the buyer can exercise the option to terminate the contract even after lapse of a reasonable time. Such lapse of a reasonable time does not in principle deprive the buyer of his right of rescission. However, in the case where the buyer alleges the existence of a defect, the seller is entitled to set a period within which the right of rescission must be claimed; if it is not claimed within such a period, the buyer may lose his right.⁹⁵³ In addition, delay in rescission may also result in loss of the right of rescission because to assert the right after lapse of a considerable period would be contrary to the principle of good faith.⁹⁵⁴ Furthermore, the buyer may be excluded from exercising the right of termination where restoration of the goods becomes impossible in substantially the condition in which he received them, which is ascribed to the buyer's own fault or wilful conduct, or where the buyer has converted the goods into another object by processing or alternating them.⁹⁵⁵

3.4.1.2. English law

In English law, the buyer may lose his right to reject and terminate in the following cases of affirmation of contract.⁹⁵⁶ The first case is where he intimates to the seller that he has accepted

⁹⁵³ KCC Art. 552.

⁹⁵⁴ Yun-jik Kwak, *supra* n. 74, at 183; Hyung-bae Kim, *supra* n. 67, at 216, 249; Jeung-han Kim, *supra* n. 135, at 86.

⁹⁵⁵ KCC Art. 553.

⁹⁵⁶ The SGA s. 11(4).

the goods.⁹⁵⁷ This case includes not only cases of express intimation but also those where it may be inferred from the buyer's conduct as long as it is clear.⁹⁵⁸ The second case is where his act after the seller's delivery is inconsistent with the seller's ownership.⁹⁵⁹ It is applied to the cases where the physical return of the goods is impossible as a result of the buyer's conduct; *e.g.*, selling, any other dispositions, consumption or use of the goods more than necessary to check their conformity with the contract.⁹⁶⁰ However, the above two cases of the intimation of acceptance and inconsistent act with the seller's ownership cannot amount to acceptance unless he has first had a reasonable opportunity to examine the goods.⁹⁶¹ The third case is where after a reasonable period he retains the goods without indicating that he rejects them.⁹⁶² Reasonableness of a period will be a question of fact depending upon the circumstances of the individual case;⁹⁶³ the factors to be considered are, for instance, the nature of the goods, the conduct of the parties, the custom of the particular trade, market conditions, and whether the buyer has been given a reasonable time to examine the goods.⁹⁶⁴ One must note that, unlike the first two cases, the fact that the buyer has not had a reasonable opportunity to examine does not necessarily prevent the buyer being deemed to have accepted the goods because it is taken into account only as a relevant factor.

⁹⁵⁷ The SGA s. 35(1)(a).

⁹⁵⁸ *Varley v. Whipp* [1900] 1 QB 513; Law Commission WP 85, *Sale and Supply of Goods*, (1983), para. 2.53.

⁹⁵⁹ The SGA s. 35(1)(b).

⁹⁶⁰ Bradgate, *supra* n. 558, at 251; Reynolds, Guest (ed.), *supra* n. 515, at 580 f. However, the buyer is not deemed to have accepted the goods 'merely because he asks for, or agrees to, their repair by or under an arrangement with the seller, or the goods are delivered to another under a sub-sale or other disposition'. The SGA s. 35(6). Cf. *Supra* n. 706-708 and accompanying texts.

⁹⁶¹ The SGA s. 35(2).

⁹⁶² The SGA s. 35(4).

⁹⁶³ The SGA s. 59.

⁹⁶⁴ The SGA s. 35(5). Cf. Bradgate, *supra* n. 558, at 252 f.; Law Commission WP 85, *supra* n. 958, at para. 2.57; Law Commission 160, *supra* n. 516, at para. 5.19; Goode, *supra* n. 729, at 376 f.; Bridge, *supra* n. 784, at 176 f.; Reynolds, Guest (ed.), *supra* n. 515, at para. 12-055. See also *supra* n. 726-729 and accompanying texts.

3.4.1.3. The Directive

The Directive does not appear to deal with the matter of loss of the right of termination. However, one must note that it has a two-year time limit during which consumers can exercise their rights including rescission for any defect which exists at the time of delivery.⁹⁶⁵ Apart from that, it seems to be mostly left to domestic laws.

3.4.1.4. CISG

Similarly to English law, CISG stipulates that the buyer may lose the right of avoidance where he fails to give notice to the seller of his avoidance within a reasonable time.⁹⁶⁶ When measuring a reasonable time, the factors to be taken into account are, for instance, a certain period within which to consider and investigate the position and to obtain legal advice, the nature of the goods, fluctuations in price, and (as the case may be) the possibility of cure by the seller in accordance with arts. 37 and 48(1).⁹⁶⁷ In addition, the buyer may lose his right of termination where restitution of the goods in substantially the condition in which he received them becomes impossible;⁹⁶⁸ he may lose the right by consuming, altering, or reselling the goods. The exceptions to this loss are as follows; first, where the buyer's inability is due to his examination of the goods,⁹⁶⁹ second, where the goods have been resold, altered or consumed by the buyer in the normal course of business or use before he discovered or ought to have

⁹⁶⁵ Directive(99/44) Art. 5.1.

⁹⁶⁶ CISG Art. 49(2). In the event of the seller's delivery of defective goods, the reasonable time begins to run from the moment when the buyer knew or ought to have known of the breach (art. 49(2)(b)(i)), but if he has given a notice under art. 47(1) requiring the seller to perform within a reasonable time, it begins to run from the expiration of that time or from the seller's declaration of refusal to perform his duty within such time (art. 49(2)(b)(ii)). Where the seller offers to cure the defect within a specific period in accordance with art. 48(2), it starts to run from the expiration of the period or from the buyer's declaration of refusal of the offer (art. 49(2)(b)(iii)).

⁹⁶⁷ Huber, Schlechtriem (ed.), *supra* n. 218, at 430 f.

⁹⁶⁸ CISG Art. 82(1).

⁹⁶⁹ CISG Art. 82(2)(b).

discovered their non-conformity,⁹⁷⁰ and third, where it is not due to the buyer's act or omission that he cannot make restitution in accordance with art. 82(1).⁹⁷¹

3.4.1.5. Comparative view

Despite the difference in language used of the provisions and no counterpart of the seller's right to give a period set for termination in English law and CISG,⁹⁷² it seems that the circumstances in which buyer will be deprived of the right of termination are generally similar in all the relevant jurisdictions. However, there are two aspects of which further examination is required.

First, as regards loss of the right due to lapse of a reasonable time, one must note that 'a period for examination of the goods under Korean law and CISG', strictly speaking, is not considered in the calculation of 'a reasonable period for the notice of avoidance' because Korean law and CISG distinguish the period for the notice of defects and of avoidance.⁹⁷³ That is, when measuring the reasonable period for the latter notice, it is already presumed in Korean law and CISG that the buyer has done due examination of the goods. The matter of whether the buyer has been given a reasonable opportunity to examine the goods in English law is rather related to the issue of the buyer's notice and examination duty in CISG and Korean law. However, there seems to be no particular difference because all the jurisdictions do not necessarily preclude the buyer terminating the contract where he could not find a defect by due examination. Nevertheless, the question arises whether each jurisdiction recognises a long-term right to reject where there is a latent defect that could not be discovered within a reasonable time. The position in CISG, Korean law and the Directive seems to allow the long-term right to reject

⁹⁷⁰ CISG Art. 82(2)(c).

⁹⁷¹ CISG Art. 82(2)(a).

⁹⁷² It seems to be doubted how useful the seller's right is in practice because it would be rare that the seller asks the buyer's position. See Yun-jik Kwak, *supra* n. 74, at 183.

⁹⁷³ Cf. Huber, Schlechtriem (ed.), *supra* n. 218, at 430 f.; Enderlein and Maskow, *supra* n. 288, at 247.

insofar as it is exercised within a limitation period of two years in CISG⁹⁷⁴ and the Directive,⁹⁷⁵ (as the case may be) six months or one year in Korean law,⁹⁷⁶ whereas English law does not seem to recognise the right although the test of whether the buyer has had a reasonable opportunity to examine appears to be related to the right.⁹⁷⁷ However, one must note that the test does not absolutely prevent a finding that the buyer has accepted despite that he has not had such an opportunity.⁹⁷⁸

Second, regarding loss of the right based on impossibility of restoration, there is a dissimilarity in that the buyer under Korean law and CISG is still allowed to terminate the contract in the cases where he has resold on, transformed or consumed the goods in the course of normal business or use,⁹⁷⁹ whereas this is not necessarily true in English law.^{980 981} The justification of the position in Korean law and CISG appears that, insofar as the buyer's inability to return the goods is not ascribed to his fault, the buyer should not be prevented from being able to terminate the contract, and that the seller is properly protected by the requirement that the buyer must account to the seller for all benefits which he has derived from the goods.⁹⁸²

3.4.2. Evaluating accounts

⁹⁷⁴ CISG Art. 39(2).

⁹⁷⁵ Directive(99/44) Art. 5.1.

⁹⁷⁶ KCC Arts. 573, 582, KCmC Art. 69(1).

⁹⁷⁷ Law Commission WP 85, *supra* n. 958, at para. 4.66. ff.; Law Commission 160, *supra* n. 516, at para. 5.6. ff. See also Bradgate, *supra* n. 558, at 253 f.; Reynolds, Guest (ed.), *supra* n. 515, at 585 f. Cf. *Bernstein v. Pamson Motors Ltd.* [1978] 2 All ER 220; *The Kanchenjunga* [1990] 1 Lloyd's Rep 391.

⁹⁷⁸ Bradgate, *id.*; Reynolds, *id.*

⁹⁷⁹ In this case, it is not deemed to be ascribed to the buyer's own fault or wilful conduct in Korean law. See *supra* n. 955 and accompanying texts; Hyung-bae Kim, *supra* n. 67, at 248 f.

⁹⁸⁰ Bridge, *supra* n. 434, at 98; Ziegel, *supra* n. 886, at 9-27.

⁹⁸¹ Note that the SGA s. 35(6)(b) provides that the buyer may not lose his right to reject merely because he has delivered the goods to another under a sub-sale or other disposition.

⁹⁸² KCC Art. 549(1); CISG Art. 84(2). See Ziegel, *supra* n. 886, at 9-27; cf. Hyung-bae Kim, *supra* n. 67, at 241 f.

3.4.2.1. Internal evaluation

The above two differences could be evaluated in light of one of the functions of the termination rules to discourage the buyer's opportunism; the buyers complaining of defective goods will be most tempted to prefer termination where there has been a substantial drop in the market price so that the seller is forced to absorb a loss which the contract contemplated that this loss would fall on the buyer in exchange for the chance of gain from a rise in price.⁹⁸³ Therefore, the position in Korean law and CISG as to a long-term right to reject⁹⁸⁴ and as to loss of the right of termination based on impossibility of restoration seems to be doubted in this light, although the principle of good faith may well come forward to prevent the buyers attempting to terminate the contract.⁹⁸⁵ However, it still remains a question in terms of consumer protection that may consistently require a long-term right to reject. Given that consumers often have insufficient sophistication and bargaining power, it seems crucial that consumers need such a right to deal with recalcitrant sellers because their bargaining position as against the sellers has to be a strong one if they are to be adequately protected.

3.4.2.2. External evaluation

Similarly, the position in Korean law and CISG as to a long-term right to reject and as to loss of the right of termination based on impossibility of restoration may be criticised in light of the buyer's opportunism in a declining market because the position may provide the buyer more chances to circumvent the point of minimising the allocative costs.⁹⁸⁶ In addition, the parties wishing to maximise the joint value of the transaction may not want to terminate the contract

⁹⁸³ Honnold, *supra* n. 218, at 512; Ziegel, *supra* n. 886, at 9-27.

⁹⁸⁴ The position in English law has been justified on the basis of its policy of finality of transactions. See *Bernstein v. Pamson Motors Ltd.* [1978] 2 All ER 220, 230; *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 398.

⁹⁸⁵ CISG Art. 7(1).

⁹⁸⁶ For the examples of the allocative costs, see *supra* n. 939-940.

provided that the goods have a greater value in the buyer's hands than in the seller's hands,⁹⁸⁷ which would be often the case as time goes on, or as the goods are used or transformed in a considerable way so that it becomes impossible to restore the goods substantially in the condition in which the buyer received them.⁹⁸⁸

The above evaluations as to a long-term right to reject appear to work properly in commercial sales, but one often asks whether the same is also true in light of the consumer's interests. Most consumers who are assumed risk-averse may prefer such right because what they generally want is goods of the proper quality at the full price, not defective goods at a lower price. In addition, even if the buyer has a long-term right to reject, one must note that the reasonable period requirements both for the examination and notice duty and for the exercise of the right of termination in CISG and Korean law may well prevent the buyer's opportunism and its interpretation of 'reasonable period' in light of efficiency may ensure the minimisation of joint costs to the buyer of discovering the defect either by inspection or through an attempt to use the goods and of the depreciation of the goods during the period that they are in the buyer's hands but not yet accepted.⁹⁸⁹

3.5. Consequences

3.5.1. Comparative accounts

When the buyer legitimately terminates the contract, it brings the contract to an end resulting in that it releases both parties from their future primary obligations either wholly or in part.⁹⁹⁰

⁹⁸⁷ Priest, *supra* n. 31, at 965.

⁹⁸⁸ E.g., the buyer's use or adaptation of defective goods to fit his particular needs provides strong evidence that damages are the cheaper remedy because the use or adaptation discloses that the value of the goods to him is likely to exceed their market value. Priest, *supra* n. 31, at 976, 989 f.

⁹⁸⁹ *Id.*, at 977.

⁹⁹⁰ CISG Art. 81(1); No provision in KCC for this consequence, but generally admitted although there are serious disputes as to the question of whether termination operates *ex tunc* or *ex nunc* (For the scholars with the *ex tunc* effect, see Yun-jik Kwak, *supra* n. 74, at 170 ff.; Wook-gon Kim, "Hae-jae-eoi

Notwithstanding the release of the parties from their obligations, it does not necessarily mean that the seller is totally discharged from any liabilities; he may be liable to pay damages for any loss which results from his delivery of non-conforming goods.⁹⁹¹ An arbitration clause remains in effect as well as a clause fixing liquidated damages and, if valid, a penalty clause.⁹⁹² Another consequence of termination is that the parties must restore whatever one party has received from the other party.⁹⁹³ If both parties are bound to make restitution, they must do concurrently.⁹⁹⁴ In general, all the above general consequences of termination seem more or less the same in all the jurisdictions, although the Directive mostly leaves the matters to domestic laws.⁹⁹⁵ However, there seems to be one aspect which draws one's attention and may reveal a significant divergence; the question is whether the buyer must also return any benefit which he derived from the use or consumption of the goods while in his possession. Korean law, CISG and the

Hyo-kwa-ae-kwan-han Bup-ri-so-go (A Study on the Theories on the Effects of Rescission)", in: Hwang, Juk-in *et al.*, *Son-hae-bae-sang-bup-eoi Jae-moon-jae (The Matters on Compensation Law)*, (1990), at 711 ff.; Chang-soo Yang, "Hae-jae-eoi Hyo-kwa-ae-kwan-han Hak-seol-deul-ae-dae-han So-gam (An Impression on the Theories on the Effects of Rescission)", (1991) 18(4) *Ko-shi-yeon-koo* 26, at 35 ff.; Seok-woo Kim, *supra* n. 135, at 134. For the scholars with the *ex nunc* effect, see Hyung-bae Kim, *supra* n. 67, at 227 ff.; Eun-young Lee, *supra* n. 68, at 768 ff.; Oh-seung Kwon, "Gae-yak-hae-jae-eoi Hyo-kwa (The Effects of Rescission)", (April, 1983) 268 *Sa-bup-haeng-jeong* 42; Yong-dam Kim, "Hae-jae-eoi-hyo-kwa-ae-kwan-han Il-ko-chal (A Study on the Effects of Rescission)", (May, 1983) 269 *Sa-bup-haeng-jeong* 34; Jeung-han Kim, *supra* n. 135, at 97 ff.); *McDonald v. Dennys Lascells Ltd.* [1933] 48 CLR 457, 469 f; *Heyman v. Darwins Ltd.* [1947] AC 356, 367 ff.; *Moschi v. Lep Air Services Ltd.* [1973] AC 331, 345, 350; Beale, *supra* n. 25, at 105; Treitel, *supra* n. 421, at 382 f.; Carter, *supra* n. 716, at paras. 314, 1038 f., 1206 f., 1211 f.

⁹⁹¹ CISG Art. 81(1); KCC Art. 551; *Johnson v. Agnew* [1980] AC 367; *Photo Production Ltd. v. Securicor Ltd.* [1980] AC 827, 848 f.; *Gill & Duffus S.A. v. Berger & Co. Inc.* [1984] AC 382, 390; Beale, *supra* n. 25, at 105; Treitel, *supra* n. 421, at 395 f.; Carter, *supra* n. 716, at paras. 1219 ff.

⁹⁹² CISG Art. 81(1); Beale, *supra* n. 25, at 105 f.; Carter, *supra* n. 716, at paras. 1210, 1224 ff.; Hyung-bae Kim, *supra* n. 67, at 246.

⁹⁹³ CISG Art. 81(2); KCC Art. 548(1). Cf. Note that this is normally true in English law, but there are some exceptions. See Beale, *supra* n. 25, at 111 f.; Treitel, *supra* n. 421, at 385 ff.

⁹⁹⁴ CISG Art. 81(2); KCC Arts. 536, 549.

⁹⁹⁵ Recital 15.

Directive (subject to the Member States' choice) require the buyer to restore it,⁹⁹⁶ whereas English law seems negative on the basis of a total failure of the consideration for which the money was paid.⁹⁹⁷ However, one must note that, insofar as qualitative defects are concerned, English law has a relatively short-lived right to reject with a corresponding automatic right to return of the purchase price in full and consequently the requirement is treated unimportant.

3.5.2. Evaluating accounts

3.5.2.1. Internal evaluation

The position in English law as to restitution of any value of the use or consumption of the goods may increase the likelihood that the buyer's termination is ascribed to his opportunistic behaviour. The reason for that is that no allowance for such use or consumption may render him a considerable private benefit in the event of his claim of termination, which is generally at the expense of the seller. However, it is unlikely to cause a significant injustice in practice in relation to defects in quality because the buyer in English law may have only a short period of time before the right of rejection will be lost.⁹⁹⁸

3.5.2.2. External evaluation

⁹⁹⁶ CISG Art. 84(2); Recital 15; Yun-jik Kwak, *supra* n. 74, at 178; Hyung-bae Kim, *supra* n. 67, at 240 ff.; Eun-young Lee, *supra* n. 167, at 186 f.

⁹⁹⁷ Law Commission 160, *supra* n. 516, at para. 6.4. (The Law Commissions rejected suggestions that the buyer's refund should be reduced on the ground of such use or consumption on the basis of its difficulty in calculating the value of use or consumption); Treitel, *supra* n. 421, at 386 f.; Bradgate and Twigg-Flesner, *supra* n. 425. Cf. *Rowland v. Divall* [1923] 2 KB 500; *Barber v. NWS Bank plc.* [1996] 1 All ER 906.

⁹⁹⁸ Nevertheless, the position in English law could be particularly problematic where the buyer's claim is based on defects in title in English law. See *Rowland v. Divall* [1923] 2 KB 500; *Karflex Ltd. v. Poole* [1933] 2 KB 251; *Butterworth v. Kingsway Motors Ltd.* [1954] 1 WLR 1286. Cf. Treitel, "Some Problems of Breach of Contract", (1967) 30 *MLR* 139, at 146 ff.; Bridge, "The Title Obligations of the Seller of Goods", in: Palmer and McKendrick (ed.), *Interests in Goods*, (1993), at 133 ff.; Lord Goff of

Where allocative costs can be minimised by termination, the parties would maintain the distribution of risk which is implicit in a contract of sale at a fixed price by allowing the seller to offset the depreciation in value due to the buyer's use or consumption.⁹⁹⁹ Nevertheless, if the rules as to the consequences of termination render the buyer a private benefit for his use or consumption while in his possession, such rules are likely to encourage the seller to incur greater settlement or litigation costs in an attempt to avoid the buyer's termination because it leaves him with the goods which are not only defective, but also used and therefore depreciated in value.¹⁰⁰⁰ That is, the more the goods have depreciated by the buyer's use or consumption of them the stronger the incentive to fight against the buyer's claim to termination so that the greater such costs are incurred. The increase of such costs, in turn, may reduce the joint value of the transaction. In this light, it appears that the position in English law that does not require the buyer to return any value of the use or consumption of the goods is doubted. Yet, insofar as defects in quality are concerned, a relatively short-lived right of rejection in English law may not necessarily yield a considerable inefficiency.¹⁰⁰¹

4. Monetary Relief

4.1. General

Where a seller has tendered non-conforming goods in either quality or quantity and a buyer has sustained some losses as a consequence of such tender, it is conceivable that there are two forms of monetary relief for the aggrieved buyer; a right to a claim in damages for any loss resulting from the seller's non-conforming tender and a right to reduce the contract price. In general, these rights are separately recognised in CISG,¹⁰⁰² whereas only the former right is

Chieveley and Jones, *The Law of Restitution*, (1993), at 421 ff.

⁹⁹⁹ Priest, *supra* n. 31, at 968.

¹⁰⁰⁰ *Id.*, at 979. Cf. Beale, *supra* n. 25, at 111 f.

¹⁰⁰¹ This may not be true in relation to defects in title. See *supra* n. 998.

¹⁰⁰² CISG Arts. 45(1)(b), 50.

recognised in English law¹⁰⁰³ and only the latter right in the Directive.¹⁰⁰⁴ Under Korean law, the specific provision for damages without stipulating price reduction appears at first sight to be similar to the position in English law.¹⁰⁰⁵ Yet, it is by no means clear that it is correct to interpret the provision for damages in the same way as English law due to the traditional continental approach to the seller's guarantee liability that permits the right to reduce the price as the only monetary relief.¹⁰⁰⁶ The following discussion will investigate the issue of in what way two kinds of monetary relief are developed in each jurisdiction, asking the question of whether the monetary relief is realised under one single remedy or two separate remedies, and if under two separate remedies, whether two separate remedies are compatible. The principal issue is whether the right to claim damages under the seller's guarantee liability of Korean law is the same as the right to damages in the other jurisdictions; this is closely related to the issue of the nature of the seller's guarantee liability.¹⁰⁰⁷ In relation to this question, the focus will be on damages under the seller's guarantee liability in Korean law, looking at the grounds on which damages may be awarded and the interests protected by the damages. However, it should be noted that this is not the place to deal with the rules limiting damages, not only because of limited space but also because the rules of limiting damages are of no particular relevance to the rules of the seller's guarantee liability (which are the main concern of this thesis) owing to the

¹⁰⁰³ English law has no direct analogue in relation to the right to reduce the price. Instead it provides the buyer with a right in all cases to damages, assessed on the difference in value basis, and permits the buyer to "set up against the seller the breach of warranty in diminution or extinction of the price" (the SGA s. 53(1)(a)). This set off rule may be compatible with the right to reduce the price, but as will be shown, it does not seem to be the same right as contemplated by CISG and the Directive.

¹⁰⁰⁴ Directive(99/44) Art. 3.5. No right to claim damages appears in the Directive, but one must note that it does not mean that the buyer has no right to claim damages. This is dealt with under domestic laws. See Green Paper, *supra* n. 277, at 90; 10th Report by Select Committee, *supra* n. 277, at 21; Directive(99/44) Art. 8.1.

¹⁰⁰⁵ KCC Arts. 575(1), 581(1).

¹⁰⁰⁶ Exceptionally, damages are allowed in the cases where the goods lack a quality which they are expressly warranted to have and where the seller fraudulently conceals a defect. BGB §463. Cf. French Code Civil Art. 1645.

¹⁰⁰⁷ For the discussion as to the nature under Korean law, see *supra* pp. 30 ff.

peculiarity in the nature of damages under the seller's guarantee liability as contrasted with the nature of ordinary damages.¹⁰⁰⁸

4.2. Damages

4.2.1. General

Damages are commonly classified as expectation, reliance and restitution damages.¹⁰⁰⁹ First, the expectation interest measure confers on the buyer the value of the seller's promise, the object of the award thus being to put him into as good a financial position as that in which he would have been had the contract been duly performed.¹⁰¹⁰ Second, the reliance interest measure compensates the buyer against expenses reasonably incurred through relying on the promise of performance.¹⁰¹¹ Its goal is to put him in the position he would have been in if he had not made the contract. Third, the restitution interest measure restores to the buyer any benefits in the form of money that he transferred to the seller between the formation of the contract and the breach. The restitution interest measure often overlaps with the reliance interest measure because the buyer's payment constitutes a form of reliance, which may be recoverable on a claim for reliance loss.¹⁰¹² However, one must note that the above three interest measures can be by no means exhaustive to describe all kinds of damages; it is conceivable that there are consequential damages which are not necessarily recoverable under those measures, although it may sometimes form part of the expectation interest of the aggrieved party.¹⁰¹³ The term of consequential damages may refer to the loss of gain which the

¹⁰⁰⁸ In addition, the matter of quantification will not be dealt with because unlike English law and CISG, Korean law has no relevant specific rules either in KCC or in the cases, but largely rests on the court.

¹⁰⁰⁹ Treitel, *supra* n. 421, at 82 ff.; Treitel, *supra* n. 951, at 873 ff.; Harris, *supra* n. 27, at 39 ff.

¹⁰¹⁰ Korean law often refers to this interest as 'positive interest'.

¹⁰¹¹ It is also known as 'negative interest' in Korean law.

¹⁰¹² Note that a claim for restitution is not strictly one for damages since its purpose is not to compensate the claimant for a loss, but to deprive the defendant of a benefit. See Treitel, *supra* n. 951, at 876.

¹⁰¹³ In addition to consequential damages, there are also cases in which expenses incurred after breach

buyer suffers in consequence of not receiving the goods contracted for or to such things as personal injury or damage to property (other than the very goods contracted for) suffered as a result of the breach.

Having said that, the following sections discuss the ground for a claim for damages and the scope of the interests protected under the seller's guarantee liability in a comparative way.

4.2.2. Comparative accounts

4.2.2.1. Korean law¹⁰¹⁴

4.2.2.1.1. Grounds for a damages claim under the seller's guarantee liability

The starting point to examine the ground for a damages claim under the seller's guarantee liability is that Korean law has a unique dual liability system; the general liability for non-performance¹⁰¹⁵ and the seller's guarantee liability.¹⁰¹⁶ Another point is that a right to claim damages under the general liability is specified identically in the articles dealing with the seller's guarantee liability.¹⁰¹⁷ One of difficulties Korean law faces is in that one cannot simply understand the right to damages in the seller's guarantee liability is the same one as in the general liability because they are distinctively treated in light of its legal history, nature and *etc.*

will be recoverable in attempts to reduce the loss; *e.g.*, expenses incurred in taking care of non-conforming goods or in making a cover purchase to avoid the loss which would otherwise result from the breach (which are described as 'incidental damages' in UCC s. 2-715(1)).

¹⁰¹⁴ The discussion of damages in Korean law will be mainly focussed on the scholars' various views not only because the court cases are inconsistent in many aspects but also because they do not seem to provide a clear clue in interpreting damages under the seller's guarantee liability. However, it will be attempted to quote some cases in footnotes where they are thought to be relevant to one's interpretation of the damages. Cf. For the study of cases in Korean law, see Dae-jeong Kim, *supra* n. 595, at 264 ff.

¹⁰¹⁵ For the general liability for non-performance in general, see *supra* pp. 20 ff.

¹⁰¹⁶ For the seller's guarantee liability in general, see *supra* pp. 26 ff. For the differences between two liabilities and their relationship in general, see *supra* pp. 29 f., 37 f., 45 ff.

¹⁰¹⁷ KCC Arts. 390, 575(1), 580, 581.

There are two different theories submitted to understand the seller's guarantee liability: the legal liability theory¹⁰¹⁸ and the contractual liability theory.¹⁰¹⁹ The former understands that it is a legal liability that is imposed on the seller by the law regardless of the contractual parties' intention and exists separately from the general liability for non-performance. On the other hand, the latter contends that it is a contractual liability in a sense that KCC presumes a contractual duty to deliver non-defective goods, which can be categorised as incomplete performance.¹⁰²⁰ These two different theories result in the discordance as to the ground for a damages claim under the seller's guarantee liability: a legal duty or a contractual duty.

4.2.2.1.2. The interests protected by the damages claim under the seller's guarantee liability

4.2.2.1.2.1. The legal liability theory

Most scholars in favour of the legal liability theory generally agree that the interpretation of damages under the seller's guarantee liability should be measured on the basis of the buyer's reliance interests on the validity of the contract.¹⁰²¹ The reason for that is that the theory is based on its theoretical background of the principle of *impossibilium nulla obligatio* in which a

¹⁰¹⁸ See *supra* pp. 30 ff.

¹⁰¹⁹ See *supra* pp. 38 ff.

¹⁰²⁰ For the practical differences in general in adopting either theory, see *supra* pp. 46 f.

¹⁰²¹ Yun-jik Kwak, *supra* n. 74, at 231 f.; Tae-jae Lee, *supra* n. 135, at 46 f.; Ki-sun Kim, *supra* n. 135, at 136; Hyun-chae Kim, *supra* n. 135, at 611 f.; the Korean Supreme Court Case, 30/10/1957, 4290 Min-Sang 552 (In this case the buyer purchased black tungsten from the seller who said there will be international bids on the tungsten. However, the seller delivered black tungsten mixed with impurities, which contained carbon tungsten and others, and the bids were not taken for the tungsten so that the seller had to do re-separation of the ores. Against the seller's claim for payment of the price the buyer refused the payment and made a plea of the set-off between the payment and damages due to the impurities. The High Court of Justice held that the plea of the set-off was not allowed due to the absence of the seller's fault in the delivery of defective goods. However, in the buyer's appeal to the Supreme Court, it was held that the seller's liability for defective goods was the one regardless of the fault principle and the buyer's claim for damages should be based on his reliance interests).

part of the contract becomes invalid due to there being initial impossibility to deliver non-defective goods.¹⁰²² They argue that any compensation for expectation interests and consequential losses should be excluded from the extent of damages under the seller's guarantee liability.¹⁰²³ This is because they understand that the seller's guarantee liability is in the nature of legal liability rather than contractual one and it is only interested in striking a proper balance by the law in terms of value for money the buyer paid in the cases where there exists initial impossibility to deliver non-defective goods which may result in no room for the buyer to rely on the general liability for non-performance due to the invalidity of the contract.¹⁰²⁴ It is also generally recognised among the scholars that the buyer claiming damages on a reliance basis should not be put into a position better than that in which he would have been had the contract been duly performed.¹⁰²⁵

4.2.2.1.2.2. The contractual liability theory

4.2.2.1.2.2.1. General

The contractual liability theory generally understands the seller's guarantee liability is a contractual one in its nature; it rests on breach of the seller's contractual duty to deliver non-defective goods that may be categorised as incomplete performance.¹⁰²⁶ Insofar as its understanding as to the nature along with the ground for a damages claim is concerned, it is natural to say that the understanding should be reflected in defining of the scope of damages; *i.e.*, expectation interest. One of difficulties this theory faces, however, is in that the contractual liability in its nature cannot simply lead into the compensation for expectation interest, even

¹⁰²² See *supra* pp. 33 f., 36 f.

¹⁰²³ As will be examined later, some argue that the compensation is possible under the general liability. See *infra* pp. 223 ff.

¹⁰²⁴ For the discussions about the nature of the seller's guarantee liability from the point of view of the legal liability theory, see *supra* pp. 30 ff.

¹⁰²⁵ Yun-jik Kwak, *supra* n. 74, at 232. Cf. KCC Art. 535(1).

though some argue it should. This is based on its idea that damages under the seller's guarantee liability which exists regardless of the fault principle cannot be treated in the same way as damages under the general liability which is governed by the fault principle.¹⁰²⁷ The idea has yielded various views to find the most appropriate interpretation of damages under the seller's guarantee liability, which is distinguished from those under the general liability; most attempts by the contractual liability theorists to distinguish damages under the seller's guarantee liability from those under the general liability have been executed in a way that limits the scope of damages the buyer can recover under the seller's guarantee liability. What follows is to investigate the various views submitted by the contractual liability theorists.

4.2.2.1.2.2.2. 'A' theory (Expectation interests + Consequential loss)

This theory argues that, since KCC does not specifically provide the extent of damages under the seller's guarantee liability, such damages must be decided on the general rule on the scope of damages¹⁰²⁸ under the general liability for non-performance.¹⁰²⁹ Therefore, it may include

¹⁰²⁶ For the discussion of the nature in light of the contractual liability theory, see *supra* pp. 38 ff.

¹⁰²⁷ See *supra* pp. 72 ff. Otherwise it may result in that the fault principle as the central rule to govern the breach of a contract made for value may lose its position in a considerable way because, as KCC Art. 567 states, such rules are correspondingly applied to all other contracts made for value in the event of the debtor's defective performance. Namely, insofar as most contracts are made for value, such corresponding application to other contracts made for value may considerably deprive of the central position of the fault principle where the creditor claims for damages in the event of the debtor's defective performance if damages under non-fault based liability (the seller's guarantee liability) are not distinguished from damages under fault based liability (the general liability).

¹⁰²⁸ KCC Art. 393.

¹⁰²⁹ Eun-Young Lee, *supra* n. 167, at 227 f.; the Korean Supreme Court Cases, 18/5/1967, 66 Da 2618; 4/2/1969, 66 Da 1615. Cf. the Korean Supreme Court Case, 14/11/1989, 89 DaKa 15298 (In this case the buyer harvested much less than the previous years, which was about half-attributable to that the seeds delivered were afflicted with a disease causing the leaves desiccated. The buyer sued the seller for his damages on lost profit, which can be said a kind of expectation interest. It was held that the measure of damages must be ascertained by the difference between the actual earnings and the average income had all sorts of normal costs for cultivating the potatoes been spent and only the half of the damages as worked out above would be awarded to the buyer because the damages were only half-attributable to the

both expectation interests and consequential loss insofar as there is adequate causation between the seller's wrong doing (delivery of defective goods) and the buyer's loss suffered and the foreseeability test is satisfied.¹⁰³⁰ In the end, the theory does not discriminate in substance damages under the seller's guarantee liability from those under the general liability.

4.2.2.1.2.2.3. 'B' theory (Reliance interests + Expectation interests)

The theory begins with that the seller's guarantee liability is an exceptional liability to the general liability for non-performance in terms of the fault principle.¹⁰³¹ It insists that the scope of damages under the seller's guarantee liability and its requirement should be divided into two categories; reliance interests (*e.g.*, price reduction, contract expenses,¹⁰³² restitution of the price paid and *etc.*) and expectation interests.¹⁰³³ The compensation for the former interests does not require fault, whereas the one for the latter interests does under the seller's guarantee liability.¹⁰³⁴ However, the scope of damages under the seller's guarantee liability should not include consequential loss, but it may be recoverable under the general liability on the basis of the positive breach of contract.¹⁰³⁵

defective seeds. However, unfortunately it did not make clear on which liability the claim is based between the seller's guarantee liability and the general liability). Cf. One scholar also argues that damages under the seller's guarantee liability must include expectation interests. See Joo-soo Kim, *supra* n. 125, at 220 f. (However, compared to Prof. Eun-young Lee, price reduction is not submitted as a separate remedy in his argument and it is based on the idea that the seller's guarantee liability requires the seller's fault in general).

¹⁰³⁰ Eun-Young Lee, *supra* n. 167, at 228 f. For the adequate causation and foreseeability test, see KCC Art. 393; Eun-young Lee, *supra* n. 68, at 614 ff.; Hyung-bae Kim, *supra* n. 66, at 250 ff.

¹⁰³¹ Kyu-chang Cho, *supra* n. 136, at 260 ff.

¹⁰³² *E.g.*, the administrative expenses of making the contract (postal expenses and agency fees), the expenses of setting the contract aside and *etc.*

¹⁰³³ *Id.*, at 262 ff.

¹⁰³⁴ *Id.* Cf. Compensation for these interests must also satisfy with the adequate causation and foreseeability test specified under KCC Art. 393.

¹⁰³⁵ *Id.*, at 264 f. Although he does not provide the particular reason for the exclusion of consequential loss, it seems that he tries to sort out all the matters directly related to the defective goods themselves within the regime of the seller's guarantee liability and the other matters like consequential loss within

4.2.2.1.2.2.4. 'C' theory (Reliance interests)

This theory contends that the scope of damages under the seller's guarantee liability should not be simply interpreted in light of its nature so that admitting a contractual liability in its nature does not necessarily mean the reparation for expectation interests because one still needs to distinguish between the general liability for non-performance governed by the fault principle and the seller's guarantee liability being a non-fault based liability.¹⁰³⁶ Insofar as the seller's guarantee liability is deemed to be a non-fault based liability for the purpose of striking proper balance in terms of value for money the buyer paid, it is argued that damages under the seller's guarantee liability must be in principle limited to the reparation for reliance interests (*e.g.*, price reduction, contract expenses, restitution of the price paid, and *etc.*; they are restricted to the cases where there is no problem about compensating even in the absence of fault).¹⁰³⁷

4.2.2.1.2.2.5. 'D' theory (Price reduction)

This theory insists that the provision for damages under the seller's guarantee liability¹⁰³⁸ is an exceptional rule to the general provision for damages under the general liability for non-

the general liability on the basis of the breach of the seller's collateral duty of care. See also *infra* n. 1061-1066 and accompanying texts.

¹⁰³⁶ Hyung-bae Kim, *supra* n. 67, at 318, 341 ff.; Bup-young Ahn, *supra* n. 167, at 202, 204 f., 212 f., 216 f.

¹⁰³⁷ Hyung-bae Kim, *id.*, at 318, 341 f., 345 f.; Bup-young Ahn, *id.*, at 219 f., 222 f. Cf. Hyung-bae Kim, *supra* n. 94, 253 ff. (He used to argue that damages under the seller's guarantee liability should be interpreted in light of its rationale, which may be derived from the interpretation of contract. It must be asked which loss suffered from the defective tender (rather than asking which legal interests) could be reimbursed under the seller's guarantee liability when taking account of its rationale. Distinguishing between the sale of specific goods and the sale of generic goods, while in the former case only contract expenses (reliance interest) may be compensated, in the latter case not only such contract expenses but also benefit he would have made had the contract duly been performed (expectation interest) and consequential loss.) Cf. *Accord*; Kwang-min Seo, *supra* n. 193, at 30 ff. (but he is in favour of the legal liability theory so far as the sale of specific goods is concerned).

¹⁰³⁸ KCC Art. 580.

performance¹⁰³⁹ in terms of the requirement of fault.¹⁰⁴⁰ On this basis, it is argued that such damages should mean nothing but price reduction itself in light of its legal history and comparative studies with other continental legal systems,¹⁰⁴¹ even though there seems to be some linguistic difficulties under the existing law to understand that the meaning of damages is merely price reduction insofar as KCC is deemed to certainly distinguish between damages and price reduction by having a separate provision for price reduction in the case of a shortage in quantity.¹⁰⁴²

4.2.2.1.3. The protection of other interests

4.2.2.1.3.1. The legal liability theory

On the presumption that the scope of damages under the seller's guarantee liability is confined to the reliance interest, the residual question is whether the buyer can ever be compensated for expectation interest or consequential loss even if it is deemed that the seller's tender of defective goods itself, or such things as personal injury or damage to property other than the very goods contracted for, which were suffered as a result of the defect, are attributable to the seller's fault.

In relation to the compensation for expectation interests, it is argued that the protection of such interests could be made by allowing concurrence with the general liability for incomplete performance¹⁰⁴³ (so called, the concurrence theory).¹⁰⁴⁴ That is, the buyer may choose his claim

¹⁰³⁹ KCC Art. 390 ff.

¹⁰⁴⁰ Dae-jeong Kim, *supra* n. 206, at 264 f.

¹⁰⁴¹ *Id.* Accord; Sang-kwang Lee, *supra* n. 167, at 303 f.

¹⁰⁴² KCC Arts. 572(1), 574. He also insists that rescission under the seller's guarantee liability should be interpreted *Wandelung* in German law (BGB §462) or *l'action rédhibitoire* in French law (Code Civil Art. 1646) in its effects so that the buyer is entitled to recovery of his payment and contract expenses. Dae-jeong Kim, *supra* n. 206, at 277 f.

¹⁰⁴³ For the discussion about incomplete performance, see *supra* pp. 24 ff.

¹⁰⁴⁴ For the scholars allowing the concurrence in the sale of specific goods, see Ki-sun Kim, *supra* n.

between the seller's guarantee liability and the general liability for non-performance so that he may be compensated for expectation interest by resting his claim on the latter liability. The basis of this view is that there is no problem whichever liability the buyer's claim is based on as the seller's guarantee liability is seen as completely distinct from the general liability in its nature.¹⁰⁴⁵ One must note that the compensation of expectation interest on the ground of incomplete performance under the general liability requires the seller's fault in essence.¹⁰⁴⁶ In contrast with this view, some scholars contend that concurrence cannot be allowed with the general liability (so called the non-concurrence theory).¹⁰⁴⁷ The reason for that is that there is no possibility for the buyer to base his claim on the general liability for incomplete performance as long as the legal liability theory is based on the principle of *impossibilium nulla obligatio* and *specific goods dogma*,¹⁰⁴⁸ insofar as the seller delivers the goods in *status quo* at the time of contract, his contractual duty is completed so that there is no room for incomplete performance.¹⁰⁴⁹ With regard to the sale of generic goods, it is reasoned that the specific provision for the seller's guarantee liability for generic goods¹⁰⁵⁰ are intended to completely exclude the application of the rules of the general liability for incomplete performance.¹⁰⁵¹

135, at 134; Hyun-tae Kim, *supra* n. 135, at 117. For the scholars allowing the concurrence in the sale of generic goods, see Young-hwan Lee, *supra* n. 135, at 115 ff.; Yeon-eoi Eo, *supra* n. 135, at 26. Cf. Jeung-han Kim and Yi-seo Ahn, *Shin-chae-kwon-gak-ron (New Particulars in Obligatory Law)*, (1963), at 225 (arguing the compensation of expectation interests within the seller's guarantee liability with the requirement of fault).

¹⁰⁴⁵ *Id.* See also *supra* n. 161-162 and accompanying texts. For the differences and interrelationship between two liabilities in general, see *supra* n. 29 ff., 37 ff., 45 ff.

¹⁰⁴⁶ KCC Art. 390. Cf. It is also required to satisfy with the adequate causation and foreseeability test specified under KCC Art. 393.

¹⁰⁴⁷ Hyun-chae Kim, *supra* n. 135, at 543; Tae-jae Lee, *supra* n. 148, at 43 f.; Jeong-pyoung Lim, *supra* n. 94, at 165; Yun-jik Kwak, *supra* n. 74, at 247 f.; Yun-jik Kwak, *supra* n. 62, at 169 ff.; Won-lim Jee, *supra* n. 135, at 402 f.; Jeung-han Kim and Hak-dong Kim, *supra* n. 104, at 111 f.; Yong-han Kim, *supra* n. 163, at 33 ff. See also *supra* n. 163-166 and accompanying texts.

¹⁰⁴⁸ For the discussion about the principle, see *supra* n. 146-149 and accompanying texts.

¹⁰⁴⁹ *Id.*

¹⁰⁵⁰ KCC Art. 581.

¹⁰⁵¹ Yun-jik Kwak, *supra* n. 62, at 170 f.; Jeung-han Kim and Hak-dong Kim, *supra* n. 104, at 112;

As regards the compensation for consequential loss, it is generally agreed that the buyer can be remunerated for such consequential losses by applying the rules as to the positive breach of contract.¹⁰⁵² That is, the seller may be responsible for any losses suffered in consequence of defective goods in addition to whatever is recoverable under the seller's guarantee liability because such consequential losses raise the matter of the positive breach of contract due to the breach of duties of care and protection of the other party's life, health and property.¹⁰⁵³ It is also noted that the seller's fault is essential to raise the positive breach of contract.¹⁰⁵⁴

4.2.2.1.3.2. The contractual liability theory

4.2.2.1.3.2.1. General

As the foregoing account showed, the scope of damages under the seller's guarantee liability has been variously interpreted so as to distinguish it from that under the general liability on the ground of its unique feature of the seller's guarantee liability being non-fault based liability and its peculiar rationale to strike a balance in terms of value for money the buyer paid. The residual matter to be settled under the contractual liability theory is in relation to the other interests which are not covered under the seller's guarantee liability, because it may be unjust if the buyer cannot be reimbursed for his loss of expectation interests or consequential loss (as the case may be) caused by the defective tender which was attributable to the seller's fault.¹⁰⁵⁵ The very core of the matter is placed in the question of how the theory based on the idea that the

Yong-han Kim, *supra* n. 163, at 34 f.

¹⁰⁵² Yun-jik Kwak, *id.*; Yong-han Kim, *id.*, at 33 ff.; Jeong-pyoung Lim, *supra* n. 94, at 165.

¹⁰⁵³ Yong-han Kim, *supra* n. 163, at 33. For the various views as to the grounds in substance of the positive breach of contract in terms of a network of duties, see *supra* n. 94.

¹⁰⁵⁴ KCC Art. 390. Cf. It is also required to satisfy with the adequate causation and foreseeability test specified under KCC Art. 393.

¹⁰⁵⁵ Insofar as 'A' theory is concerned, there is no need to discuss this matter due to full coverage under the seller's guarantee liability. Cf. The Korean Supreme Court Case, 7/5/1997, 96 Da 39455 (the case for the buyer's damage claim for consequential losses caused by defective goods was held on the basis of the

seller's guarantee liability is for the breach of a contractual duty to deliver non-defective goods which is categorised as 'incomplete performance' under the general liability can settle the interrelationship between the seller's guarantee liability and the general liability.¹⁰⁵⁶

4.2.2.1.3.2.2. The concurrence theory

This theory maintains that the interests that cannot be recovered under the seller's guarantee liability should be protected by the means of allowing concurrence with incomplete performance.¹⁰⁵⁷ The ground for the concurrence is that even though the seller's guarantee liability is similar in its nature to the general liability for incomplete performance,¹⁰⁵⁸ the 'special' incomplete performance (the seller's guarantee liability) is distinctive from the 'general' incomplete performance (the general liability) in terms of its requirements and effects; in particular, there is no requirement of fault.¹⁰⁵⁹ Therefore, insofar as the fault principle is satisfied, the buyer may be empowered to claim damages under the general liability for incomplete performance, by which he may be compensated for his loss of expectation interests or consequential loss.¹⁰⁶⁰

4.2.2.1.3.2.3. The non-concurrence theory

The starting point of this theory is in the principle of *lex specialis derogat legem generalem*.¹⁰⁶¹ That is, it is understood that the rules of the seller's guarantee liability are

general liability for incomplete performance requiring the seller's fault).

¹⁰⁵⁶ See *supra* pp. 45 ff.

¹⁰⁵⁷ Hyung-bae Kim, *supra* n. 67, at 313 ff.; Sang-yong Kim, *supra* n. 203, at 80 f.; Bup-young Ahn, *supra* n. 167, at 225 f.; Sang-kwang Lee, *supra* n. 167, at 306 ff.

¹⁰⁵⁸ The similarity is only in that both liabilities place the seller on a contractual duty to deliver non-defective goods. Hyung-bae Kim, *id.*, at 314 f.

¹⁰⁵⁹ Hyung-bae Kim, *supra* n. 66, at 224 ff.

¹⁰⁶⁰ KCC Arts. 390, 393. Cf. It is also required to satisfy with the adequate causation and foreseeability test specified under KCC Art. 393.

¹⁰⁶¹ Dae-jeong Kim, *supra* n. 206, at 264 ff.; Kyu-chang Cho, *supra* n. 136, at 260 ff.; Kwang-min Seo, *supra* n. 193, at 40 ff.

special rules within the rules of the general liability so that the general rules are excluded to the extent which the special rules are applied.¹⁰⁶² On the basis of this simple principle, concurrence is not basically allowed with the general liability. However, one must note that this theory understands that the principle of *lex specialis derogat legem generalem* is applied only to the extent of the buyer's losses which can be recoverable under the special regime of the seller's guarantee liability,¹⁰⁶³ and it argues that the special regime have lacuna insofar as damages for expectation interests or consequential loss are concerned.¹⁰⁶⁴ On the basis of the principle that the general rules may supplement the special rules where the latter rules have lacuna, the theory maintains that the general regime for non-performance may play a role so as to supplement the lack of the special regime so that the buyer may be entitled to damages for expectation interests or consequential loss under the general liability.¹⁰⁶⁵ For such damages, the requirement of the seller's fault is essential.¹⁰⁶⁶

4.2.2.2. English law and CISG

4.2.2.2.1. Grounds for a damages claim under the seller's guarantee liability

The ground for a damages claim under English law and CISG must be examined in light of their unified liability system; unlike Korean law, they treat the seller's guarantee liability as part of the general system of 'breach of contract' rather than an independent regime for defective

¹⁰⁶² Dae-jeong Kim, *id.*

¹⁰⁶³ That is, reliance and expectation loss in 'B' theory, reliance loss in 'C' theory, and only price reduction in 'D' theory.

¹⁰⁶⁴ Dae-jeong Kim, *supra* n. 206, at 264 ff. It may be only related to consequential loss in 'B' theory, expectation and consequential loss in 'C' theory, all the other possible losses than price reduction in 'D' theory.

¹⁰⁶⁵ *Id.* Cf. Eun-Young Lee, *supra* n. 167, at 229 (She is in favour of the non-concurrence theory in principle, but exceptionally allows concurrence provided that the buyer's claim for replacement is not compatible with his claim for damages under the seller's guarantee liability).

¹⁰⁶⁶ Cf. It is also required to satisfy with the adequate causation and foreseeability test specified under KCC Art. 393.

goods.¹⁰⁶⁷ It is generally understood that any breach of implied obligations to deliver the goods in conformity with the contract or to deliver the goods corresponding with certain standard or quality under the SGA¹⁰⁶⁸ and CISG¹⁰⁶⁹ is deemed to be just like all other breaches of contract which themselves arise from broken promises.¹⁰⁷⁰ Having said that, it is worth noting that any breach of contract, no matter what form it takes, confers on an injured buyer a right to claim damages under English law and CISG.¹⁰⁷¹ The ground for the buyer's damages claim is the seller's breach of a contractual duty to deliver the goods free from defects.¹⁰⁷²

4.2.2.2.2. The interests protected by damages claim under the seller's guarantee liability

4.2.2.2.2.1. English law

As already stated, a breach of contract always gives rise to liability in damages. The basic rule in the award of damages is that it is compensatory and is designed above all to give the aggrieved buyer the benefit of the promised bargain; namely, it is generally said that the aggrieved buyer's expectation interests are protected by the award of damages in a sense that the purpose of the award of damages is to put the plaintiff in as good an economic position as

¹⁰⁶⁷ See *supra* pp. 49 ff.

¹⁰⁶⁸ See *supra* pp. 52 ff.

¹⁰⁶⁹ See *supra* pp. 58 ff.

¹⁰⁷⁰ For the discussion as to the nature of the seller's liability for defective goods, see *supra* pp. 62 f.

¹⁰⁷¹ Treitel, *supra* n. 421, at 75; Zweigert and Kötz, *supra* n. 20, at 540; Huber, Schlechtriem (ed.), *supra* n. 218, at 368; Stoll, Schlechtriem (ed.), *supra* n. 218, at 555 ff.; Honnold, *supra* n. 218, at 301 f.; Knapp, Bianca/Bonell (ed.), *supra* n. 221, at 539 f.; Enderlein and Maskow, *supra* n. 288, at 297.

¹⁰⁷² The ground and interests protected by a damages claim under the Directive is not dealt here because the damage claim has recourse to domestic laws (Green Paper, *supra* n. 277, at 90; 10th Report by Select Committee, *supra* n. 277, at 21; Directive(99/44) Art. 8.1.), although given that a domestic law entitles a buyer to a damages claim, the ground for the claim may be understood the breach of the seller's contractual duty to deliver conforming goods with the contract as examined before and the damage claim may certainly protect in principle the expectation interests (but, it may depend on the requirement of fault). See *supra* pp. 62 f. For the implied contractual duties under the Directive in general, see *supra* pp. 56 ff.

that in which he would have been had the seller not committed a breach.¹⁰⁷³

The award of damages being in principle based on the expectation interests, it is plainly established that the buyer is entitled to choose between claiming on an expectation or a reliance basis.¹⁰⁷⁴ However, it is generally recognised that the aggrieved buyer's claim based on reliance loss should not put him in a position better than that in which he would have been had there been no breach.¹⁰⁷⁵ One example in which the buyer's claim may be based on reliance loss is where he is unable to prove to a satisfactory standard the lost expectancy, precisely because of the seller's breach.¹⁰⁷⁶

Recovery on the basis of the restitution interests instead of the expectation interests is available to the aggrieved buyer in the cases, *e.g.*, where the seller's delivery of goods is so defective that the buyer justifiably rejects and terminates the contract.¹⁰⁷⁷ It is worth noting that the aggrieved buyer may be, on restoring the defective goods to the seller, allowed to combine his restitution claims with claims for expenses incurred in reliance on the contract and the excess cost of a substitute insofar as there is no double recovery in respect of the same loss.¹⁰⁷⁸ Where the buyer

¹⁰⁷³ Treitel, *supra* n. 951, at 873 f.; *Robinson v. Harman* [1848] 1 Ex 850, 855, *per* Parke B.; *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] AC 673, 688, *per* Viscount Haldane L.C.

¹⁰⁷⁴ *Culliance v. British "Rema" Mfg. Co.* [1954] 1 QB 292, 303; *Anglia Television Ltd v. Reed* [1972] 1 QB 60, 63-64; *CCC Films (London) Ltd. v. Impact Quadrant Films Ltd* [1985] QB 16, 32; *cf.* *Lloyd v. Stanbury* [1971] 1 WLR 535, 547; *The Selda* [1998] 1 Lloyd's Rep 416, 419 quoted in Treitel, *supra* n. 951, at 877, n. 16.

¹⁰⁷⁵ Treitel, *supra* n. 421, at 97 f.; Treitel, *supra* n. 951, at 877 f.; *C. & P. Haulage v. Middleton* [1983] 1 WLR 1461; *CCC Films (London) Ltd. v. Impact Quadrant Films Ltd* [1985] QB 16; *McRae v. Commonwealth Disposals Commission* [1951] 84 CLR 377; *Bowlay Logging Ltd. v. Domtar Ltd.* [1978] 4 WWR 105.

¹⁰⁷⁶ See *Anglia Television Ltd v. Reed* [1972] 1 QB 60; *McRae v. Commonwealth Disposals Commission* [1991] 84 CLR 377.

¹⁰⁷⁷ Treitel, *supra* n. 951, at 877. This is one of the cases of a total failure of consideration. For the cases where the buyer is entitled to reject the goods and terminate the contract, see *supra* pp. 184 ff.

¹⁰⁷⁸ *Millar's Machinery Co. Ltd. v. David Way & Son* [1934] 40 Com Cas 204; Treitel, *supra* n. 421, at 98 ff. *Cf.* Barker, "Restitution of Passenger Fare", (1994) *LMCLQ* 291; McKendrick, "Total Failure of Consideration and Counter-Restitution: Two Issues or One?", in: Birks (ed.), *Laundering and Tracing*,

claims for restitution of a sum of money as opposed to damages, such claim may leave the buyer better off than he would have been had there been no breach (*e.g.*, where he made a bad bargain) because unlike a reliance loss claim, there is no ceiling to the expectation interests in a restitution claim in which the measure of recovery is what the seller received rather than what the buyer has lost by way of reliance or by way of lost expectation.¹⁰⁷⁹

In addition, the buyer can often recover ‘consequential loss’, which may refer to further harm, such as personal injury¹⁰⁸⁰ or damage to property¹⁰⁸¹ suffered as a result of breach.¹⁰⁸²

One must note that the buyer’s claim for damages under English law is not affected by the matter of whether the breach of contract has been culpably committed intentionally or negligently or in any other way (non-fault based liability).¹⁰⁸³ What really matters is the mere fact of the breach of contract.¹⁰⁸⁴

4.2.2.2.2. CISG

(1995), at 217 ff.; Burrows & McKendrick, *Cases and Materials on the Law of Restitution*, (1997), at 210 ff.

¹⁰⁷⁹ *Id.*, at 100 ff.; Treitel, *supra* n. 951, at 878.

¹⁰⁸⁰ *Godley v. Perry* [1960] 1 All ER 36.

¹⁰⁸¹ *Bostock & Co Ltd. v. Nicholson & Sons Ltd.* [1904] 1 KB 725.

¹⁰⁸² See also *Smith v. Green* [1875] 1 CPD 92. Cf. *The Batis* [1990] 1 Lloyd’s Rep 345 (expenses incurred in complying with directions wrongfully given by the defendant). Cf. *British Sugar plc. v. NEI Power Projects Ltd* [1997] 87 Build LR 42 for the meaning of consequential damages.

¹⁰⁸³ See *supra* n. 588-589 and accompanying texts.

¹⁰⁸⁴ In order for the buyer to recover damages, he must prove that the losses were caused by the breach and he will be recovered to the extent that losses fall inside the rule of remoteness of damage. The remoteness rule specifies that the defendant will be liable for losses that, considered at the time of contract, fell within the reasonable contemplation of the parties as liable to result from a breach. This rule was stated in the leading case of *Hadley v. Baxendale* [1854] 9 Ex 341. It consists of two limbs (the first limb is that the plaintiff would recover in respect of losses arising in the usual course of things, and the second limb states that it was designed for more unusual losses present to the minds of the particular contracting parties). For more detail, see Treitel, *supra* n. 951, at 898 ff.; Harris, Beale (ed.), *supra* n. 847, at para. 27-024 ff. Compare with KCC Art. 393 which is similar to the rules of *Hadley v. Baxendale*.

An aggrieved buyer is granted a general right to claim damages whenever there has been any breach of the contract.¹⁰⁸⁵ The basic formula for damages for the breach of contract under CISG is designed to compensate the loss, including loss of profit, suffered by the injured buyer as a consequence of breach.¹⁰⁸⁶ Assuming a causal connection between the breach and the loss, CISG seeks to place the aggrieved buyer in the same financial position he would have enjoyed had the seller not committed the breach of contract; *i.e.*, similarly to English law, the damages claim under CISG serves in principle to protect the buyer's expectation interests.¹⁰⁸⁷ The general rule for damages stipulated in art. 74 being in principle to protect the aggrieved buyer's expectation interests, a lesser measure of reliance or restitution interest protection is presumably also available within such rule, depending on the circumstances; *i.e.*, it does not necessarily seem to deny the buyer the right to claim recovery of his reliance interest alternatively, if any, along with his restitution interest in order to place him in the position in which he would have been had he not relied on the due performance of the contract where the buyer is entitled to avoid the contract.¹⁰⁸⁸ However, where it can be proved in such a case that the buyer would have suffered a financial loss had the contract been duly performed, one must not shift such loss to the seller when calculating the buyer's loss.¹⁰⁸⁹

As specified in the general rule for measuring damages, "... consists of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach", the buyer is

¹⁰⁸⁵ CISG Art. 45(1)(b).

¹⁰⁸⁶ CISG Art. 74.

¹⁰⁸⁷ Secretariat's Commentary, *O.R.*, at 59, Art. 70, No. 3; Honnold, *supra* n. 218, at 445; Enderlein and Maskow, *supra* n. 288, at 300; Knapp, Bianca/Bonell (ed.), *supra* n. 221, at 543; Stoll, Schlechtriem (ed.), *supra* n. 218, at 553; Farnsworth, "Damages and Specific Relief", (1979) 27 *Am. J. Comp. L.* 249; Bridge, *supra* n. 434, at 102; Lookofsky, "The 1980 United Nations Convention on Contracts for the International Sale of Goods", in: Blanpain (ed.), *International Encyclopaedia of Laws – Contracts*, (1993), at 123.

¹⁰⁸⁸ Stoll, Schlechtriem (ed.), *supra* n. 218, at 554; Ziegel, *supra* n. 886, at 9-37; Lookofsky, *supra* n. 1087, at 123.

¹⁰⁸⁹ Stoll, *id.*

also entitled to recover any consequential loss caused by the breach of contract.¹⁰⁹⁰ However, one must note that any consequential damages with regard to the cases of death or personal injuries caused by the defective goods are excluded, regardless of whether the buyer himself or a third party is involved.¹⁰⁹¹

The buyer's right to recover damages is not related to any proof of the seller's culpable breach,¹⁰⁹² *i.e.*, there is no requirement of fault.¹⁰⁹³ However, in certain exceptional cases, the seller may be exempted from his liability for damages to the extent that he can demonstrate the following; first, that the failure to perform was attributable to an impediment beyond his control, second, that he could not reasonably be expected to have taken the impediment into account at the time of contract, third, that he could not reasonably have been expected to have avoided or overcome the impediment or its consequences.¹⁰⁹⁴

¹⁰⁹⁰ CISG Art. 74.

¹⁰⁹¹ CISG Art. 5. See Stoll, Schlechtriem (ed.), *supra* n. 218, at 557.

¹⁰⁹² But his right is governed by a general rule of remoteness and causation of damage in art. 74 which stipulates that damages equal to the loss suffered as a consequence of breach will be awarded, upto the limit of what was or ought to have been foreseen at the time of the contract by the defendant as a possible consequence of breach. For more detail, see Stoll, Schlechtriem (ed.), *supra* n. 218, at 567 ff. Cf. Sutton, "Measuring Damages under the United Nations Convention on the International Sale of Goods", (1989) 50 *Ohio St. L. J.* 737; Ferrari, "Comparative Ruminations on the Foreseeability of Damages in Contract Law", (1993) 53 *Lou. L. Rev.* 1257; Nicholas, *supra* n. 892, at 230 f.; Darkey, "Damages Provisions under UN Convention", (1989) 15 *J. L. & Com.* 139; Ziegel, *supra* n. 886, at 9-36 f.; Bridge, *supra* n. 434, at 102 f.

¹⁰⁹³ See *supra* n. 588-589 and accompanying texts. See also Secretariat's Commentary, *O.R.*, at 37, Art. 41, No. 3; Knapp, Bianca/Bonell (ed.), *supra* n. 221, at 540; Enderlein and Maskow, *supra* n. 288, at 298, 320; Treitel, *supra* n. 421, at 23 f. and 75; Lookofsky, *supra* n. 1087, at 123; Schlechtriem, *supra* n. 307, at 101; Tallon, Bianca/Bonell (ed.), *supra* n. 221, at 573. Cf. Nicholas, "Prerequisites and Extent of Liability for Breach of Contract under the U.N. Convention", in: Schlechtriem (ed.), *Einheitliches Kaufrecht und nationales Obligationenrecht*, (1987), at 286; Nicholas, "Fault and Breach of Contract", in: Beatson and Friedmann (ed.), *supra* n. 812, at 351 ff.; Nicholas, "Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods", in: Galston/Smit (ed.), *International sales*, (1984), at 5-10 ff. (He tries to find that CISG is based on a concept of fault from the point of view of German law, art. 79 being the basis of the fault principle).

¹⁰⁹⁴ CISG Art. 79(1); Bernstein and Lookofsky, *supra* n. 563, at 107; Schlechtriem, *supra* n. 307, at 101;

4.2.2.3. Comparative view

As regards the ground for the buyer's claim for damages under the seller's guarantee liability, it was shown in Korean law that it depends upon the matter of which theory one takes for the nature of the seller's guarantee liability. The legal liability theory takes the view that the ground is on the breach of a legal duty to deliver non-defective goods imposed on the seller irrespective of the parties' contractual intention. On the other hand, the contractual liability theory contends that it is the breach of a contractual duty to deliver non-defective goods which is generally in accordance with the ground under English law and CISG.

KCC stipulates the same right to claim damages under the seller's guarantee liability as the one under the general liability. The latter right is in principle to protect the aggrieved party's expectation interests in order to place him in the same financial position as he would have been if the contract had been duly performed. In some cases, however, depending upon the circumstances, this right may include the buyer's reliance and consequential loss. In this light, it is similar to the right to claim damages in English law and CISG.¹⁰⁹⁵

Then, the question is whether the fact that the same right of damages as in the general liability is specified in the seller's guarantee liability means that it protects expectation interests as well

Stoll, Schlechtriem (ed.), *supra* n. 218, at 606; Tallon, Bianca/Bonell (ed.), *supra* n. 221, at 576; Enderlein and Maskow, *supra* n. 288, at 320 f.; Bridge, *supra* n. 434, at 107; Audit, "The Vienna Sales Convention and the Lex Mercatoria", in: Carboneau (ed.), *Lex Mercatoria and Arbitration*, rev. ed., (1998), at 179 f. However, some scholars argue that the exemption conferred on the seller by art. 79 is not applicable to the cases of the delivery of non-conforming goods based on that the replacement of "circumstances" by "impediment" in the process of legislation of art. 79 implies a barrier to performance which prevents performance (as contrasted with circumstances that lead to defective performance). This view seems to be submitted because they are overly anxious about the introduction of fault liability through the "back door", art. 79. See Honnold, *supra* n. 218, at 477 ff.; Nicholas, *supra* n. 1093, at 5-10 ff. Cf. For the counterpart in English law of art. 79, see *supra* n. 222; Bridge, *supra* n. 434, at 106 f. Cf. Hudson, "Exemptions and Impossibility under the Vienna Convention", in: McKendrick (ed.), *Force majeure and Frustration of Contract*, (1991), at 175 ff.

¹⁰⁹⁵ However, one must note that it is distinctive from English law and CISG in terms of the requirement of fault.

as consequential loss. The answer was quite negative even from the point of view of the contractual liability theory which takes the view of the ground for damages being on the breach of the contractual duty. In general, the theory has tried to find a lesser measure of damages for the seller's guarantee liability than the one for the general liability because of its distinctive nature of non-fault based liability.¹⁰⁹⁶ That is, it is thought that it may be unfair for the seller to remunerate the buyer for his expectation loss as well as consequential loss even if the seller was not at fault. In the end, one may find that the scope of damages under the seller's guarantee liability in Korean law departs from English law and CISG,¹⁰⁹⁷ although 'A' theory in Korean law is similar to English law and CISG in that it may compensate the buyer's expectation loss and even consequential loss regardless of the fault principle.¹⁰⁹⁸

There have been various views in Korea so as to find the most appropriate lesser measure for damages under the seller's guarantee liability. Of the various views, the reliance measure seems to draw one's attention in light of a comparative study because this measure is sometimes taken as an alternative of the expectancy measure in English law and CISG, depending on the circumstances.¹⁰⁹⁹ Notwithstanding the apparent similarity, a careful examination may reveal dissimilarity in its contents, although it seems similar insofar as the legal liability is concerned. The reliance measure taken by the contractual liability theory in Korea is generally understood to include price reduction, contract expenses, restitution of the price when the contract has been rescinded, and *etc.*; it is restricted to the cases where there is no problem about compensating in the absence of fault,¹¹⁰⁰ but it seems to exclude a reliance loss in foregoing the opportunity of

¹⁰⁹⁶ But except 'A' theory. See *supra* pp. 220 f.

¹⁰⁹⁷ The protection of the buyer's expectation interests or consequential loss not covered by the seller's guarantee liability in Korean law, as the case may be, has been left to the general liability for incomplete performance based on the fault principle by the means of either allowing concurrence with the general liability or applying the principle of the general rules supplementing the lack of the special rules.

¹⁰⁹⁸ See *supra* pp. 220 f.

¹⁰⁹⁹ See *supra* pp. 218 f.(for the legal liability theory), 221 f.(for 'B' theory), 222 (for 'C' theory).

¹¹⁰⁰ See *supra* pp. 222 ('C' theory). Cf. See also *supra* pp. 221 f.('B' theory; it takes the similar view as 'C' theory in a sense that the reliance interest is protected regardless of the fault principle. But one must

making a profitable contract with another person.¹¹⁰¹ On the other hand, it seems that the measure in English law, CISG and the legal liability theory includes such loss in the foregone opportunity to contract with someone else.¹¹⁰² The reason for the limited reliance measure in the contractual liability theory in Korean law seems to lie in their reluctance to award damages for the foregone profit which is thought in principle to be the buyer's risk and generally governed by the fault principle.¹¹⁰³

4.2.3. Evaluating accounts

4.2.3.1. Internal evaluation

As to the rationale of the award of the right to claim damages, there seems to be no doubt that it is to protect the aggrieved party's expectation interests in the event of the other party's breach of his contractual undertaking.¹¹⁰⁴ This rationale has been well reflected in the claim for

note that unlike 'C' theory, the expectation interest is also protected within the seller's guarantee liability on the condition of satisfying the fault principle).

¹¹⁰¹ This loss is categorised in continental law as one of negative damage (*lucrum cessans*) as contrasted with actual loss (*damnum emergens*). Negative damage is often an element in expectation interest although it may be an element of reliance interest like this case of the foregone profit. See Treitel, *supra* n. 421, at 84 f.

¹¹⁰² See *supra* pp. 218 f.; Bridge, *supra* n. 784, at 539 f.; Bridge, *supra* n. 434, at 334; Bridge, "Expectation Damages and Uncertain Future Losses", in: Beatson and Friedmann (ed.), *supra* n. 812, at 427 ff. Cf. *East v. Maurer* [1991] 1 WLR 461 (In this case the claimant was interested in buying a hairdressing salon and was induced to buy one belonging to the defendant by the latter's fraudulent representation. It was held that the claimant could be compensated for damages with regard to another such business in which he would have invested his money if the representation had not been made, but not the profits which he would have made out of the defendant's business, if the representation relating to it had been true.)

¹¹⁰³ Cf. Kwang-min Seo, *supra* n. 193, at 36 f.; Bup-young Ahn, *supra* n. 167, at 219 f.; Hyung-bae Kim, *supra* n. 67, at 241 f.. Cf. KCC Art. 535(1).

¹¹⁰⁴ From the point of view of Korean law, it is generally governed by the fault principle so that the contractual undertaking may extend right up to the point at which he promises to do their best to produce the envisaged result.

damages under English law and CISG. However, the same is hardly true so far as the seller's guarantee liability in Korean law is concerned, because of both the long disputes as to the nature of the seller's guarantee liability and its unique feature of a non-fault based liability. Undoubtedly, there seems to be no problem in excluding the expectation interests from the measure of damages from the point of view of the legal liability theory because in any event the theory does not accept the seller's contractual undertaking to deliver non-defective goods which is the basic foundation for the damages claim for the breached party's expectancy. Leaving aside the matter of its justification in excluding the expectation interests in the seller's guarantee liability,¹¹⁰⁵ however, the question arises in its view as to the protection of expectation interests; some scholars argue that it must be remunerated by the means of allowing concurrence with the general liability, whereas the others insist no concurrence, restricting all the damages to reliance loss in the seller's guarantee liability.¹¹⁰⁶ First, as regards the former view, there seems to be no room for the concurrence insofar as the sale of specific goods is concerned and the theory is based on the *specific goods dogma*¹¹⁰⁷ because all the contractual duties, breach of which is the cornerstone for the damage claim for expectation loss under the general liability, are deemed to have been fulfilled if the goods are delivered as they were at the time of contract.¹¹⁰⁸ Second, the latter view cannot avoid some criticism in that it is unfair for the buyer if he cannot recover his expectation loss in the event of the seller's delivery of defective goods attributable to the

¹¹⁰⁵ As argued long before, its grounds for non-contractual undertaking have been criticised in various aspects by the contractual liability theorists and further by this thesis. See *supra* pp. 38 ff., 69 ff. Cf. Is the restriction to reliance loss by the legal liability theory free from criticism? The first question is whether the restriction will achieve its purpose to find a lesser measure than the expectation measure; in practice, it may be more or less equivalent as long as the reliance measure includes the loss of profit by foregoing the opportunity to make the contract with the third person. The second question is that its theoretical basis on the invalidity of the contract cannot be compatible with the cases where the buyer claims damages without the contract being rescinded because the matter of invalidity is closely related only to the cases where the contract is rescinded. See Kwang-min Seo, *supra* n. 193, at 35 ff.

¹¹⁰⁶ See *supra* n. 1043-1051 and accompanying texts.

¹¹⁰⁷ See *supra* pp. 33 f.

¹¹⁰⁸ Nevertheless, note that the concurrence may be possible if the generic goods are concerned.

seller's fault in the sale of generic goods.

Moving onto the contractual liability theory, the question arises whether its assumption of the seller's contractual undertaking is linked with the expectation measure. Some argue that the scope of damages under the seller's guarantee liability should be limited on the basis of its unique nature of non-fault based liability to the limited reliance loss¹¹⁰⁹ or the price reduction only.¹¹¹⁰ Having stated this limitation, their remaining task was to find the way to compensate the aggrieved buyer for his expectation loss because it is natural to say that their assumption of the contractual undertaking should be in principle followed by the compensation for such loss in the event of the breach of the undertaking; two views have been submitted (the concurrence theory and the non-concurrence theory).¹¹¹¹ Both theories seem quite plausible in their theoretical construction, although their practical result would be more or less the same.¹¹¹² However, they too cannot be free from criticism in terms of the ensuing questions. First, as to the concurrence theory, it still remains the question to be answered, as was asked by the non-concurrence theory, of how it could clearly explain the principle of *lex specialis derogat legem generalem* in their theory.¹¹¹³ Second, regarding the non-concurrence theory, the question is in that, depending on the type of loss, the applicable provision is differentiated for the same cause of action (the seller's delivery of defective goods)¹¹¹⁴ although it is in practice quite difficult to clearly distinguish the various type of loss.¹¹¹⁵ Consequently, it may cause the instability of law unless it provides clear guidelines for the applicable provision.¹¹¹⁶

¹¹⁰⁹ See *supra* p. 222.

¹¹¹⁰ See *supra* p. 222.

¹¹¹¹ See *supra* pp. 225 ff.

¹¹¹² Namely, it is similar in that the interests not protected under the seller's guarantee liability are protected by the general liability at the end on the condition of satisfying the fault principle.

¹¹¹³ Dae-jeong Kim, *supra* n. 206, at 254 ff.

¹¹¹⁴ E.g., the provisions for the seller's guarantee liability (arts. 580 and 581) are exclusively applicable for some of the reliance loss, whereas the provisions for the general liability (art. 390) applicable to the loss of the other interests not protected by the seller's guarantee liability.

¹¹¹⁵ Bup-young Ahn, *supra* n. 167, at 208 f., 224 f.

¹¹¹⁶ *Id.*

Given that all the complexities faced in Korean law are basically due to the disputes about the nature of the seller's guarantee liability along with the artificial distinction of fault or non-fault based liability, one should recall the arguments raised at the beginning of this thesis which was aimed at unifying the dual liability system in light of the approach taken by English law and CISG.¹¹¹⁷ The first argument was related to the nature of the seller's guarantee liability, which maintained that it should be a contractual liability for the breach of the seller's contractual duty to deliver non-defective goods in light of the logic and reasonableness of the existing theories.¹¹¹⁸ This finding could be understood as a foundation for a damages claim based on the buyer's expectancy in the sale of both generic goods and specific goods. The second argument was that Korean law needs another way of thinking, first, that one needs to interpret in an unified way that damages under the seller's guarantee liability are as they are under the general liability so that it may include all kinds of loss, second, that the requirement of fault is dependent upon what remedy the buyer seeks to claim rather than the artificial distinction of fault or non-fault based liability.¹¹¹⁹ Consequently, insofar as the damages claim under the general liability is subject to the fault principle,¹¹²⁰ the requirement of fault is also crucial for the damages claim under the seller's guarantee liability. This argument appears unfavourable from the point of view of the buyer compared to the existing theories because, given that no specific provision for a price reduction in the case of qualitative defects under KCC means he cannot claim a price reduction,¹¹²¹ he may not have any monetary relief where it is shown the absence of fault on the seller's part. However, there seems no particular difference in practice since, even if any fault is not found, it is generally understood that some losses may be still compensated regardless of the fault principle under the general liability (*e.g.*, contract expenses

¹¹¹⁷ See *supra* pp. 65 ff.

¹¹¹⁸ See *supra* pp. 68 ff., 77 f.

¹¹¹⁹ See *supra* pp. 73 ff.

¹¹²⁰ KCC Art. 390.

¹¹²¹ In contrast, KCC has a provision for a price reduction in the case of defects in quantity. KCC Art. 572(3).

where the contract is rescinded), and, as will be argued later, the buyer is still allowed to claim a price reduction which exists separate from a damages claim.¹¹²² This seems even clearer when one considers that most contractual liability theorists limit the scope of damages under the seller's guarantee liability to, at most, reliance loss or price reduction which would have no problem to be compensated in the absence of fault if it was dealt under the general liability and they leave the matters of expectation loss and consequential loss to the fault principle.¹¹²³ In this light, the arguments raised seem helpful to ease the complexities in interpreting damages under the seller's guarantee liability, in particular, for the compensation of expectation loss and consequential loss, without any disadvantage on the buyer.¹¹²⁴

4.2.3.2. External evaluation

The goal, from an efficiency perspective, is to employ the legal remedy that will hinder the parties from producing inefficient breach, ensuring resources to be allocated to their highest-valued uses.¹¹²⁵ It has been submitted that, of the measures of contract damages, expectation is the only measure of contract damages that discourages breach only where performance is more

¹¹²² Notwithstanding no provision on price reduction, the ensuing discussion will show how the price reduction in the case of defects in quality could be independently recognised of damages under the existing KCC. See *infra* n. 1175 and accompanying texts.

¹¹²³ See *supra* pp. 219 ff., 225 ff. But except 'A' theory (*supra* pp. 220 f.)

¹¹²⁴ *Accord*; Choon-soo Ahn, *supra* n. 148, at 441 f.

¹¹²⁵ Ulen, "The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies", in: Katz (ed.), *Foundations of the Economic Approach to Law*, (1998), at 117; Mercuro and Medema, *Economics and the Law: From Posner to Post-Modernism*, (1997), at 75; Beale, *supra* n. 25, at 160 f.; Miceli, *Economics of Law*, (1997), at 71 f.; Hirsch, *Law and Economics: An Introductory Analysis*, (1988), at 142 f.; Posner, *supra* n. 21, (1998), at 130 f.; Polinsky, *supra* n. 22, at 29 f.; Cooter & Ulen, *supra* n. 27, at 172 f.; Harris, *supra* n. 27, at 84 f. On the other hand, since economic efficiency assumes that there be circumstances where the breach of contract is more efficient than performance, the legal rules should also encourage the parties to breach the contract in the cases where such breach is efficient. Assuming efficiency requires maximising the sum of the payoffs to the promisor and promisee, the cases of efficient breach are where the costs of performance exceed the benefit to all the parties. Cf. Cooter & Ulen, *supra* n. 27, at 172 f. Cf. For the critical views as to efficient breach, see Harris, *supra* n. 27, at 86 f.; Beale, *supra* n. 25, at 163 f.

efficient than is breach.¹¹²⁶ The reason for that is that expectation damages fully internalise to the potential breacher all costs of the breach to the victim.¹¹²⁷ For instance, suppose that A has a computer for sale at a price of \$1,000. B is willing to pay up to \$1,300, and agrees to purchase the computer at the price of \$1,000. Thus, at A's asking price, B realises a consumer surplus of \$300. Before the sale is completed, C offers A \$1,200 for the same computer (an amount equal to the value he places on possessing it). If the court imposes expectation measure which makes B as well-off as if the contract had been performed, A will have an incentive to perform because the payment of B's expectation damages (the consumer surplus \$300) is greater than A's gain (\$200) when he takes the higher offer from C and breaks the contract with B. Consequently, the expectation measure seems to properly ensure the goal of the legal remedies, namely that the computer still remains with one who values it most. However, the award of reliance or restitution damages may not produce an efficient result because the breacher does not internalise the full cost of the breach to the victim. For instance, in the example case of the contract between A and B, suppose B agrees to purchase the computer at the same price of \$1,000 with a good faith deposit of \$400 and the remaining payment within 5 days. He values it \$1,300. In reliance on this contract, B purchases some accessories for the computer, spending \$100 that is non-refundable. Before the computer is conveyed to B, C offers \$1,200 for the same computer, which is valued by C at the same amount as he pays. Both reliance and restitution damages would provide A with an incentive for inefficient breach, resulting in that the computer does not move to the highest-valued use (B values it more than C) because the cost of breaching is inefficiently low. That is, if the court is supposed to take reliance measure, it may provide an incentive for A to breach the contract with B who values the computer most because reliance damages will make A an additional gain of \$100 after the compensation of \$100 for the expenses for the accessories and refund of \$400 if he takes the higher offer from C.

¹¹²⁶ *Id.*

¹¹²⁷ However, in reality, expectation damages actually awarded by the court are not perfect due to the practical difficulty to estimate the breached party's expectation. See Cooter & Ulen, *supra* n. 27, at 175;

Similarly, restitution will also provide A with an incentive for an inefficient breach because it will make A an additional gain of \$200 after refund of \$400 when he contracts with C who values the computer lesser than B.

Having said that, the question arises whether each theory and jurisdiction may well respond to the result derived above. Insofar as the legal liability theory is concerned, it seems that it is not necessary to discuss the matter of damages based on the buyer's contractual expectation under the seller's guarantee liability because it is understood that the seller is not deemed to promise the buyer to deliver non-defective goods in the contract.¹¹²⁸ However, the answer may be different if one considers the case of the sale of generic goods, which undoubtedly has a contractual duty to deliver non-defective goods. Although some of the legal liability theorists allow the expectation damages in that case by the means of allowing concurrence with the general liability (the concurrence theory), the others argue that it is restricted to the reliance damages because they understand the special provisions for the seller's guarantee liability for generic goods are intended to exclude the application of the general liability (the non-concurrence theory).¹¹²⁹ It seems apparent that the latter theory may provide the seller with an incentive for inefficient breach because the restriction to the reliance damages does not internalise to the seller the full cost of the breach to the buyer. On the other hand, the contractual liability theory (which allows the expectation damages by whatever means),¹¹³⁰ English law and CISG may discourage the seller to commit an inefficient breach to the extent that their routine measure is based on the expectation. However, one must recall that the scope of expectation in Korean law departs from that in English law and CISG in terms of the requirement of fault;¹¹³¹ the former is based on the seller's promise to do their best to produce the envisaged result, whereas the latter requires the seller to guarantee it. Given that, in the

Ulen, *supra* n. 1125, at 120.

¹¹²⁸ See *supra* pp. 30 ff.

¹¹²⁹ See *supra* pp. 223 ff.

¹¹³⁰ For the means to allow the expectation damages in this theory, see *supra* pp. 225 ff.

¹¹³¹ But note that 'A' theory in Korean law does not require fault. See *supra* pp. 220 f.

modern world, exchange transactions are largely standardised and they are quickly and painlessly executed, it seems better to assume that one treats the parties to guarantee the envisaged result rather than merely to do their best to procure it.¹¹³² This view seems to be well witnessed in Korea by the efforts of the many scholars to reverse the burden of proof and to narrow the possibilities for rebutting the presumption of fault in sales transactions so that the seller may face a very difficult task to show that he was not at fault, which may end up being equivalent to imposing the strict liability on the seller.¹¹³³

Another point to be evaluated in light of efficiency is in the uncertainty inherent in the interpretation of damages under the seller's guarantee liability in Korean law.¹¹³⁴ As examined above, the long disputes about damages under the seller's guarantee liability seem to cause a form of market failure in a way that increases the transaction costs by the contractual parties in order to clarify the scope of damages under the seller's guarantee liability. The principal reason for that is the uncertainty caused by the various attempts in Korean law to distinguish damages under the seller's guarantee liability from damages under the general liability. This failure seems to suggest that one should support the view submitted above to attempt to interpret in a unified way that damages under the seller's guarantee liability are as they are under the general liability.¹¹³⁵

4.3. Price reduction

4.3.1. General

Where the seller delivers defective goods, another type of financial remedy under Korean law, the Directive and CISG is the right to reduce the contract price. The legal principle of price

¹¹³² Zweigert and Kötz, *supra* n. 20, at 549 f.; Kyu-chang Cho, *supra* n. 136, at 263 f.

¹¹³³ Kyu-chang Cho, *supra* n. 136, at 263 f.; Bup-young Ahn, *supra* n. 167, at 222 ff.; Kwang-min Seo, *supra* n. 193, at 41; Dae-jeong Kim, *supra* n. 206, at 279 f.

¹¹³⁴ See *supra* pp. 217 ff.

¹¹³⁵ Cf. See *supra* pp. 76 f.

reduction can be traced back to the *actio quanti minoris* of Roman law, which was inherited to continental laws;¹¹³⁶ the underlying principle of price reduction is said to be that the buyer may keep the defective goods tendered by the seller in which case the contract is adapted to the new circumstances in a way that the price is reduced as if the subject matter of the goods had from the outset been the defective goods actually delivered.¹¹³⁷ The legal nature of price reduction is deemed to be a quasi-restitutionary rather than compensatory, and to be intended to prevent the seller receiving full payment where he has not performed in full.¹¹³⁸ The further thing to be noted is in its nature that unlike damages being subject to negotiation or litigation, it is a non-judicial remedy in the sense that the buyer can unilaterally declare a reduction without a prior judicial adjudication, providing some immediate relief, although it may force the seller to file suit if he does not agree.¹¹³⁹

English law does not recognise the principle of price reduction for the seller's delivery of defective goods, although it may be compared with the SGA s. 53(1)(a) by which the damages to which the buyer is entitled by reason of the defect can be deducted from the price.

4.3.2. Comparative accounts

4.3.2.1. Korean law

Unlike other continental laws, Korean law has no particular provision for price reduction as a remedy for the seller's delivery of defective goods in quality, although such a remedy is stipulated in KCC for the case of shortage in quantity,¹¹⁴⁰ and in KCmC.¹¹⁴¹ It is, however,

¹¹³⁶ For the historical background, see *supra* pp. 31 f., 39 ff.

¹¹³⁷ Huber, Schlechtriem (ed.), *supra* n. 218, at 437 f.; Will, Bianca/Bonell (ed.), *supra* n. 221, at 372.

¹¹³⁸ Will, Bianca/Bonell (ed.), *supra* n. 221, at 372.

¹¹³⁹ Will, *id.*, at 373; Enderlein and Maskow, *supra* n. 288, at 196; Bergsten & Miller, "The Remedy of Reduction of Price", (1979) 27 *Am. J. Comp. L.* 255, at 265 f.; Secretariat's Commentary, *O.R.*, at 43; Eun-young Lee, *supra* n. 68, at 798.

¹¹⁴⁰ KCC Art. 574.

¹¹⁴¹ KCmC Art. 69(1).

generally recognised by scholars and by case law in defective quality, even though there are various views as to the means to recognise it. The first view argues that it can be allowed in the form of a partial avoidance of the contract on the basis of initial impossibility in part¹¹⁴² which is one of theoretical backgrounds of the legal liability theory.¹¹⁴³ Analogous to full restitution in the case of rescission, the proportionate reduction provides a degree of quality-gap compensation in order to strike a balance in terms of value for money where there is initial impossibility in part which may lead to the contract being partially invalid.¹¹⁴⁴ The second view maintains that it is generally included in the buyer's claim for damages under the seller's guarantee liability.¹¹⁴⁵ This view does not seem to recognise it as a separate remedy, although it is well reflected in the interpretation of damages under the seller's guarantee liability.¹¹⁴⁶ The third view contends that damages under the seller's guarantee liability means nothing but price reduction itself.¹¹⁴⁷ The fourth view insists that Korean law recognises price reduction as distinct from damages under the seller's guarantee liability.¹¹⁴⁸ However, this view does not seem to clearly provide the means to allow price reduction in the case of qualitative defects under the existing KCC.

The particular importance of price reduction in Korean law is that the buyer is given a right to reduce the price regardless of the fault principle once it is found to be an imbalance in terms of value for money the buyer paid. The right in principle is merely one to have the price reduced in the proportion which the actual value of the goods delivered bears to the value which it

¹¹⁴² See *supra* pp. 36 f.

¹¹⁴³ Yun-jik Kwak, *supra* n. 74, at 231.

¹¹⁴⁴ *Id.*

¹¹⁴⁵ Kwang-min Seo, *supra* n. 193, at 38 f.; Bup-young Ahn, *supra* n. 167, at 219 f.; Hyung-bae Kim, *supra* n. 66, at 224 f.; Hyung-bae Kim, *supra* n. 67, at 341 f., 345 f.; Kyu-chang Cho, *supra* n. 136, at 262 f.

¹¹⁴⁶ According to this view, price reduction is treated as one of reliance losses and claimed in the form of a damages claim.

¹¹⁴⁷ Dae-jeong Kim, *supra* n. 206, at 264 f.; Sang-kwang Lee, *supra* n. 167, at 303 f. See also *supra* p. 222.

¹¹⁴⁸ Eun-Young Lee, *supra* n. 167, at 227.

would have had if it had not been defective.¹¹⁴⁹ Although it is not clear about the relevant time for estimating both values, it seems that insofar as the first view is concerned, it is the time of contract due to its theoretical basis. The right could be claimed even after the buyer has paid the contractual price.¹¹⁵⁰ Price reduction is generally compatible with damages for other losses under the seller's guarantee liability¹¹⁵¹ as well as damages under the general liability for the losses not covered by the seller's guarantee liability.¹¹⁵²

4.3.2.2. English law

Where the seller delivers non-conforming goods in quality, the buyer has a right to claim damages for breach of warranty in the cases where he elects or is compelled to affirm the contract and retain the goods.¹¹⁵³ The buyer may claim the right to claim damages by way of abatement against the price where he has not paid yet.¹¹⁵⁴ Therefore, he may exercise a measure of self-help by simply withholding a part or all of the price where the seller sues for the price so that he may set up the defects as a defence reducing his liability. The award of damages is *prima facie* assessed according to the difference between the value of the goods at the date of delivery to the buyer and the value they would have had at that time if they had conformed with the contract.¹¹⁵⁵ His claim for damages may completely extinguish his liability to pay, even if it is too late to reject. Where the buyer has suffered further damage, the buyer is not precluded from bringing a separate action for damages for the same breach of warranty or a counterclaim

¹¹⁴⁹ Dae-jeong Kim, *supra* n. 206, at 270 f. Cf. the Korean Supreme Court Cases, 22/7/1980, 79 Da 1519; 24/7/1979, 78 Ma 248.

¹¹⁵⁰ Eun-young Lee, *supra* n. 167, at 227.

¹¹⁵¹ For the losses covered by the seller's guarantee liability, see *supra* pp. 218 ff. Note that, from the standpoint of the second view, there is no need to discuss the compatibility of price reduction with damages.

¹¹⁵² For the losses not covered by the seller's guarantee liability, see *supra* pp. 223 ff.

¹¹⁵³ The SGA s. 53(1). For the cases of loss of the right of termination, see *supra* pp. 205 f.

¹¹⁵⁴ The SGA s. 53(1)(a). For the leading case before the SGA, see *Mondel v. Steel* [1841] 8 M&W 858, 151 ER 1288. See also *Poulton v. Lattimore* [1829] 9 B&C 259.

¹¹⁵⁵ The SGA s. 53(3).

in the seller's action for the price.¹¹⁵⁶

One must note that even if the buyer has paid the full price or the seller has recovered the full price by an action against him, the buyer is not bound to set up the breach of warranty by way of defence when the seller sues for the price; he may subsequently bring a separate action against the seller for damages attributable to the breach of warranty.¹¹⁵⁷

In the case of the seller's delivery of non-conforming goods in quantity, English law does not allow the buyer to reduce the price. However, the SGA s. 30(1) makes clear that if he accepts the delivery of a quantity of goods less than he contracted to buy, he must pay for them at the contract rate.

4.3.2.3. The Directive

Should a consumer not be entitled to have the goods repaired, or to get a replacement, or should the seller fail to provide repair or replacement within a reasonable time, or without significant inconvenience to the consumer, the consumer may require that the contractual price be reduced.¹¹⁵⁸ Insofar as the rights awarded by the Directive are exercised without prejudice to other rights that the consumer is entitled to under domestic rules, the compatibility of price reduction with damages may rely on the domestic rules.¹¹⁵⁹ Significance of price reduction under the remedial system of the Directive seems that it is the last resort the consumer can rely on where he is not entitled to any other remedies in the Directive along with domestic sales laws in the event of the seller's delivery of non-conforming goods. The Directive does not give guidance as to how price reduction is to be assessed. Nevertheless, it is submitted that it may be

¹¹⁵⁶ The SGA s. 53(4). Cf. For uncertainty of the meaning of 'further damage', see Harris, Guest (ed.), *supra* n. 515, at para. 17-047.

¹¹⁵⁷ The reason for that is that the existence or extent of a defect may not become apparent to the buyer until after the buyer has paid the price claimed by the seller. See Harris, Guest (ed.), *supra* n. 515, at para. 17-047.

¹¹⁵⁸ Directive(99/44) Art. 3.5.

¹¹⁵⁹ Green Paper, *supra* n. 277, at 90; 10th Report by Select Committee, *supra* n. 277, at 21. See also Directive(99/44) Art. 8.1.

calculated as is under CISG; the price is reduced proportionally in the same ratio that the value of the goods as delivered bears to the value they would have had had they conformed to the contract at the time of delivery.¹¹⁶⁰ In addition, although it is not clear whether the consumer can claim this right after he has paid the price, it seems to be fair to say that he may do so in light of comparison with CISG and other jurisdictions, which specify such a right.

4.3.2.4. CISG

CISG also entitles the buyer to a certain reduction in price where the goods do not conform to the contract in quality, quantity and description or are not contained or packaged in the manner required by the contract.¹¹⁶¹ The reduction is a proportional reduction of the price calculated by the ratio of the value of conforming goods to that of the goods actually delivered at the time of delivery.¹¹⁶² This right could be exercised irrespective of whether the buyer has already paid the price.¹¹⁶³ The buyer is entitled to combine price reduction with a claim for damages so that he may base his claim for price reduction on art. 50, and claim damages for additional losses.¹¹⁶⁴ The right to price reduction is of importance as an independent right along with the right to damages under CISG in that, first, the seller is not exempted from price reduction even if he can show non-conformity is due to an impediment within the meaning of art. 79; second, the right to price reduction is not affected by the limitations to which a claim for damages is subjected under arts. 74-77; third, the amount the buyer may get by proportional price reduction may be higher than that by damages where the market price has fallen because damages are in principle assessed by the linear calculation method (the actual difference in value between the

¹¹⁶⁰ Bradgate and Twigg-Flesner, *supra* n. 425.

¹¹⁶¹ CISG Art. 50.

¹¹⁶² *Id.* Cf. It used to be based on the time of contract in art. 46 ULIS and the preliminary drafts of CISG up until art. 46 of the 1978 New York Draft. The prevailing view under BGB §472 stands with this time of concluding the contract. See Huber, Schlechtriem (ed.), *supra* n. 218, at 441.

¹¹⁶³ CISG Art. 50.

¹¹⁶⁴ CISG Art. 45(1)(b) and (2). See Secretariat's Commentary, *O.R.*, at 43, Art. 46, No. 13.

conforming and non-conforming goods at the time of delivery);¹¹⁶⁵ fourth, CISG provides no time limit for the buyer to exercise price reduction insofar as he gives notice of lack of conformity in due course, whereas the right of avoidance or specific performance is subject to time limit of 'within a reasonable time'.¹¹⁶⁶

4.3.2.5. Comparative view

As examined above, price reduction in Korean law, CISG and the Directive is more or less similar in that, first, the amount of any price reduction is to be calculated according to the ratio that the value of the goods delivered bears to the value they would have had if the goods had been non-defective, and second, it may be exercised regardless of whether the buyer has already paid, third, it may be combined with damages for additional losses.¹¹⁶⁷ One possible departure exists in relation to the relevant time for assessing the value of the goods actually delivered and the value of the hypothetical conforming goods; one of the various views in Korean law seems to be based on the time of contract, whereas CISG and the Directive on the time of delivery.

In English law, there is no counterpart of price reduction in a strict sense regarding qualitative defect although it may be comparable with s. 53 of the SGA. One must note that s. 53 is not a remedy separate from that of damages and it is deemed to be a particular means of exercising the right to claim damages.¹¹⁶⁸ That is, while price reduction in Korean law, CISG and the Directive can be claimed regardless of the buyer's entitlement to damages, the abatement rule in

¹¹⁶⁵ Honnold, *supra* n. 218, at 336 ff.; Kritzer, *supra* n. 725, at 344, 377; Huber, *id.*, at 438; Bernstein and Lookofsky, *id.*, at 95; Will, Bianca/Bonell (ed.), *supra* n. 221, at 373. Cf. Treitel, *supra* n. 421, at 108. For the linear calculation method for damage claim where the buyer retains the goods, see Secretariat's Commentary, *O.R.*, at 59, Art. 70, No. 6 f.; Knapp, Bianca/Bonell (ed.), *supra* n. 221, at 546; Huber, Schlechtriem (ed.), *supra* n. 218, at 559; Bernstein and Lookofsky, *supra* n. 563, at 99.

¹¹⁶⁶ CISG Arts. 46 and 49. See Will, Bianca/Bonell (ed.), *supra* n. 221, at 372; Enderlein and Maskow, *supra* n. 288, at 197.

¹¹⁶⁷ However, the Directive is not clear because the issue of compatibility is left to domestic laws. See *supra* n. 1159 and accompanying texts.

¹¹⁶⁸ Cf. *Robinson v. Harman* [1848] 1 Ex. 850, 855; *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] AC 673, 689.

s. 53 relies on such entitlement. The further thing to note is that the rule can be exercised only where he has not paid the price. In relation to quantitative defect, s. 30(1) of the SGA can be comparable as price reduction, but it differs in terms of the method of calculating the reduced price because it does not refer to the actual value of the goods, but only the contract rate.¹¹⁶⁹

4.3.3. Evaluating accounts

4.3.3.1. Internal evaluation

As investigated above, each jurisdiction has shown their own particular importance of price reduction under their own remedial system both as a separate remedy and a non-judicial remedy, although English law has no price reduction in a strict sense and has found itself in no particular need of price reduction because its damages rules are deemed sufficient to protect the breached party regardless of the fault principle. Korean law has also recognised its importance because of the historical background of the seller's guarantee liability, having faced endless disputes as to the meaning and scope of damages along with no provision for price reduction being one of its heritages from Roman law.¹¹⁷⁰ As shown above, the attempts to recognise price reduction in Korea have been executed in various ways. It could be broadly divided into two categories. One is the attempt to recognise it within the provision for damages under the seller's guarantee liability; damages are understood either as nothing but price reduction

¹¹⁶⁹ Cf. Piliounis, "The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?", (1999), as reproduced at "<http://www.cisg.law.pace.edu/cisg/biblio/piliounis.html>", at 23 f.; Gärtner, "The Vienna Convention on the International Sale of Goods Contains Some Well-Known Inconsistencies, but There Is Much in It Which Is Worth Preserving and Which Better Accords with Commercial Reality Than the Sale of Goods Act 1979", (2000), as reproduced at "<http://www.cisg.law.pace.edu/cisg/biblio/gartner.html>".

¹¹⁷⁰ If damages under the seller's guarantee liability are understood like damages in English law which is not governed by the fault principle, it seems true that the importance of price reduction may lose its place under Korean law because in any event the buyer is empowered a right to claim damages simply by proving his loss. One scholar takes this view in Korean law. See *supra* pp. 220 f.

itself,¹¹⁷¹ or including price reduction as one of reliance losses.¹¹⁷² The other tries to find it somewhere else apart from the provision for damages under the seller's guarantee liability.¹¹⁷³ Given that Korean law admits the arguments raised above for the purpose of unifying the dual liability system that it needs to interpret in a unified way that damages under the seller's guarantee liability are as they are under the general liability,¹¹⁷⁴ the former category can be left out of our concern. The residual matter is in the question of how price reduction can be allowed under the existing law by the latter category. It is carefully submitted that it can be possible by way of analogical interpretation of KCC Art. 572 which stipulates price reduction in the cases of quantitative defects.¹¹⁷⁵ However, the best way seems that it needs legislative consideration to elucidate price reduction as a separate remedy in KCC Art. 580.

4.3.3.2. External evaluation

The uncertainty inherent in the means to derive the right to price reduction under Korean law can be an issue for the evaluation in light of efficiency. This evaluation is analogous to the point argued above as to its uncertainty of the meaning of damages under the seller's guarantee liability¹¹⁷⁶ because the matter of price reduction is closely connected with the interpretation of damages as examined before. Since the uncertainty may lead to a market failure, increasing the transaction costs by the contractual parties in order to clarify the meaning of damages (either price reduction itself¹¹⁷⁷ or including price reduction as one of reliance losses),¹¹⁷⁸ it seems to support the argument raised above that Korean law needs to interpret in a unified way that

¹¹⁷¹ See *supra* n. 1147 and accompanying texts.

¹¹⁷² See *supra* n. 1145-1146 and accompanying texts.

¹¹⁷³ See *supra* n. 1142-1144, 1148 and accompanying texts.

¹¹⁷⁴ See *supra* n. 359-365, 1117-1124 and accompanying texts.

¹¹⁷⁵ The view allowing price reduction in the form of a partial avoidance of the contract cannot be justified because of unreasonableness of its theoretical background of initial impossibility in part as discussed long before. See *supra* pp. 69 ff.

¹¹⁷⁶ See *supra* n. 1134-1135 and accompanying texts.

¹¹⁷⁷ See *supra* n. 1147 and accompanying texts.

damages under the seller's guarantee liability are as they are under the general liability and find a distinctive price reduction which is free from the provision for damages under the seller's guarantee liability.

Another point in terms of efficiency is in that price reduction along with damages under Korean law and CISG may produce an inefficient result in particular where the market has fallen by the due delivery date. Suppose that A makes a contract with B for the sale of No.1 apples at the price of \$100, but delivers No.2 apples. Before the apples are delivered, the market price which was \$100 for No.1 and \$90 for No.2 at the time of the contract has fallen about 20%; hence \$80 for No.1 apple and \$72 for No.2 apple. On the basis of non-conforming delivery, B claims price reduction which is assessed by the proportional calculation method; B recovers \$10 ($\$100 - (\$100 \times \$72 / \$80)$). It seems certain that this claim may put back on A part of the risk of the market decline which was initially allocated to B because B may be compensated only \$8 by a damages claim ($\$80 - \72).¹¹⁷⁹ Therefore, B's claim for price reduction in this case, while throwing back onto A part of his risk, may provide A with an incentive to perform when breach appears more efficient because such claim may compensate B more than damages which is based on the expectation principle.¹¹⁸⁰

A further point to be discussed in the light of efficiency is related to the relevant time chosen for estimating the value of the goods actually delivered and the value of the hypothetical conforming goods. It seems the time of delivery is closer to the parties' intention.¹¹⁸¹ This is because at the time of contract, the buyer contemplates only to obtain the contractual standard

¹¹⁷⁸ See *supra* n. 1145-1146 and accompanying texts.

¹¹⁷⁹ *Accord*; Bridge, *supra* n. 434, at 101 f.

¹¹⁸⁰ It exceeds about \$2 ($\$10 - \8). Cf. Assume that the price-level rises about 20% in the same case. Damages rule may compensate B about \$12 ($\$120 - \108), whereas price reduction about \$10 ($\$100 - (\$100 \times \$108 / \$120)$). Consequently, B does not recover the full contractual expectancy by a price reduction. However, one must note that, although price reduction may not fully internalise to A all costs of the breach to B, those costs can be internalised either by combining price reduction with damages subject to no-double recovery principle (see Honnold, *supra* n. 218, at 338 f.; Nicholas, *supra* n. 892, at 226) or by exercising B's option to claim damages instead of price reduction.

goods rather than any inferior goods.¹¹⁸² The value of inferior goods at that time has in fact nothing to do with the buyer. It seems that such value is totally irrelevant until after the time of delivery when he discovers the lack of conformity because it is only at that moment that the buyer decides which remedies to choose, depending upon the marketability and the actual rather than the historical value of the non-conforming goods, as compared to the value of the goods contracted.¹¹⁸³ Suppose that D agrees to sell No.1 corn to E, but delivered No.3 corn. At the time of contract, the value of No.1 was \$200 and that of No.3 was \$150. The market price of No.1 and No.3 corn falls disproportionately; say 20% and 60% respectively. It may produce either the reduced price of \$150 based on the time of contract¹¹⁸⁴ or \$75 based on the time of delivery.¹¹⁸⁵ In the case of price reduction, it means E holds the corn not only of inferior quality but also of even more inferior market value. It seems that it is fair to say D should bear the risk of a declining market value, which would have been D's anyway had E chosen not to accept. In this light, the time of contract cannot be justified because there seems to be no plausible reason why acceptance would result in a change in risk distribution.¹¹⁸⁶

5. Specific performance

5.1. General

It is conceivable that another remedy when the seller delivers non-conforming goods is specific performance. This means that, in its broadest sense, a process whereby the aggrieved buyer obtains as nearly as possible what was agreed in the contract, as opposed to reparation in

¹¹⁸¹ O.R., at 358; Will, Bianca/Bonell (ed.), *supra* n. 221, at 370 f.

¹¹⁸² Will, *id.*

¹¹⁸³ *Id.*

¹¹⁸⁴ $\$150 = \150 (Value of non-conforming goods) \times $\$200$ (Contract price) / $\$200$ (Value of conforming goods).

¹¹⁸⁵ $\$75 = \60 (Value of non-conforming goods) \times $\$200$ (Contract price) / $\$160$ (Value of conforming goods).

¹¹⁸⁶ Will, *id.*

money for the failure to obtain it.¹¹⁸⁷ The remedy has several advantages. First, as defined above, it enables the aggrieved buyer to obtain as far as possible what was agreed by the parties.¹¹⁸⁸ Second, it may avoid difficulties in estimating the amount of damages.¹¹⁸⁹ Third, it may emphasise the importance of contractual obligations.¹¹⁹⁰ In light of these advantages, each jurisdiction has developed the remedy of specific performance,¹¹⁹¹ although it may be very different in its nature.¹¹⁹²

This section basically aims to examine the meaning and importance of specific performance in each jurisdiction, to ask the question whether specific performance is treated as a right of the buyer available in the event of the seller's delivery of defective goods, and to consider what requirements must be satisfied for the remedy of specific performance.

5.2. Comparative accounts

5.2.1. Korean law

The terms which describe specific performance in Korean law are not restricted to the cases where the court orders the defaulting party personally to perform the contract, but may include any process by which the aggrieved party receives the substance of what he bargains for. Therefore, in Korean law, an order of specific performance includes, first, that it coerces the

¹¹⁸⁷ Treitel, *supra* n. 421, at 43.

¹¹⁸⁸ Lando and Beale (ed.), *supra* n. 509, at 395.

¹¹⁸⁹ *Id.*

¹¹⁹⁰ *Id.*

¹¹⁹¹ KCC Arts. 389, 581(2); the SGA s. 52(1); Directive(99/44) Art. 3.3.; CISG Art. 46. Cf. For the comparison in general between Civil law and Common law, see Treitel, *supra* n. 421, at 43 ff.

¹¹⁹² Cf. For the difference in the use of terminology of specific performance, see Treitel, *supra* n. 421, at 45 f.; Dawson, "Specific performance in France and Germany", (1959) 57 *Mich. L. R.* 495; Szladits, "The Concept of Specific Performance in Civil Law", (1955) 4 *Am. J. Comp. L.* 208; Romero, "Specific Performance of Contracts in Comparative Law: Some Preliminary Observations", (1986) 27 *C. de D.* 785; Zamir, "Toward a General Concept of Conformity in the Performance of Contracts, (1991) 52 *La. L. Rev.* 1.

defaulting party to perform himself his obligations,¹¹⁹³ second, that it entitles the creditor to the right to receive performance at the expense of the debtor, the execution of which may be performed by the creditor himself or by a third party,¹¹⁹⁴ and third, that it is indirectly coerced by means of the court order, either appointing a reasonable term for performance by the defaulting party and directing the payment of a fixed amount of damages in proportion to the delay if he fails to perform within such term, or directing immediate payment of damages.¹¹⁹⁵ The mechanisms of enforcing a judgment for performance in Korean law depend upon the nature of the obligation upon which the judgment is based; it is a traditional analysis to draw a basic distinction between “obligation to give” and “obligation to do”.¹¹⁹⁶ Based on this distinction, one must note that specific performance in the sales contract implies in principle only the first category because it is a typical case of the obligation to give, which is of relevance to our issue of the sale of goods.¹¹⁹⁷

Specific performance under the seller’s guarantee liability is recognised as a right available in the event of the seller’s delivery of defective goods.¹¹⁹⁸ It is in principle no different from the

¹¹⁹³ KCC Art. 389(1).

¹¹⁹⁴ KCC Art. 389(2).

¹¹⁹⁵ The Korean Code of Civil Procedure (*hereinafter* KCCP) Art. 693. The payment provided in this provision is construed as damages rather than fine in that it goes to the creditor. See Yun-jik Kwak, *supra* n. 62, at 192 f. Cf. KCC or KCCP does not adopt means of imprisonment for the enforcement of contract, which are employed in German law (CC Proc. Art. 888). The basic reason for that seems to protect the liberty of the defaulting party as a citizen. See Yun-jik Kwak, *supra* n. 62, at 192 f. Cf. For the position in French law along with the concept of *astreinte* in general, see Treitel, *supra* n. 421, at 59 ff.

¹¹⁹⁶ Yun-jik Kwak, *supra* n. 62, at 190 ff.; Hyung-bae Kim, *supra* n. 67, at 141 ff.; Eun-young Lee, *supra* n. 68, at 582 ff.

¹¹⁹⁷ A judgment of specific performance as to the obligation to give is enforced by the marshal taking the goods away from the defaulting party and handing them over to the aggrieved party. KCCP Art. 689. The second and third category applies to the obligation to do. The difference between them is that the second method is only available when the personal participation of the debtor is not necessary for the performance of the obligation, whereas the third method is executed only where such participation of the debtor is crucial for the performance of the obligation.

¹¹⁹⁸ KCC Arts. 389, 581(2).

right of rescission or damages. Accordingly, if the buyer applies for a judgment for performance, the court is bound to grant him a judgment forcing the seller to perform what the seller has undertaken under the contract as long as all the relevant requirements are satisfied.

Where the seller delivers goods which are defective in quality, it is conceivable that there are two particular aspects of the general right to require performance; replacement and repair. As regards the former, it is generally agreed that, as KCC provides, the buyer is entitled to demand delivery of other non-defective goods in lieu of the right to damages or the right of rescission in the event of the seller's delivery of defective goods.¹¹⁹⁹ This right is only applied to the sale of generic goods because in the sale of specific goods, the seller's duty is from the outset restricted to those goods so that there is no room to acquire any other goods if the specific goods delivered are themselves defective.¹²⁰⁰ It is worth noting that the wording of art. 581¹²⁰¹ seems to suggest that the right to require substitute goods can be exercised regardless of the seriousness of a defect (*i.e.*, regardless of whether it is possible to achieve the object of the contract despite the existence of a defect), as long as the existence of any defect is proved.¹²⁰² In relation to the right to require repair, it is not entirely clear whether the buyer is invested with such right in the event of the seller's delivery of defective goods because, unlike the right to require replacement, there is no specific provision in KCC.¹²⁰³ According to the legal liability theory, the right to require repair is not admitted in the case of both generic and specific goods on the basis of its theoretical background of *impossibilia nulla obligatio* and *specific goods dogma* and its corresponding application to generic goods when they become ascertained (*e.g.*, by

¹¹⁹⁹ KCC Art. 581(2).

¹²⁰⁰ Eun-young Lee, *supra* n. 68, at 800; KCC Art. 581(1).

¹²⁰¹ Article 581 (Sale in Kind and the Seller's Liability for Warranty) (1) Even where the subject-matter of a sale has been specified in kind, if there exist any defects in the specified subject-matter, the provisions of the preceding Article shall apply *mutatis mutandis*. (2) In the cases of the preceding Paragraph, the buyer may demand the non-defective item without rescinding a contract or claiming for damages.

¹²⁰² Dae-jeong Kim, *supra* n. 206, at 275 f.; Eun-young Lee, *supra* n. 68, at 801.

¹²⁰³ Cf. the Korean Supreme Court Case, 13/7/1993, 93 Da 4783.

delivery).¹²⁰⁴ On the other hand, some of the contractual liability theorists argue that insofar as the defect is capable of being remedied by repair, the buyer may require the seller to repair it, whether the goods were specific from the outset or originally generic.¹²⁰⁵

As to the right to damages combined with the right to require performance, although the wording of art. 581(2) appears that the former cannot be combined with the latter, it is generally understood that the buyer can claim damages for delay or for breach of subsidiary duties where the right to require performance will not fully compensate him; *e.g.* where he has suffered lost gains as well as deprivation of the actual subject-matter of the contract.¹²⁰⁶ However, one must note that insofar as the damages constitute of part of the expectation interests or are consequential losses, the loss may not be within the scope of damages under the seller's guarantee liability, but may be recovered under the general liability governed by the fault principle.¹²⁰⁷

With regard to the right to require performance in the event of shortage in quantity, it seems clear that that right is not dealt with under the seller's guarantee liability because, as stated long before, the matter of the shortage in quantity under the seller's guarantee liability is of relevance only to the cases of initial impossibility (*i.e.*, specific goods), which may not raise the buyer's right to require performance.¹²⁰⁸ However, in the cases of generic goods, there is no doubt that

¹²⁰⁴ For the background, see *supra* pp. 33 f.

¹²⁰⁵ Eun-young Lee, *supra* n. 68, at 801; Dae-jeong Kim, *supra* n. 206, at 269 f., 275 f. (the view restricting the right to require repair only in the cases where the object of the contract can be achieved despite the existence of a defect); Dong-seok Kim, *supra* n. 832, at 62 f.; Sang-kwang Lee, *supra* n. 167, at 304 f. *Contra*; Hyung-bae Kim, *supra* n. 67, at 341; Sang-yong Kim, *supra* n. 392, at 240; Choon-soo Ahn, *supra* n. 148, at 434.

¹²⁰⁶ Eun-young Lee, *supra* n. 68, at 800 f.; Dae-jeong Kim, *supra* n. 206, at 271 f., 287.

¹²⁰⁷ See *supra* pp. 217 ff. However, it could be within the scope of damages under the seller's guarantee liability, if one follows some of the contractual liability theorists; 'A' (Expectation interests + Consequential loss) or 'B' theory (Reliance interests + Expectation interests). See *supra* pp. 220 ff. If one stands with some of the legal liability theorists (the non-concurrence theory), the buyer may never be compensated for such damages, in particular, expectation interests. See *supra* n. 1047-1051 and accompanying texts.

¹²⁰⁸ KCC Art. 574. See also *supra* n. 397-398 and accompanying texts.

the buyer may be also entitled to require performance as to the quantitative shortage part under the general liability.¹²⁰⁹

5.2.2. English law

The notion of specific performance in English law is restricted to the cases where the court addresses the order to the defaulting party to do specifically what he has promised.¹²¹⁰ Thus, the order forces the defendant to perform himself the obligation.¹²¹¹ Not performing the order of the court is a contempt of court and it may be sanctioned by fines or imprisonment.¹²¹²

Under English law, granting specific performance is a remedy which is not treated as a right of the buyer who is aggrieved by the seller's breach, but as an equitable remedy whose exercise is left to the discretion of the court.¹²¹³ In general, English courts are very reluctant to decree specific performance of contracts for the sale of goods and such performance is granted in very limited circumstances. This position is reflected in statutory form in the SGA, which empowers the making of an order of specific performance on the fulfilment of two requirements; first, the goods to be delivered by the defaulting seller are "specific or ascertained", and second, the court must "think fit" the grant of an order for specific performance.¹²¹⁴

S. 52(1) clearly limits an order of specific performance to those circumstances involving

¹²⁰⁹ KCC Art. 389(1). Cf. Hyung-bae Kim, *supra* n. 67, at 327.

¹²¹⁰ Treitel, *supra* n. 421, at 46.

¹²¹¹ *Id.*

¹²¹² *Id.*

¹²¹³ *Lamare v. Dixon* [1873] LR 6 HL 414, 423, *per* Lord Chelmsford; *Stewart v. Kennedy* [1890] 15 App Cas 75, 102, *per* Lord Watson. Cf. Treitel, "Specific Performance in the Sale of Goods", (1966) *J.B.L.* 211; Jones and Goodhart, *Specific Performance*, (1996), at 143 ff.; Sharpe, *Injunctions & Specific Performance*, (1983), at 8-230 ff.; Spry, *The Principles of Equitable Remedies*, (1984), at 52 ff.; Burrows, "Specific Performance at Cross-roads", (1984) 4 *Leg. Stud.* 102. For a good description of English law approach to specific performance and contractual remedies in general, see *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] AC 1, 9 ff., *per* Lord Hoffmann.

¹²¹⁴ The SGA s. 52(1). However, it is submitted that the statutory formula is much wider than the practice because the fact that the court is statutorily reminded that it has a discretion has not had an effect of the more liberal grant of specific performance in practice. See Bridge, *supra* n. 784, at 531 f.

“specific” or “ascertained” goods; “specific goods” are defined as “identified and agreed on at the time a contract of sale is made and includes an undivided share as a fraction or percentage, of goods identified and agreed on as aforesaid”,¹²¹⁵ and “ascertained goods” mean “identified in accordance with the agreement after the time a contract of sale is made”.¹²¹⁶ Notwithstanding its clear limitation to “specific” or “ascertained” goods, the position in relation to unascertained goods is not so clear as it seems in its face. Some view the SGA as a codification of the common law (and equity) regarding sales law, meaning that the SGA is designed to provide a comprehensive code and concurrently the limitation to “specific” or “ascertained” goods is intended that the remedy cannot be granted for unascertained goods.¹²¹⁷ On the other hand, others argue that the SGA operates in addition to any other remedies available at the common law or equity because, first, s. 52(1) does not in terms state that specific performance can be ordered only where the goods are “specific or ascertained”, second, the idea that the SGA is a comprehensive code is arguable.¹²¹⁸ This view is supported by a case where the judge granted an interim injunction (which was treated as in effect specific performance) to stop an oil company from cutting off supplies of petrol (*i.e.* unascertained goods) to a garage since the garage was unable to locate an alternative supply of petrol due to an interruption of supply as a result of the Yom Kippur war.¹²¹⁹ However, it is submitted that the case is hard to reconcile

¹²¹⁵ The SGA s. 61(1); *Dominion Coal Co. Ltd. v. Dominion Iron and Steel Co. Ltd.* [1909] AC 293, 311.

¹²¹⁶ *Re Wait* [1927] 1 Ch 606, 630, *per* Atkin L.J. Cf. *Thames Sack and Bag Co. Ltd. v. Knowles & Co. Ltd.* [1918] 88 LJKB 585, 588, *per* Sankey J. (“ascertained” means that “the individuality of the goods must in some way be found out, and when it is, then the goods have been ascertained”).

¹²¹⁷ *Re Wait* [1927] 1 Ch 606, 635, *per* Atkin L.J. (“The sum total of legal relations arising out of the contract for the sale of goods may well be regarded as defined by the Code.”) In this case, the majority refused to order specific performance for what it considered to be unascertained goods.

¹²¹⁸ Treitel, *supra* n. 951, at 954; Treitel, *supra* n. 1213, at 223 f. See also Bridge, *supra* n. 784, at 532; Jones and Goodhart, *supra* n. 1213, at 146 f.

¹²¹⁹ *Sky Petroleum Ltd. v. V.I.P. Petroleum Ltd.* [1974] 1 WLR 576. Cf. *Total Oil (Great Britain) Ltd. v. Thompson Garage (Biggin Hill) Ltd.* [1972] 1 QB 318, 324; *Redler Grain Silos Ltd. v. B.I.C.C. Ltd.* [1982] 1 Lloyd’s Rep 435.

with the language of s. 52(1) and with both earlier¹²²⁰ and subsequent cases.¹²²¹ In addition, the case is weakened by the fact that the court failed to discuss whether in fact it had the power to grant such a remedy under those circumstances and also failed to discuss how the remedy fit into s. 52 or *Re Wait*.¹²²² Therefore, it is difficult to say that the scope of when a court might have discretion to grant specific performance extends to unascertained goods.¹²²³

Having said that, one must note that the mere fact that specific goods or ascertained goods are involved does not necessarily mean that the court will exercise its discretion and order specific performance because, as stated in s. 52(1), the court is given a broad power to grant an order of specific performance only ‘where it thinks fit’. The foremost consideration of the court in granting specific performance is that the remedy will be granted only where the normal common law remedy of damages is inadequate.¹²²⁴ Although there is no clear rule as to the test of adequacy of damages, specific performance may be granted in general based on inadequacy of damages where damages fail to afford a complete remedy to the buyer,¹²²⁵ where it is hard to assess and recover damages¹²²⁶ or where the buyer cannot get a satisfactory equivalent of what

¹²²⁰ E.g., *Re Wait* [1927] 1 Ch 606.

¹²²¹ *Re London Wine (Shippers) Co. Ltd.* [1986] PCC 121, 149 (Oliver J. was inclined to think that the case was not strictly a contract of sale of goods, but a long-term supply contract); *Société des Industries Metallurgiques SA v. The Bronx Engineering Co Ltd.* [1975] 1 Lloyd’s Rep 465.

¹²²² [1927] 1 Ch. 606.

¹²²³ Atiyah and Adams, *supra* n. 421, at 508 f.

¹²²⁴ *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] AC 1, 11. Cf. *Beswick v. Beswick* [1968] AC 58, 88, 90 f., 102 (this case envisaged a wider role of specific performance, based on the appropriateness of the remedy in the circumstances of the case rather than as a supplementary remedy in a hierarchical system of remedies. It suggested that the question is not whether damages are an “adequate” remedy, but whether specific performance will “do more perfect and complete justice than an award of damages”). For the more expansive view, see also *Tito v. Waddel (No. 2)* [1977] Ch 106, 322; *Rainbow Estates Ltd. v. Tokenhold* [1998] 2 All ER 860, 868; *Evans Marshall and Co. Ltd. v. Bertola S. A.* [1973] 1 WLR 349, 379; Treitel, *supra* n. 951, at 954 f.; McKendrick, *supra* n. 952, at 442 f.

¹²²⁵ *Wilson v. Northampton & Banbury Junction Railway Co.* [1874] 9 Ch App 279, 284, *per* Lord Selborne. Cf. Macdonald, “The Inadequacy of Adequacy: The Granting of Specific Performance”, (1987) 38 *N. Irel. Leg. Q.* 244.

¹²²⁶ *Hart v. Herwig* [1873] 8 Ch App 860, 866, *per* Mellish LJ; *Fells v. Read* [1796] 3 Ves 70, 71, *per*

he contracted for from some other source.¹²²⁷

In *Behnke v. Bede Steam Shipping Co. Ltd.*,¹²²⁸ specific performance was granted because the ship in question was of peculiar and practically unique value to the buyer so that damages would not be an adequate remedy.¹²²⁹ However, it does not follow that the buyer of a ship will be invariably granted specific performance. In *CN Marine Inc. v. Stena Line A/B*,¹²³⁰ the court reversed the trial judge's discretion in favour of specific performance, even though the ship had highly individual characteristics.¹²³¹ The court's reluctance to grant specific performance can be also shown in *Société des Industries Metallurgiques SA v. The Bronx Engineering Co Ltd.*¹²³² In this case, the seller had wrongfully repudiated a contract to deliver a complex machine to be manufactured by him which was over 220 tons in weight and costs around £270,000 and it was shown that the buyer would have to wait a further nine to twelve months for a substitute machine to be supplied by another seller. Despite the considerable delay to get a substitute, the court did not decree specific performance on the basis that goods were of a type obtainable on the market in the ordinary course of business and the additional loss suffered by the buyer as the result of the delay would be covered by an increased award of damages.¹²³³

In addition to the adequacy of damages, the court is entitled to look at all the circumstances of the cases including the conduct of the parties¹²³⁴ and to consider the hardship which an order

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¹²²⁷ *Adderley v. Dixon* [1824] 1 Sim & St 607, 610; *Buxton v. Lister* [1746] 3 Atk 383; *Cohen v. Roche* [1927] 1 KB 169; *Phillips v. Lamdin* [1949] 2 KB 33; *Behnke v. Bede Steam Shipping Co. Ltd.* [1927] 1 KB 649.

¹²²⁸ [1927] 1 KB 649.

¹²²⁹ *Id.*, at 661

¹²³⁰ [1982] 2 Lloyd's Rep. 336.

¹²³¹ For another example showing the court's reluctance to grant specific performance even where there is no close equivalent available, *Cohen v. Roche* [1927] 1 KB 169 (the court refused specific performance to the buyer of a set of Hepplewhite chairs, saying that they were "ordinary articles of commerce and of no special value or interest.").

¹²³² [1975] 1 Lloyd's Rep 465.

¹²³³ *Id.*, at 468 f.

¹²³⁴ The relevant factors are, for instance, whether there had been any default by the buyer, whether he

would inflict on the seller.¹²³⁵

Damages may be awarded in addition to specific performance.¹²³⁶ Therefore, the buyer may be entitled to get specific performance plus damages, *e.g.*, for delay in completion.¹²³⁷

5.2.3. The Directive

Although the concept of specific performance is not used in the Directive, it recognises the concept by providing two forms of the buyer's right to require performance; repair and replacement.¹²³⁸ The Directive does not specify what mechanism courts shall employ to require the performance of the contract. All such matters seem to be left to the general procedure of domestic laws. This was shown earlier in their evidence to the Select Committee that representative of the Commission indicated that it is not intended to alter national judicial procedures and practice.¹²³⁹

Under its unique two-tier remedial scheme of the Directive, the buyer's right to require either repair or replacement takes the position of primary remedy in a sense that the other remedies (rescission and price reduction) are available only where the primary remedy cannot be invoked.¹²⁴⁰ This remedy is treated as a right available in the event of the seller's delivery of non-conforming goods, as stipulated under the heading of "Rights of the consumer" in art. 3.

had delayed unreasonably in seeking the remedy, whether there had been misrepresentation by the buyer, or whether the seller had made the contract as the result of a mistake. See Treitel, *supra* n. 951, at 957; Harris, Guest (ed.), *supra* n. 515, at para. 17-093; Snell & Turner, *Snell's Equity*, (1990), at 602, 608 ff.

¹²³⁵ *Tamplin v. James* [1880] 15 ChD 215, 221; *Stewart v. Kennedy* [1890] 15 App Cas 75, 105; *Patel v. Ali* [1984] Ch 283 (but these cases are not related to the sale of goods). See Treitel, *supra* n. 951, at 955 f.; Harris, Guest (ed.), *supra* n. 515, at para. 17-093; Snell & Turner, *supra* n. 1234, at 612.

¹²³⁶ Chancery Amendment Act 1858 s. 2 (known as Lord Cairns' Act); The Supreme Court Act 1981 s. 50; Treitel, *supra* n. 951, at 974 ff.; McDermott, *Equitable Damages*, (1994), at 169 ff.; Jones and Goodhart, *supra* n. 1213, at 285 f.

¹²³⁷ *Ford-Hunt v. Raghbir Singh* [1973] 1 WLR 738; *Easton v. Brown* [1981] 3 All ER 278.

¹²³⁸ Directive(99/44) Art. 3.3.

¹²³⁹ 10th Report by Select Committee, *supra* n. 277, at 18,32, 54; Beale and Howells, *supra* n. 257, at 33 f.

¹²⁴⁰ Directive(99/44) Arts. 3.3. and 3.5.

Insofar as all the relevant requirements are satisfied, therefore, it appears that the court would in principle be obliged to order specific performance upon the consumer's application for such performance. However, one must note that, although the position is not so clear due to the absence of express provision in the Directive, it seems that the Directive as being a minimal harmonisation measure would not require the national court to grant specific performance.¹²⁴¹ As indicated by representative of the Commission in their evidence to the Select Committee, the Directive is not intended to alter national judicial procedures and practice.¹²⁴²

The consumer's right to demand repair or replacement is not available where neither is possible or it would be disproportionate to do either.¹²⁴³ The limitation based on impossibility and disproportionality should be separately applied to repair and replacement.¹²⁴⁴ Therefore, the consumer's secondary remedies (rescission or price reduction) cannot be pursued as long as one of the primary remedies (repair or replacement), at least, is still possible and proportionate.¹²⁴⁵ It is suggested that it will be impossible to replace goods that are unique or of specific nature, *e.g.*, second-hand goods,¹²⁴⁶ whilst a repair will usually be impossible if the goods have been misdescribed, *e.g.*, a clocked car cannot be put right.¹²⁴⁷ It is disproportionate where the chosen remedy imposes on the seller costs which, in comparison with the alternative remedy, are

¹²⁴¹ 10th Report by Select Committee, *supra* n. 277, at 18,32, 54; Beale and Howells, *supra* n. 257, at 33 f.

¹²⁴² It is submitted that the present English law where repair or replacement costs can be recovered as damages would comply with the Directive, which is not dissimilar to some continental laws enforcing specific performance by allowing the buyer to have repair or replacement done at the seller's expense (*e.g.*, French law (Code Civil Art. 1144); Tallon, Harris and Tallon (ed.), *Contract Law Today*, (1989), at 266 ff.). See Beale and Howells, *supra* n. 257, at 33. That is, it seems that English law would maintain its present regime in relation to specific performance, insofar as the requirement of the Directive as a minimal harmonisation measure would be complied with. Cf. Bradgate and Twigg-Flesner, *supra* n. 425.

¹²⁴³ Directive(99/44) Art. 3.3.

¹²⁴⁴ Bradgate and Twigg-Flesner, *supra* n. 425.

¹²⁴⁵ *Id.*

¹²⁴⁶ Recital 16.

¹²⁴⁷ Williams & Hamilton, *supra* n. 876, at 33.

unreasonable.¹²⁴⁸ In assessing disproportionality, the following factors should be taken into account; the value of the goods without the lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be completed without significant inconvenience to the consumer.¹²⁴⁹ The test of reasonableness is in the question of whether the costs of one remedy are significantly higher than the costs of the other.¹²⁵⁰

The matter of compatibility of damages with the right to demand repair or replacement and that of specific performance in the case of shortage in quantity are left to national law because the Directive deals with neither damages nor shortage in quantity.¹²⁵¹

5.2.4. CISG

The term specific performance is used in art. 28 and it refers to orders of performance addressed to the seller in the event of his non-conforming delivery. However, CISG does not provide the mechanisms to be employed by the courts in order to require the seller to perform what was agreed in the contract.¹²⁵² This matter is necessarily left to the general procedure of the forum.¹²⁵³

Specific performance under CISG is deemed to be a right in the event of a breach of contract. It is intended to act as direction to a court, upon the buyer's application for specific performance, to order such performance and enforce the order against the seller by the means available to it under its procedural law where the requisite requirements are fulfilled.¹²⁵⁴ However, the court is not bound to grant the order for specific performance unless it would do

¹²⁴⁸ Directive(99/44) Art. 3.3.

¹²⁴⁹ *Id.*

¹²⁵⁰ Recital 11.

¹²⁵¹ Green Paper, *supra* n. 277, at 90; 10th Report by Select Committee, *supra* n. 277, at 21. See also Directive(99/44) Art. 8.1.

¹²⁵² Honnold, *supra* n. 218, at 219.

¹²⁵³ *Id.*

¹²⁵⁴ Secretariat's Commentary, *O.R.*, at 38, Art. 42, No. 8.

so in respect of similar contracts of sale not governed by CISG.¹²⁵⁵ Therefore, where the forum's rules on specific performance in domestic sales contracts are more restricted than those in CISG, the forum is permitted to apply its restrictive domestic law to transactions governed by CISG. The same is also arguably true in the cases where the buyer claims to require substitute goods or repair, which is largely unknown to common law countries, insofar as those claims are deemed to be a species of the more general right to demand performance as agreed.¹²⁵⁶

Where the seller delivers non-conforming goods in quality, CISG provides two rights to require performance; the right to require substitute goods¹²⁵⁷ and the right to require repair.¹²⁵⁸ Regarding the former, it is limited only to the cases of a fundamental breach,¹²⁵⁹ *i.e.* the buyer must have suffered a detriment which substantially deprives him of what he is entitled to expect under the contract.¹²⁶⁰ The decisive criterion is whether, despite the defect, it is reasonable to expect the buyer permanently to accept the goods and to content himself with damages for loss of value or with price reduction as compensation for the difference in value.¹²⁶¹ In addition it must be also taken account of the possibility of remedying the lack of conformity by repair within a reasonable time after the date of delivery.¹²⁶² In addition, the buyer may require

¹²⁵⁵ CISG Art. 28. This limitation was the result of a compromise between civil law countries and common law countries. Cf. Bergsten, "The Law of Sales in Comparative Law", in: *Les Ventes Internationales de Marchandises*, (1981), at 11 ff. For the criticism of the compromise, see Will, Bianca/Bonell (ed.), *supra* n. 221, at 333 f.; Walt, "For Specific Performance Under the United Nations Sales Convention", (1991) 26 *Tex. Int'l L. J.* 211, at 218 ff.; Kastely, "The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention", (1988) 63 *Washington Law Review* 607, at 624 ff.; Ziegel, *supra* n. 886, at 9-9.

¹²⁵⁶ Bernstein and Lookofsky, *supra* n. 563, at 85 ff.; Huber, Schlechtriem (ed.), *supra* n. 218, at 202 f.; Treitel, *supra* n. 421, at 44 f.; Ziegel, *supra* n. 748, at 105; Walt, *supra* n. 1255, at 217; Schlechtriem, *supra* n. 307, at 63, 76. *Contra*; Kastely, *supra* n. 1255, at 635 ff.; Honnold, *supra* n. 218, at 310 f.

¹²⁵⁷ CISG Art. 46(2).

¹²⁵⁸ CISG Art. 46(3).

¹²⁵⁹ CISG Art. 46(2).

¹²⁶⁰ CISG Art. 25.

¹²⁶¹ Huber, Schlechtriem (ed.), *supra* n. 218, at 384 ff. Cf. *Supra* n. 879-889 and accompanying texts.

¹²⁶² Huber, *id.* Cf. However, one must note that the possibility of cure is arguable as a factor to decide fundamental breach (see *supra* n. 890-899 and accompanying texts for the relationship between

delivery of substitute goods only if he makes his request either in conjunction with timely notice of defects given under art. 39 or, at the latest, within a reasonable time thereafter.¹²⁶³ Moreover, it is required that he must be prepared to return the goods already received.¹²⁶⁴

The right to require repair is not dependent upon the fundamentality of breach, but restricted to the cases where it is reasonable to require repair by the seller, having regard to all the circumstances.¹²⁶⁵ It is submitted that a repair will be unreasonable if the cost to the seller is unreasonably high;¹²⁶⁶ *e.g.* where the cost of repair is disproportionately higher than the cost of acquiring a substitute, where the cost of repair bears no reasonable relationship to the advantage that the buyer will derive from such repair, or where some minor repairs can be made more readily by the buyer.¹²⁶⁷ The right to claim repair, like the right to require substitute goods, must be exercised within a reasonable time after notice of defects has been given, so that the seller is not left in doubt as to the buyer's intentions.¹²⁶⁸ Further thing to be noted is that, although neither art. 46(2) or (3) refer to inconsistent remedies, it appears that the exercise of an inconsistent remedy undoubtedly precludes the buyer from later demanding repair or replacement.¹²⁶⁹

fundamental breach and the seller's right to cure).

¹²⁶³ CISG Art. 46(2).

¹²⁶⁴ CISG Art. 82(1).

¹²⁶⁵ CISG Art. 46(3).

¹²⁶⁶ Huber, Schlechtriem (ed.), *supra* n. 218, at 391 f.; Will, Bianca/Bonell (ed.), *supra* n. 221, at 338 f.; Schlechtriem, *supra* n. 307, at 76; Fitzgerald, "CISG, Specific Performance, and the Civil Law of Louisiana and Quebec", (1997) 16 *J.L.&Com.* 291, at 293; Honnold, *supra* n. 218, at 309 f.; Kastely, *supra* n. 1255, at 618 f.

¹²⁶⁷ Huber, *id.*

¹²⁶⁸ CISG Art. 46(3).

¹²⁶⁹ Honnold, *supra* n. 218, at 306 f.; Will, Bianca/Bonell (ed.), *supra* n. 221, at 338; Fitzgerald, *supra* n. 1266, at 293. Inconsistency may arise where the buyer avoids the contract so that he can no longer demand performance because of one of consequences of avoidance releasing the seller from his contractual obligations and where the buyer claims the reduction of price and damages for non-delivery (based on the difference between the contract and the market price) because these remedies and specific performance compensate for the same thing and it is unreasonable that the buyer receives compensation twice. See Treitel, *supra* n. 421, at 50 f.; Huber, Schlechtriem (ed.), *supra* n. 218, at 378; Catalano,

Although there is no particular provision in art. 46, the right to require substitute goods or repair should be interpreted in light of the principle of good faith.¹²⁷⁰ Therefore, the requirement of good faith may effectively prevent the buyer from speculating at the seller's expense and from punishing the seller by requiring performance when it would be onerous to do so.¹²⁷¹

As regards the matter of shortage in quantity, the buyer is also entitled to require the seller to deliver the missing part pursuant to art. 46(1) rather than art. 46(2) or (3). The reason for that is that in respect of that missing part, it is deemed that there is a simple failure to perform within the meaning of art. 46(1), not a lack of conformity under art. 46(2) or (3).¹²⁷² The consequence is that his right to require performance is not subject to the conditions stipulated in art. 46(2) or (3); fundamental nature of the shortage, request within a reasonable time.¹²⁷³

If the buyer requires performance of the contract under art. 46, it is permitted that the buyer can also claim damages for any loss that cannot be remedied by means of delivery of substitute goods or repair (*e.g.*, losses caused by delay or ancillary losses).¹²⁷⁴ However, it cannot be

“More Fiction than Fact: The Perceived Differences in the Application of Specific Performance under the United Nations Convention on Contracts for the International Sale of Goods”, (1997) 71 *Tulane L. Rev.* 1807, at 1810.

¹²⁷⁰ CISG Art. 7; Honnold, *supra* n. 218, at 309 f.; Kastely, *supra* n. 1255, at 619 f.; Huber, Schlechtriem (ed.), *supra* n. 218, at 381; Fitzgerald, *supra* n. 1266, at 293 f.; Bernstein and Lookofsky, *supra* n. 563, at 84; Cf. Some argue that it must be also restricted in light of the duty to mitigate damages performance (CISG Art. 77) and the duty to preserve and dispose of the goods (CISG Arts. 85, 86, 88(2)); *e.g.*, where he would be demanded to resell the goods to prevent rapid deterioration. See Secretariat's Commentary, *O.R.*, at 39, Art. 42, No. 14; Honnold, *supra* n. 218, at 309 f.; Flechtner, *supra* n. 888, at 60 f.; Bridge, *supra* n. 434, at 100, n. 192; Fitzgerald, *supra* n. 1266, at 293 f.; Bernstein and Lookofsky, *supra* n. 563, at 84; Treitel, *supra* n. 421, at 73 f. *Contra*; Kastely, *supra* n. 1255, at 621 ff.; Farnsworth, *supra* n. 1087, at 249 ff.; Hellner, “The UN Convention on the International Sale of Goods – an Outsider's View”, in: Jayme (ed.), *Ius internnationes, Festschrift für Stefan Riesenfeld*, (1983), at 98 f.; Ziegel, *supra* n. 886, at 9-41 f). Cf. Huber, Schlechtriem (ed.), *supra* n. 218, at 378 f. (limits to the right to require performance based on exemption under art. 79).

¹²⁷¹ Honnold, *supra* n. 218, at 309 f. See also Kastely, *supra* n. 1255, at 619 f.; Huber, Schlechtriem (ed.), *supra* n. 218, at 381.

¹²⁷² Huber, Schlechtriem (ed.), *supra* n. 218, at 382 f.

¹²⁷³ *Id.*

¹²⁷⁴ CISG Art. 45(2).

compatible with damages calculated on the assumption of non-delivery (based on the difference between the contract and the market price).¹²⁷⁵

5.2.5. Comparative view

As to the concept of specific performance used in English law and Korean law and its mechanisms to be employed by the courts to require the performance of the contract, it seems similar to both English and Korean law as they are based on the direct enforcement of the seller's personal performance, insofar as it is related to the "obligation to give".¹²⁷⁶ However, one must note that the position in Korean law may be different in the case of the buyer's right to require repair. Although the position in Korean law is not entirely clear, given that Korean law allows the right to require repair, an order of specific performance may include the buyer's right to repair non-conformity by himself or by a third party at the expense of the seller because the seller's duty to repair seems to fall within the category of "obligation to do".¹²⁷⁷

The importance of the role given to specific performance constitutes a major difference in the above four laws examined. In English law, specific performance is a secondary remedy, which means that a court may grant specific performance only when the grant of the primary remedy of damages is inadequate.¹²⁷⁸ The court has also a discretionary power in granting specific performance. It is not a right of the buyer which he can claim in all cases but an equitable remedy whose exercise is left to the court to decide whether to grant it or not. The situation is entirely different in CISG, Korean and the Directive¹²⁷⁹ where contrary to English law, specific

¹²⁷⁵ See *supra* n. 1269.

¹²⁷⁶ The position in the Directive and CISG is, as examined above, left to the applicable domestic law.

¹²⁷⁷ See *supra* n. 1196-1197 and accompanying texts. Where the personal participation of the seller is crucial for the repair, it is conceivable that it may also include the indirect enforcement of performance by means of the court order, either appointing a reasonable period for performance by the defaulting party and directing the payment of a fixed amount of damages in proportion to the delay if he fails to perform within such term, or directing immediate payment of damages.

¹²⁷⁸ Treitel, *supra* n. 421, at 44, 75.

¹²⁷⁹ As to the matter of the primacy of specific performance, it seems that there is no doubt in that it is a

performance is available as a right of the buyer.¹²⁸⁰ Thus, upon the buyer's application for specific performance, the court has to grant it unless the circumstances give rise to certain exceptions that do not fulfil any requirement in question for the exercise of specific performance¹²⁸¹ because unlike English law, the court does not have a discretionary power over granting specific performance.¹²⁸² In addition, the buyer under English law may be limited to the requirement that the goods be specific, ascertained or otherwise identified under the contract,¹²⁸³ whereas the same is not true under Korean law, the Directive and CISG. Likewise, unlike English law, the buyer in Korean law, the Directive and CISG is not required to show the court that damages are an inadequate remedy.

In comparing Korean law with the two other systems that provide specific performance as a right of the buyer, it seems that Korean law has close similarities to them in that it has two forms of specific performance in the event of the seller's delivery of defective goods in quality; repair and replacement. In addition, it is similar that his right to claim damages can be compatible with specific performance,¹²⁸⁴ although on some views of Korean law this may not be within the scope of damages under the seller's guarantee liability.¹²⁸⁵

primary remedy over rescission and price reduction in the Directive. See *supra* n. 1240 and accompanying texts. The position in Korean law and CISG seems that the buyer may choose between damages and specific performance. See KCC Art. 581(2) (it entitles the buyer to choose which of the three remedies; rescission, damages and delivery of substitute goods); Hyung-bae Kim, *supra* n. 67, at 343 f.; Dae-jeong Kim, *supra* n. 595, at 302 f.; Eun-Young Lee, *supra* n. 167, at 229 f.; Treitel, *supra* n. 421, at 75. *Contra*; Huber, Schlechtriem (ed.), *supra* n. 218, at 376.

¹²⁸⁰ But the position in CISG is subject to art. 28 which gives the national court a discretion to depart from CISG rules if they do not order specific performance under their national law in similar contracts of sale not governed by CISG, and similarly that in the Directive also seems to depend upon the discretion of the Member States' court (see *supra* n. 1241-1242 and accompanying texts).

¹²⁸¹ For the requirements, see *supra* n. 1200-1202(Korean law), 1243-1250(the Directive), 1259-1271(CISG) and accompanying texts.

¹²⁸² Again the position in CISG and the Directive is subject to the conditions stated in *supra* n. 1280.

¹²⁸³ The SGA s. 52(1).

¹²⁸⁴ Cf. The position in English law is also same. See *supra* n. 1236-1237 and accompanying texts.

¹²⁸⁵ See *supra* n. 1207 and accompanying texts. It is conceivable that if one stands with one of the legal liability theorists (the non-concurrence theory), no part of expectation interests may be compensated; *e.g.*,

Despite the similarities, the requirements for specific performance seem to show some divergences. The right to require specific performance in the Directive is subject to the test of impossibility and disproportionality of, as the case may be, either repair or replacement. In regard to the test of impossibility, although Korean law and CISG do not specifically provide such a test, it is self-evident because if performance is impossible, the right to require performance is devoid of purpose.¹²⁸⁶ As to the test of disproportionality, despite some difference in structure and language used for the test, a close examination of the factors for such test in the Directive¹²⁸⁷ seems to reveal much in common with those under CISG for the test of fundamental breach for the right to require substitute goods¹²⁸⁸ and reasonableness for the right to demand repair¹²⁸⁹ along with the imperative requirement of the good faith on the part of the buyer who claims specific performance.¹²⁹⁰ However, the position in Korean law differs from the Directive and CISG in that the buyer is in principle entitled to the right to demand substitute goods whether or not, despite the existence of a defect, the buyer is able to achieve the object of the contract intended at the time of contract.¹²⁹¹ In addition, assuming that the right to demand repair is admitted under Korean law, it is not clear whether such right can be pursued even where the costs of repairing the goods to the seller are unreasonably high. Another difference as to the requirements to specific performance is that while the buyer's right to coerce repair or replacement under CISG is subject to the further requirement of the notice of his claim at the latest within a reasonable time after giving notice of defects under art. 39,¹²⁹² the same is not true under Korean law and the Directive.

damages for delay in completion. See *supra* n. 1047-1051 and accompanying texts.

¹²⁸⁶ Huber, Schlechtriem (ed.), *supra* n. 218, at 380; KCC Art. 389(1).

¹²⁸⁷ See *supra* n. 1243-1250 and accompanying texts.

¹²⁸⁸ See *supra* n. 1259-1260 and accompanying texts.

¹²⁸⁹ See *supra* n. 1265-1267 and accompanying texts.

¹²⁹⁰ See *supra* n. 1270-1271 and accompanying texts.

¹²⁹¹ See *supra* n. 1201-1202 and accompanying texts.

¹²⁹² CISG Art. 46(2) and (3). But no such requirement in the cases of quantitative defects. See *supra* n. 1272-1273 and accompanying texts.

5.3. Evaluating accounts

5.3.1. Internal evaluation

As examined above, it is true that a claim for specific performance is the buyer's ordinary right in Korean law, the Directive and CISG,¹²⁹³ whilst it is regarded as exceptional in English law depending upon the court's discretionary power. Although the difference appears to have a broad gap between them, it may be probably more marked in theory than in practice.¹²⁹⁴ Many writers acknowledge that there is little practical difference between the use of specific performance in the common law as compared to the civil law.¹²⁹⁵ It is submitted that although the claim to specific performance is regarded as a general right in the civil law system, it does not in practice have the significance originally attached to it because of the reality of business transaction.¹²⁹⁶ That is, whenever goods are fungible and easily obtainable, an aggrieved party will generally prefer to hold the defaulting party liable in damages rather than risk wasting time and money on litigation to get goods he presumably needs.¹²⁹⁷ There is also a case that an aggrieved party may seldom seek the defaulting party's performance after the breach of what was agreed in the contract because the breach may often result in that the aggrieved party loses trust in the quality of the defaulting party's performance. Moreover, substitute performance at the expense of the seller in Korean law appears in practice to differ little from damages in

¹²⁹³ Note that the position in CISG and the Directive is subject to the conditions stated in *supra* n. 1280.

¹²⁹⁴ Cf. Treitel, *supra* n. 421, at 47.

¹²⁹⁵ Honnold, *supra* n. 218, at 199 f.; Enderlein and Maskow, *supra* n. 432, at 177; Will, Bianca/Bonell (ed.), *supra* n. 221, at 334; Markesinis, Lorenz, and Dannemann, *supra* n. 62, at 617 f., 624; Zweigert and Kötz, *supra* n. 20, at 519; Huber, Schlechtriem (ed.), *supra* n. 218, at 202; Walt, *supra* n. 1255, at 232; Bergsten, *supra* n. 1255, at 11 ff.; UNCITRAL Yearbook V, A/CN.9/SER.A/1974, (1975), at 53; UNCITRAL Yearbook VI, A/CN.9/SER.A/1975, (1976), at 101 f.; Honnold, *supra* n. 724, at 130, 226 f.; Lando and Beale (ed.), *supra* n. 509, at 400; Bishop, "The Choice of Remedy for Breach of Contract", (1985) 14 *J. Legal Stud.* 229, at 318 f.; Ziegel, *supra* n. 886, at 9-11.

¹²⁹⁶ *Id.* See also Hyung-bae Kim, *supra* n. 66, at 139.

¹²⁹⁷ *Id.*

English law insofar as the ultimate financial position of the buyer is concerned, although in theory it may depart from damages in that the whole expense is placed on the shoulders of the seller directly.¹²⁹⁸ In addition to the practical implications of two different systems, one must also note that the various limitation rules to the general right to demand performance, as in Korean law, the Directive and CISG,¹²⁹⁹ seem to narrow their theoretical gap between the civil law and the common law, which may lead to similar results in many cases.¹³⁰⁰

However, the difference between them can be crucial, resulting in unfair results in certain cases, in particular, where the purchase of substitute goods elsewhere will not be a satisfactory solution; *e.g.*, where substitute goods may be difficult to locate, where there may be some delay in their production, where alternative seller or manufacturers may not have comparable reputations for quality.¹³⁰¹ It is conceivable that, in any of these cases, the buyer's preference may well be to insist the original seller or manufacturer's performance, even if the buyer may be involved in some litigation.¹³⁰² In such a case, Korean law, the Directive and CISG may well be ready to grant the aggrieved buyer an order for specific performance by the original seller or manufacturer, whereas the position in English law seems both unclear and quite negative to grant such an order.¹³⁰³ This is not only because of, as stated in s. 52(1), their reluctance to order specific performance in the cases of unascertained goods, but also because of uncertainty inherent in the court's discretion.¹³⁰⁴

¹²⁹⁸ Cf. Treitel, *supra* n. 421, at 45 ff.

¹²⁹⁹ See *supra* n. 1200-1202, 1243-1250, 1259-1271 and accompanying texts.

¹³⁰⁰ For the various ways to limit the right to require performance, see Treitel, *supra* n. 421, at 47 ff.

¹³⁰¹ Cf. Kastely, *supra* n. 1255, at 611. Cf. *Société des Industries Metallurgiques SA v. The Bronx Engineering Co Ltd.* [1975] 1 Lloyd's Rep 465 (the court did not decree specific performance despite a substantial delay to get a substitute machine; see *supra* n. 1232-1233 and accompanying texts).

¹³⁰² *Id.*

¹³⁰³ Note that the position in CISG and the Directive may be also unclear because of the conditions stated in *supra* n. 1280.

¹³⁰⁴ It is submitted that, compared to the civil law, the common law rules are still in a state of disorder and inconsistent. See Ziegel, *supra* n. 886, at 9-10; Zweigert and Kötz, *supra* n. 20, at 540. Cf. Treitel, *supra* n. 1213, at 215 f. (he asked whether it would not be proper to allow the buyer to claim specific

As regards the differences as to the requirements of specific performance, Korean law which appears to have no counterpart in respect of disproportionality in the Directive, or fundamentality and reasonableness in CISG seems doubtful in light of the rationale to restrict specific performance in most legal systems. It is submitted by Treitel that the reasons for such restriction are, first, that “it may be regarded as an undue interference with the personal freedom of the debtor”,¹³⁰⁵ and second, that “it may impose strains on the machinery of law enforcement which are too severe when balanced against the benefit derived from enforced performance”.¹³⁰⁶ Therefore, although the seller’s guarantee liability rules under KCC do not contain an express rule as to such restriction, one hopes that the principle of good faith in Korean law may prevent the buyer from resorting to the right to require performance where the buyer’s exercise of the right may impose on the seller unreasonable costs or effort for repair or replacement.¹³⁰⁷

5.3.2. External evaluation

It is frequently said in terms of ‘efficient breach’ that specific performance is inefficient because it may prevent a seller from transferring the goods to a third party who values them

performance in sales contract generally and to refuse him the remedy only where the seller has some justifiable interests in resisting it); Dawson, *supra* n. 1192, at 533 (severe criticism on the various doctrines of the common law to limit specific performance and to grant so great a discretion on the court); Lawson, *Remedies of English Law*, (1980), at 211 (in favour of a general right to specific performance). Cf. Waddams, “The Choice of Remedy for Breach of Contract”, in Beatson and Friedmann (ed.), *supra* n. 812, at 471 ff. (the view against the general right to specific performance, suggesting that a distinction between money remedies and specific remedies will always be necessary and stressing the importance of the court’s discretionary power).

¹³⁰⁵ This is true not only where performance can be rendered personally by the defaulting party, but also where the aggrieved party could be put into almost as good a position for most practical purposes by monetary relief. In addition, specific performance may put the defaulting party into hardship that would not be occasioned by monetary relief, in particular, where such relief would be subject to reduction under the mitigation rules. See Treitel, *supra* n. 421, at 47.

¹³⁰⁶ *Id.*

¹³⁰⁷ *Accord*; Eun-Young Lee, *supra* n. 167, at 230. Cf. Dae-jeong Kim, *supra* n. 595, at 303 f. Cf. For the other approach to limit the right to require performance, see the UNIDROIT Principles Art. 7.2.2.; the Principles of European Contract Law Art. 9:102.

most.¹³⁰⁸ However, many economists argue that allowing specific performance need not discourage an efficient allocation of the goods because, given zero transaction costs, it can be assumed that the parties will renegotiate their contract;¹³⁰⁹ the seller may renegotiate with the buyer to share some of the surplus from a sale to the third party in exchange for a release of the buyer's claim for specific performance.¹³¹⁰ How the surplus is distributed is in fact efficiency-neutral.¹³¹¹ However, one must note that the efficiency-neutral nature of specific performance does not necessarily answer the question of which remedy is superior to the other because if transaction costs are positive, the result is indeterminate. Thus, regard should be had to the impact of transaction costs of pre- and post-breach transaction costs in order to evaluate which remedy is superior.¹³¹²

In regard to pre-breach transaction costs, the economic efficiency argument concludes that a

¹³⁰⁸ Cohen, "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry", (1982) 32 *U. Toronto L.J.* 31, at 59; Date-Bah, "The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selective Commentary", (1979) 11 *Rev. Ghana L.* 50, at 62; Farnsworth, "Damages and Specific Relief", (1979) 27 *Am. J. Comp. L.* 247, at 250 f.; Ziegel, *supra* n. 886, at 9-10. See generally Posner, *supra* n. 21, (1998), at 145 ff.; Rogerson, "Efficient Reliance and Damages Remedies for Breach of Contract", (1984) 15 *Rand J. Econ.* 39; Kornhauser, "An Introduction to the Economic Analysis of Contract Remedies", (1986) 57 *U. Colo. L. Rev.* 683, at 711 f. Cf. *Supra* n. 1125 and accompanying texts.

¹³⁰⁹ Cooter & Ulen, *supra* n. 27, at 215 ff.; Miceli, *supra* n. 1125, at 88 f.; Mercuro and Medema, *supra* n. 1125, at 78 f.; Ogus, Harris and Tallon (ed.), *supra* n. 1242, at 259 f.; Epstein, "Inducement of Breach of Contract as a Problem of Ostensible Ownership", (1987) 16 *J. Legal Stud.* 1, at 36 f.; MacNeil, "Efficient Breach of Contract: Circles in the Sky", (1982) 68 *Va. L. Rev.* 947, at 950 ff.; Kronman, "Specific Performance", (1978) 45 *U. Chi. L. Rev.* 351, at 353, 373; Schwartz, "The Case for Specific Performance", (1979) 89 *Yale L.J.* 271, at 284 ff.

¹³¹⁰ The price of release will be something between the value of performance to the buyer and the surplus the seller would make from the subsequent sale with the third party. It may depend upon the bargaining strength and abilities of the original two parties.

¹³¹¹ *Id.* The difference between damages and specific performance is purely distributional that a damages award may result the seller capturing all the surplus from the subsequent sale with the third party, whilst an order of specific performance may let the parties share such surplus. For the examples of distribution of surplus comparing the remedies of specific performance and expectation damages, see Cooter & Ulen, *supra* n. 27, at 218 f.

rule allowing specific performance may conform to what the parties want at the time of contract only where the good is unique because the expense of locating it in cases where an identical good is not available in the market is substantial and the risk of undercompensation is great.¹³¹³

However, several economists have argued that the criterion of uniqueness for the parties' preference as to a remedy of specific performance is not necessarily appropriate and it should rather be whether the buyer either values the contract goods more highly than does the market or is in doubt that accurate damages will be obtainable or collectable.¹³¹⁴

In this light, it seems doubted that the unclear and negative position in English law to grant specific performance in the example cases dealt with in the internal evaluation¹³¹⁵ may be seen as a way of reducing the transaction costs that the parties would otherwise have incurred in providing for a remedy of specific performance.

As to post-breach transaction costs, they may be conveniently divided into three categories to consider the impact of such costs; i) the costs of the court enforcing and supervising performance where the parties' renegotiation is unsuccessful to release the seller, ii) the parties' renegotiation costs for such release, and iii) the cover costs for one of the parties to locate and obtain for the aggrieved buyer an alternative to what was promised under the contract.¹³¹⁶ The first category does not occur if damages are awarded. It seems, however, significant where personal service is involved.¹³¹⁷ The costs in the second category should be compared with

¹³¹² Ogus, Harris and Tallon (ed.), *supra* n. 1242, at 260 ff.

¹³¹³ Kronman, *supra* n. 1309, at 365 ff.

¹³¹⁴ Ulen, Katz (ed.), *supra* n. 1125, at 122 (stressing on the importance of subjective valuations); Linzer, "On the Amoralism of Contract Remedies; Efficiency, Equity, and the Second Restatement", (1981) 81 *Colum. L. Rev.* 111, at 125 (the parties' preference for specific performance where damages cannot be ascertained by a market evaluation); Schwartz, *supra* n. 1309, at 279 ff. (the parties' preference is hard to be generalised and their concern is not only related to the nature of the goods, but also to the likelihood of obtaining and enforcing an accurate damage award).

¹³¹⁵ See *supra* n. 1301-1304 and accompanying texts.

¹³¹⁶ Ogus, Harris and Tallon (ed.), *supra* n. 1242, at 261 f.

¹³¹⁷ *Id.*; Ulen, Katz (ed.), *supra* n. 1125, at 122 f. It may be of relevance to the right to require repair, which may incorporate flexibility and discretion in the manner and quality of performance.

those that are incurred in the process of obtaining monetary compensation; *e.g.*, litigation costs and proof costs.¹³¹⁸ An order of specific performance may be less efficient than an award of damages only where the former costs outweigh the latter. No a priori comparative assessment or estimate can be made on the basis of unsupported assertions.¹³¹⁹ However, it is expected that an order of specific performance may be more efficient where the buyer has a high subjective value in the goods because litigation or proof costs of such value may increase much more than the renegotiation costs.¹³²⁰ In relation to the third category, efficiency asks the question of whether the buyer or the seller may have lower cover costs.¹³²¹ The comparative cover costs depend partly upon the functioning and accessibility to the market.¹³²² If the seller has better information on the market and easier access to the market, his costs are likely to be lower than the buyer so that an order of specific performance may be more efficient.¹³²³ On the other hand, an award of damages will be superior where the buyer may easily obtain an alternative to what was agreed in the contract and specific performance may cause the seller unreasonable expenses or effort. The above arguments as to the comparative post-breach transaction costs seem to explain not only that an order of specific performance does not always create an inefficient result, but also why each jurisdiction having specific performance as an ordinary right stipulates rules to limit the exercise of specific performance; disproportionality in the Directive, or fundamentality and reasonableness in CISG. In this light, the position in Korean law which

¹³¹⁸ Ogus, Harris and Tallon (ed.), *supra* n. 1242, at 261 f.; Cooter & Ulen, *supra* n. 27, at 219 ff.; Walt, *supra* n. 1255, at 235.

¹³¹⁹ Walt, *supra* n. 1255, at 235, n. 123.

¹³²⁰ *Id.*; Ogus, Harris and Tallon (ed.), *supra* n. 1242, at 261 f. Cf. For the argument that contract law should adopt specific performance more widely as a remedy because the problem of valuation by courts is generally so severe and the possibility of undercompensating of the aggrieved party through a damage remedy is high, see Ulen, Katz (ed.), *supra* n. 1125, at 121; Schwartz, *supra* n. 1309, at 366 ff.; Miceli, *supra* n. 1125, at 88 f.

¹³²¹ Ogus, *id.*, at 262; Walt, *id.*, at 235 ff.

¹³²² Walt, *id.*, at 237.

¹³²³ But he may be reluctant to cover from one of his competitors. Note that if the buyer's needs are peculiar to him, his costs are lower than the seller's and yet because of high subjective value the court

appears to have no limitation rules under the seller's guarantee liability should be re-examined and interpreted in a way that enhances efficiency along with the imperative principle of good faith.

6. Concluding remarks

6.1. "Dual liability system vs. Unified liability system" and "Legal liability vs. Contractual liability"

Further to the previous discussions in Chap. II, the study examined how the problems Korean law has suffered by adopting either the legal liability theory or the contractual liability theory are unfolded in the rules as to the effects of the seller's guarantee liability and showed inferiority of the legal liability theory and justified an argument that one needs to introduce a genuine unified liability system into Korean law.

First, the legal liability theory which does not admit the buyer's right of suspension cannot be justified in light of its practical importance where the seller has failed to perform his reciprocal contractual duties and the buyer has not yet performed his part of the contract.¹³²⁴ It can be also criticised in terms of its efficiency function in providing the buyer with information on whether non-performance will occur; where termination of the contract is more efficient, the information may help termination to take place at an earlier time than if the right of suspension was not available so that the goods move more quickly to a higher value user.¹³²⁵ Although the legal liability theory can be justified insofar as it is concerned with non-substitutable and non-repairable specific goods, the problem is that the theory may be interpreted as requiring that its theoretical basis of the *specific goods dogma* be extended to substitutable and repairable goods; thus, where the seller delivers defective (but substitutable and repairable) goods, the buyer's

may often order specific performance. See Ogus, Harris and Tallon (ed.), *supra* n. 1242, at 262.

¹³²⁴ See *supra* pp. 176 f.

¹³²⁵ See *supra* pp. 179. In this light, a view in English law which does not recognise the separate right of

right to require the seller's cure under the seller's guarantee liability can be invoked only after fulfilling his duty to pay and take delivery so that it is inevitable for him to run a greater risk of non-performance by the seller.¹³²⁶

Second, the examination of the various views submitted by the legal liability theory or the contractual liability theory as to the scope of damages and its relationship with price reduction was executed in light of the logic, practicability and appropriateness of each view, certainty in defining the scope of damages under the seller's guarantee liability and the argument that expectation measure is the only measure of contract damages to enhance efficiency.¹³²⁷ It showed that none of the views is satisfactory insofar as all the complexities each view faces are inherently due to the disputes as to the nature of the seller's guarantee liability and due to the artificial distinction of fault and non-fault based liability.¹³²⁸ Consequently, it proved that in order to resolve inadequacy of each view, one needs to recall the arguments raised before for the ultimate purpose of achieving a genuine unified liability system in Korean law.¹³²⁹

6.2. Protecting the reasonable expectations of the parties?

6.2.1. Consumers' interests

This study has showed that the consumer's real interests are differentiated from the commercial buyer's in that unlike the commercial buyer's, what the consumer generally wants is goods of the proper quality at the full price, not defective goods at a lower price. In this light, it was found, first, that the absolute rights of suspension and termination seem crucial in consumer sales, so that the position in Korean law and CISG (which depends the right of

suspension seems also unjustifiable.

¹³²⁶ See *supra* pp. 177 f. This is because the seller's delivery of defective goods as they were at the time of contract or specification is deemed to be complete performance of his duty.

¹³²⁷ See *supra* pp. 235 ff., 249 ff.

¹³²⁸ See *supra* pp. 235 ff., 249 ff.

¹³²⁹ See *supra* pp. 68 ff., 77 f.

suspension on the slight or trivial nature of a defect) and the position in Korean law, the Directive and CISG (which depends the right of termination on a certain degree of seriousness of breach and the seller's right to cure after the delivery date) is inadequate to reflect the consumer's interests.¹³³⁰ Second, the non-recognition of a long-term right to reject in English law where there is a latent defect that could not be discovered within a reasonable time may be adverse to consumers' interests.¹³³¹

6.2.2. Common interests

Where the issue was not directly related to the interests of consumers as opposed to those of commercial buyers, the study showed in what aspects each law fails to reflect the common interests of all the parties.

First, a view in CISG that the relevant time for the foreseeability of substantial detriment to the buyer in the event of non-conformity as a requirement for a right of termination should be the time of breach rather than the time of contract seems to interfere with the basis of the bargain between the parties which was agreed at the time of contract.¹³³² The reason for that is that the view may provide the buyer with an opportunity to escape a bad bargain which was a risk initially allocated to the buyer.¹³³³

Second, CISG and Korean law which do not deprive the buyer of the right of termination, despite his inability to return the goods in substantially the same condition as he received them if his inability to return is due to his transformation or consumption in the course of normal business or use, seems inappropriate in some cases where there has been a substantial drop in the market price because it may encourage the buyer's opportunism, transferring to the seller a market risk originally born by the buyer.¹³³⁴

¹³³⁰ See *supra* pp. 178, 179 f.

¹³³¹ See *supra* pp. 210, 211.

¹³³² See *supra* pp. 201 f.

¹³³³ *Id.*

¹³³⁴ See *supra* pp. 210 f.

Third, a view in Korean law requiring the seller's fault for the expectation damages claim seems adverse to the parties' general preference that they are likely to guarantee the envisaged result rather than merely to do their best to procure it in light of sales in the modern world being largely standardised and quickly and painlessly executed.¹³³⁵

Fourth, the remedy of price reduction and its proportional calculation method in Korean law, CISG and the Directive seems to distort the original distribution of the risks of market fall which was agreed between the parties at the time of contract.¹³³⁶

Fifth, given that the price reduction remedy was agreed between the parties, the position in CISG and possibly the Directive that the relevant time for assessing the value of the goods actually delivered and that of the hypothetical conforming goods is the time of contract rather than that of delivery would be also contrary to the parties' intention where there is a market fall.¹³³⁷ This is because at the time of contract the buyer contemplates only to obtain the conforming goods rather than any inferior goods and the value of inferior goods is totally irrelevant until after the time of delivery when he discovers the lack of conformity.¹³³⁸

Sixth, the reluctance and uncertainty in English law in ordering specific performance based on the discretionary power does not reflect the parties' preference in particular where the purchase of substitute goods elsewhere is not a satisfactory solution.¹³³⁹

Seventh, Korean law, which has no limitation on the right to require specific performance, is likely to be both unfair and adverse to the parties' intention because the buyer's unlimited exercise of such right in some cases may impose on the seller unreasonable costs or effort for repair or replacement.¹³⁴⁰

¹³³⁵ See *supra* pp. 241 f.

¹³³⁶ See *supra* p. 106.

¹³³⁷ See *supra* pp. 251 f.

¹³³⁸ *Id.*

¹³³⁹ See *supra* pp. 271, 273 f.

¹³⁴⁰ See *supra* pp. 272, 274 ff.

V. Exclusion of the Seller's Liability for Non-Conforming Goods

1. General Remarks

It is a common feature of written, and even oral contracts in the present day (in particular those in standard form) that the business seller often inserts into them clauses variously termed “exemption”, “exclusion” or “disclaimer” which purport to exclude or restrict the liability of the seller for breach of contract. In relation to defective goods, which are our main concern, such clauses take various forms to exclude or restrict the seller's liability for the delivery of defective goods; the specific exclusion of “statutory implied conditions” or “the seller's guarantee liability”, the exclusion or limitation of the right of termination, the confinement of the amount of damages that may be recoverable, or the clause to shorten a time limit allowed by law for termination or other remedies. Exemption clauses often attract serious objection because they may alter a distribution of risks that the buyer would reasonably have intended.¹³⁴¹ It may be often caused by his simple ignorance; it may result from lack of opportunity to become aware of the clauses or inability to understand their full potential implications.¹³⁴² In addition, it may be also caused by disparity in bargaining power; the buyer has no effective bargaining power to negotiate the clauses, nor to refuse to contract even if he is fully aware of the unacceptable clauses.¹³⁴³

Korean law and English law have recognised all these problems and developed various techniques to control exclusion and limitation clauses by applying stringent rules requiring the clauses to be incorporated effectively into the contract,¹³⁴⁴ and by construing such clauses in a restrictive way.¹³⁴⁵ Yet, these techniques of control which operate indirectly and concentrate on

¹³⁴¹ Reynolds, Guest (ed.), *supra* n. 515, at para. 13-002.

¹³⁴² *Id.*

¹³⁴³ *Id.*

¹³⁴⁴ Yun-jik Kwak, *supra* n. 74, at 39 ff.; Eun-young Lee, *supra* n. 68, at 728; Reynolds, Guest (ed.), *supra* n. 515, at para. 13-011 ff.; Guest, Beale (ed.), *supra* n. 846, at para. 12-013 ff.

¹³⁴⁵ Yun-jik Kwak, *supra* n. 74, at 42 ff.; Eun-young Lee, *supra* n. 68, at 728 f.; Reynolds, Guest (ed.),

procedural, rather than substantive, considerations, proved inadequate because provided that the clauses are clearly worded and effectively incorporated into the contract, the courts has no power to cut it down. Therefore, each jurisdiction has employed the legislative intervention technique which allows the courts to directly control the clauses and to consider its substantive fairness.¹³⁴⁶

Bearing in mind one of the ultimate purpose of this thesis to investigate how effectively each law protects the reasonable expectations of the parties, the ensuing discussion is to examine in a comparative way, first, whether each jurisdiction treats the seller's guarantee liability for non-conformity in quality and quantity as mandatory rules, second, if it does, to what extent it is treated so (*e.g.*, in terms of the status of the parties and the form of contract), and third, if not, in what way it controls the seller's attempt to exclude or restrict his liability for non-conformity in quality and quantity.

2. Comparative accounts

2.1. Korean law

The rules on the seller's guarantee liability in Korean law are of a non-mandatory nature.¹³⁴⁷ Thus, the parties are allowed to insert a clause in the contract to exclude or restrict the seller's guarantee liability and the clause is in principle valid insofar as it is effectively incorporated into the contract and its content is clear.¹³⁴⁸ However, if, notwithstanding that the seller is aware

supra n. 515, at para. 13-019 ff.; Guest, Beale (ed.), *supra* n. 846, at para. 14-005 ff. The courts often adopt the principle of *contra proferentem* that any ambiguities in the clause would be construed contrary to the interests of the party seeking to rely on it.

¹³⁴⁶ The Korean Act on Regulation of Standard Terms of 1986; The Unfair Contract Terms Act 1977; The Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083); The EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC, O.J. No. L. 95, 21); Directive(99/44) Art. 7.

¹³⁴⁷ Yun-jik Kwak, *supra* n. 74, at 254; Eun-young Lee, *supra* n. 68, at 796; Sang-kwang Lee, *supra* n. 167, at 309 ff.; Hyung-bae Kim, *supra* n. 67, at 349.

¹³⁴⁸ *Id.*

of the existence of a defect, he inserts the exemption clause, the clause is void and he is liable for the defect under the seller's guarantee liability¹³⁴⁹ because it is deemed to be contrary to the general principle of good faith.¹³⁵⁰

In addition, the fact that the seller did not know of the existence of a defect does not necessarily render that the exemption clause is always valid because it must also pass through legislative control of standard terms under by the Korean Act on Regulation of Standard Terms of 1986 (*hereinafter* KARST).¹³⁵¹ The clause falls within the scope of the application of KARST if;¹³⁵² first, the standard term forms a part of the contract,¹³⁵³ second, it has not been individually negotiated,¹³⁵⁴ third, it has been preformulated in advance,¹³⁵⁵ and fourth, it is intended to be incorporated into numerous contracts.¹³⁵⁶ One must note that the application of

¹³⁴⁹ KCC Art. 584.

¹³⁵⁰ Yun-jik Kwak, *supra* n. 74, at 254. Cf. Hyung-bae Kim, *supra* n. 67, at 349 (in this case the seller will be liable not only for the defect under the seller's guarantee liability, but also for the breach of his duty to disclose the existence of a defect).

¹³⁵¹ For the general explanation of KARST, see Sang-jeong Lee, "Yak-kwan-kyu-jae-bup So-go (A Study on Regulation of Standard Term Act)", (1989) 1 *So-bi-ja-saeng-hwal Yeon-koo* 48.

¹³⁵² KARST Art. 2(1).

¹³⁵³ It is not important whether it forms a part of main or auxiliary obligations. Eun-young Lee, "Yak-kwan-kyu-jae-bup Hae-seol (Comment on Regulation of Standard Term Act)", (May, 1987) 317 *Sa Bup Haeng Jeong* 43, at 43.

¹³⁵⁴ Insofar as a term has been subject to negotiation, it is out of the scope of KARST even if the term has not been changed in the process of negotiation. However, it is crucial that the buyer must have a real opportunity to scrutinise and influence the substance of the term. Young-gap Kim, "Yak-kwan-kyu-jae-eoi Bup-ri-wa Soo-jeong-hae-seok-eoi Moon-jae (The Legal Theories on Standard Terms Regulations and the Matters of Modification Interpretation)" (1997) 46(1) *Bup-jo* 80, at 86 f.

¹³⁵⁵ It does not matter who drafted the term, whether it be the supplier, a trade association, or even a commission representing the interests of persons usually confronted with standard terms of that kind. What is important is that the term has been introduced into the contract by one party. See Eun-young Lee, *supra* n. 1353, at 43.

¹³⁵⁶ The intent to use the term as a standard one in numerous contracts is sufficient, but the term for one-off contract is out of the scope. Eun-young Lee, *supra* n. 1353, at 43; Young-gap Kim, *supra* n. 1354, at 85 f.

KARST does not depend on whether the buyer is a consumer or a businessman,¹³⁵⁷ and the fact that a standard term has been individually negotiated does not necessarily mean that the remainder of the contract is not governed by KARST.¹³⁵⁸

Given that a clause to exclude or restrict the seller's guarantee liability falls within the scope of KARST, there are three relevant hurdles for the seller to overcome to get the clause to be effective.

First, the clause is not deemed to be incorporated into the contract where the seller fails to fulfil the duties to give notice of¹³⁵⁹ or to elucidate the substance of the clause.¹³⁶⁰ As regards notice, it must be given in a reasonable manner for the transaction in question in order to provide the buyer a reasonable opportunity to obtain knowledge of the clause.¹³⁶¹ However, even if it is reasonably expected that notice may be given by other means than tendering a written standard term, the seller is still obliged to provide an exemplar of the term which can be kept by the buyer where the buyer requests it.¹³⁶² It is also required that the contents of the terms be written in conspicuous and comprehensible language.¹³⁶³ Regarding the duty to elucidate, one must note that it is limited to the essential part of the contract and it is not required where the nature of the contract makes it significantly difficult.¹³⁶⁴ The crucial test to decide the essential part of the contract is whether the buyer would have entered into the

¹³⁵⁷ *Id.*

¹³⁵⁸ *Id.*

¹³⁵⁹ KARST Art. 3(1).

¹³⁶⁰ KARST Art. 3(2). The buyer who has signed a document including the clause may still claim that it was not effectively incorporated on the basis of the seller's failure to give notice or to elucidate the substance of the clause.

¹³⁶¹ KARST Art. 3(1). It could be done by tendering the written standard terms, by oral statements or by posting a conspicuous notice at the place the contract is made. Eun-young Lee, *supra* n. 1353, at 45.

¹³⁶² KARST Art. 3(1).

¹³⁶³ Eun-young Lee, *Yak-kwan-kyu-jae-bup (Regulation of Standard Term Act)*, (1994), at 117. Cf. The Korean Supreme Court Case, 9/3/1999, 98 Da 43342 (where a party tendered a document that generally and abstractly introduces the contents of insurance, it was held that he did not fulfil his duty to explain unless the other party knew or could have been aware of them).

¹³⁶⁴ KARST Art. 3(2).

contract had he been given an explanation.¹³⁶⁵ However, the duty of explanation is not applied where the buyer already knew or could not have been unaware of the clause.¹³⁶⁶ In addition, an exclusion clause in a written document cannot be incorporated where it is overridden by an individually negotiated agreement that is inconsistent with the clause.¹³⁶⁷

Second, the clause cannot be effective by the operation of the following rules; that a standard clause must be both objectively and consistently interpreted in light of average customers,¹³⁶⁸ that it must be interpreted in accordance with the principle of good faith,¹³⁶⁹ and that ambiguous clauses are construed against the drafter.¹³⁷⁰

Third, where a clause excludes or restricts the seller's guarantee liability, or a clause makes the liability or its enforcement subject to restrictive or onerous conditions, the clause is not deemed to be enforceable 'unless there is a reasonable ground for insertion of the clause'.¹³⁷¹ In addition, if the goods are sold by sample or by description as to quality or performance, a clause to exclude or restrict the seller's guarantee liability rendered by the sample or the description is

¹³⁶⁵ Eun-young Lee, *supra* n. 1363, at 118; Oh-seung Kwon, *So-bi-ja-bo-ho-bup (Consumer Protection Law)*, (1997), at 117; Dong-hoon Kim, "Yak-kwan-kyu-jae-eoi Pan-rae-wa-e-ron (Cases and Theories on Standard Terms Regulations)" (1997) 42(12) *Ko-shi-gae* 115, at 117. See *e.g.*, the Korean Supreme Court Cases, 12/12/1995, 95 Da 11344; 25/6/1996, 96 Da 12009. Cf. For the insurance cases where it was held a certain clause was not incorporated due to the drafter's failure to explain, see the Korean Supreme Court Cases, 12/4/1996, 95 Da 4893; 8/3/1996, 95 Da 53546; 11/8/1995, 94 Da 52492; 14/10/1994, 94 Da 17970; 10/3/1992, 91 Da 31883.

¹³⁶⁶ See *e.g.*, the Korean Supreme Court Cases, 11/5/1999, 98 Da 59842; 7/9/1999, 98 Da 19240; 9/3/1999, 98 Da 43342; 27/11/1998, 98 Da 32564; 9/9/1997, 95 Da 45873.

¹³⁶⁷ KARST Art. 4. Cf. The Korean Supreme Court Cases, 28/3/1989, 88 Da 4645; 26/11/1985, 84 DaKa 2543. It is not important whether the agreement is reached orally or in writing. Eun-young Lee, *supra* n. 1353, at 46. However, it does not mean the clause is invalid because it may be restored where the agreement is subsequently found ineffective. Young-gap Kim, *supra* n. 1354, at 92.

¹³⁶⁸ KARST Art. 5(1). Cf. The Korean Supreme Court Cases, 25/6/1996, 96 Da 12009; 26/5/1995, 95 Da 36704; Ji-yeol Son, "Yak-kwan-ae-kwan-han Pan-rae-eoi Dong-hyang (The Trend of Cases Regarding Standard Terms)", (1988) 10 *Minsa-panrae-yoenkoo* 408, at 422.

¹³⁶⁹ KARST Art. 5(1).

¹³⁷⁰ KARST Art. 5(2). Cf. the Korean Supreme Court Case, 25/6/1996, 96 Da 12009.

¹³⁷¹ KARST Art. 7(3).

invalid insofar as it cannot be shown a reasonable ground for the clause.¹³⁷² In determining the existence of a reasonable ground, one must take into account all the relevant circumstance of the transaction in question at the time of contract and all other terms of the contract.¹³⁷³ For instance, if an exemption clause is offset by a lower price, it may evidence that there is a reasonable ground.¹³⁷⁴ However, a lower price does not always constitute a reasonable ground because it must be proved that the loss of the buyer's rights due to the exemption clause was reasonably compensated by the reduced price.¹³⁷⁵

Given that all the above three requirements are satisfied, the question arises whether an exclusion clause of the seller's guarantee liability is always effective. It is related to the matter of to what extent the general provision under KARST that is the general gauge to assess the fairness of a standard term is applicable.¹³⁷⁶ On the one hand, some argue that, once the clause has passed a test specifically designed for exclusion clauses of the seller's guarantee liability, it is not justifiable to impose another test by the general provision on the clause.¹³⁷⁷ On the other hand, others contend that even if the clause is valid in terms of the specifically designed test, it may be still invalidated where it infringes the fairness rules stated in the general provision.¹³⁷⁸ The rules are that where the clause prejudices the customer in a manner that violates the command of good faith, the clause is deemed unfair.¹³⁷⁹ In the case of doubt about the fairness

¹³⁷² *Id.*

¹³⁷³ Eun-young Lee, *supra* n. 1353, at 48. The burden of proof is on the supplier who seeks to rely on the clause. Eun-young Lee, *supra* n. 1363, at 186 f., 209. However, any attempt by the seller to exclude or restrict the buyer's right of rescission rendered by the seller's guarantee liability is unequivocally void. KARST Art. 9(1); Eun-young Lee, *supra* n. 1363, at 264 ff.

¹³⁷⁴ *Id.*

¹³⁷⁵ *Id.*

¹³⁷⁶ KARST Art. 6.

¹³⁷⁷ Koch/Stübing, *AGB*, (1977), § 9, Rdn. 6; cited in Eun-young Lee, *supra* n. 1363, at 191, n. 2. Cf. Prof. Eun-young Lee also stands with this view, but note that the 'reasonable ground' test is in fact executed on the basis of criteria stipulated in the general provision.

¹³⁷⁸ Kyung-hwan Jang, "A Study on the General Provisions of Regulation of Standard Term Act", PhD thesis, *The Graduate School of Seoul National University*, (1990), at 80 ff.

¹³⁷⁹ KARST Art. 6(1).

of a standard clause, KARST uses three presumptions to determine when such a clause prejudices the buyer contrary to the general principle of good faith.¹³⁸⁰ One is a presumption of unfairness of a standard clause when it creates any unreasonable disproportion to the detriment of the buyer.¹³⁸¹ The test of unreasonable disproportion must be assessed in light of a comparison between benefits rendered by the clause to the customer and those to the supplier.¹³⁸² In addition, the test must depend upon what are reasonable interests from the point of view of the run of average customers.¹³⁸³ Another apparent case of unfairness is presumed in the case where a standard clause is so unusual that the buyer could not reasonably expect it.¹³⁸⁴ In assessing the unexpectedness of a clause, all the relevant circumstances must be taken into account at the time of contract in light of the run of average customers,¹³⁸⁵ which includes conspicuousness and comprehensibility of the clause that the court may find crucial.¹³⁸⁶ The other presumption is concerned with standard clauses that contradict the rights and obligations inherent in the nature of the contract.¹³⁸⁷ This presumption applies to the cases where standard clauses eviscerate terms that are material to the contract; a clause to entitle the supplier to render a contractual performance substantially different from what was reasonably expected of the customer at the time of contract.¹³⁸⁸

¹³⁸⁰ KARST Art. 6(2).

¹³⁸¹ KARST Art. 6(2-1).

¹³⁸² Eun-young Lee, *supra* n. 1353, at 47. Cf. Eun-young Lee, *supra* n. 1363, at 185 f.

¹³⁸³ Eun-young Lee, *supra* n. 1353, at 47.

¹³⁸⁴ KARST Art. 6(2-2).

¹³⁸⁵ Eun-young Lee, *supra* n. 1363, at 188 f. Cf. the Korean Supreme Court Cases, 27/12/1994, 93 Da 29396; 11/12/1990, 90 DaKa 26553 (the cases show the courts are generally reluctant to judge the unfairness of a clause on the basis of unexpectedness; Dong-hoon Kim, *supra* n. 1365, at 120).

¹³⁸⁶ Kyung-hwan Jang, *supra* n. 1378, at 207 (criticising that this test of unexpectedness is already dealt with in the matter of incorporation and it should not be a part of the unfairness test to control substances of the clause).

¹³⁸⁷ KARST Art. 6(2-3).

¹³⁸⁸ Eun-young Lee, *supra* n. 1353, at 47 f. This presumption applies, e.g., to a dragnet security clause which has the effect that, as long as any item purchased from the seller is not yet completely paid for, all the other goods bought from the seller serve as security for the open balance and can be repossessed upon

2.2. English law

2.2.1. Incorporation, construction and other Common law rules

In order to be effective, at the first stage, to exclude the seller's liability for non-conformity in quality or quantity a contractual clause must be validly incorporated into the contract in question. The clause can be incorporated in two ways, first, where it is in a document signed by the buyer because he may be bound by what he signs regardless of whether he has read it,¹³⁸⁹ second, where a reasonable notice of the clause has been given to the buyer at or before the time of contract in order to make it part of the contract.¹³⁹⁰ What amounts to a reasonable notice is a question which depends upon the facts and circumstances of the individual case.¹³⁹¹ The more unusual or unexpected the clause, the greater the degree of the notice required by the courts.¹³⁹²

At the second stage, it must be shown that the clause, properly interpreted or construed, covers the loss which has arisen. The general approach the courts have adopted to the interpretation of exclusion clauses is a strict one, under which the exclusion clause is construed *contra proferentem*. Therefore, an exclusion clause of 'no warranty express or implied' may not

default of any payment because the extended possibility of repossession makes it difficult for the buyer to obtain unrestricted possession of the purchased goods.

¹³⁸⁹ But it is not applied where its effect has been misrepresented (the clause is still part of the contract, but it is not enforceable) or where *non est factum* can be pleaded (see *Saunders v. Anglia Building Society* (No. 2) [1971] AC 1039).

¹³⁹⁰ For the cases holding the notice was ineffective because it was given after the time of contract, see e.g., *Olley v. Marlborough Court Ltd.* [1949] 1 KB 532; *Thornton v. Shoe Lane Parking Ltd.* [1971] 2 QB 163. For the cases holding that a notice is not regarded as having been given where the clause appears on a document that would not be expected to have a contractual effect, e.g. *Chapleton v. Barry UDC* [1940] 1 KB 532 (receipt for hiring deck-chair).

¹³⁹¹ See e.g., *Thompson v. L. M. and S. Ry* [1930] 1 KB 41; *The Mikhail Lermontov* [1990] 1 Lloyd's Rep. 579, 594; *Sugar v. London, Midland and Scottish Railway Co.* [1941] 1 All ER 172.

¹³⁹² See e.g. *J. Spurling Ltd. v. Bradshaw* [1956] 1 WLR 461; *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] QB 433. One must note that a clause can be incorporated into a contract by a course of dealing that must be both regular and consistent. See *McCutcheon v. David MacBrayne*

exclude conditions,¹³⁹³ and an exclusion of liability for breach of implied terms may not exclude liability for breach of express terms.¹³⁹⁴

It must be noted that English law used to adopt a doctrine known as ‘fundamental breach of contract’, under which exemption clauses might be inoperative in the case of such breach.¹³⁹⁵ This rule has been disapproved by the House of Lords and it is now established that it should be assimilated into the rules as to construction.¹³⁹⁶ That is, the question whether an exclusion clause covers a fundamental breach is a question of construction so that a clearly worded exclusion clause may even cover such a breach. However, one must note that it is likely that the courts will show their reluctance in general to uphold the exclusion clause as to a fundamental breach unless it is not clearly and fairly susceptible of only one meaning.¹³⁹⁷

In addition to the above two stages, it must be also noted that there are further Common law rules to control exclusion clauses. The seller cannot rely on an exclusion clause where he misrepresents, whether fraudulently or otherwise, the terms or effect of the clause inserted by him in a contract.¹³⁹⁸ He is not also allowed to rely on an exclusion clause contained in a written document when it is overridden by an express inconsistent undertaking given at or

Ltd. [1964] 1 WLR 125. Cf. *Henry Kendall & Sons v. William Lillico & Sons* [1969] 2 AC 31.

¹³⁹³ *Wallis, Son & Wells v. Pratt & Haynes* [1911] AC 394.

¹³⁹⁴ *Andrews Bros (Bournemouth) Ltd. v. Singer and Co. Ltd.* [1934] 1 KB 17. For further examples as to the matter of construction of exclusion clauses of the seller’s liability for non-conformity, see Reynolds, Guest (ed.), *supra* n. 515, at para. 13-022 ff. (if there is a gross non-conformity between the goods as described in the contract and as delivered, the courts may hold that an exemption clause purporting, *e.g.*, to require the buyer to take the goods ‘with all faults and imperfections’, to deprive the buyer of the right to reject, or to exclude the seller’s liability for errors of description, is not applicable to a failure to provide the contract goods).

¹³⁹⁵ See *e.g.*, *Karsales (Harrow) Ltd. v. Wallis* [1956] 1 WLR 936.

¹³⁹⁶ *Suisse Atlantique Société d’Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361; *Photo Production Ltd v. Securicor Ltd.* [1980] AC 827; *Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.* [1983] 1 WLR 964. The position is now effectively confirmed by s. 9 of UCTA.

¹³⁹⁷ Bradgate, *Commercial Law*, (2000), at 75; McKendrick, *supra* n. 952, at 230 f.

¹³⁹⁸ *Curtis v. Chemical Cleaning and Dyeing Co.* [1951] 1 KB 805. See also *Jaques v. Lloyd D. George & Partners Ltd.* [1968] 1 WLR 625; *Charlotte Thirty Ltd. v. Croker Ltd* [1990] 24 Const.L.R. 46.

before the time of contract.¹³⁹⁹

2.2.2. Legislative control

2.2.2.1. General

The legislative control of exemption clauses in English law must be examined in light of two overlapping legal regimes; the Unfair Contract Terms Act 1977 (*hereinafter* UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (*hereinafter* the Regulations).¹⁴⁰⁰ The reason for this is that English law has failed to consolidate the new rules, which had to be implemented by virtue of the EC Directive on Unfair Terms in Consumer Contracts,¹⁴⁰¹ with those already contained in UCTA. As a result there are two separate but overlapping legislative

¹³⁹⁹ *Couchman v. Hill* [1947] KB 554.

¹⁴⁰⁰ The Regulations replace earlier regulations made in 1994 which were introduced to implement the EC Directive on Unfair Terms in Consumer Contracts. For discussions on the EC Directive on Unfair Terms in Consumer Contracts or the Regulations 1994, see Beale, "Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts", in: Beatson and Friedmann (ed.), *supra* n. 812, at 231 ff.; Brownsword and Howells, "The Implementation of the EC Directive on Unfair Terms", (1995) *J.B.L.* 243; Macdonald, "Mapping the Unfair Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts", (1994) *J.B.L.* 441; Reynolds, "Unfair Contract Terms", (1994) 110 *L.Q.R.* 1; Weatherill, "Prospects for the Development of European Private Law Through "Europeanisation" in the European Court – The Case of the Directive on Unfair Terms in Consumer Contracts", (1995) 3 *Eur. Rev. of Private Law* 307, at 316 ff.; Harrison, *Good Faith in Sales*, (1997), at 699 ff. Cf. Bright and Bright, "Unfair Terms in Land Contracts: Copy Out or Cop Out", (1995) 111 *L.Q.R.* 655; Collins, "Good Faith in European Contract Law", (1994) 14 *O.J.L.S.* 229; De Moor, "Common and Civil Law Conceptions of Contract and a European Law of Contract; The Case of the Directive on Unfair Terms in Consumer Contracts", (1995) 3 *Eur. Rev. of Private Law* 257; Tenreiro, "The Community Directive on Unfair Terms and National Legal Systems The Principle of Good Faith and Remedies for Unfair Terms", (1995) 3 *Eur. Rev. of Private Law* 273; Joerges, "The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines – an Analysis of the Directive on Unfair Terms in Consumer Contracts", (1995) 3 *Eur. Rev. of Private Law* 175; Whittaker, "Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract", (2000) 116 *L.Q.R.* 95; Howells & Wilhelmsson, *EC Consumer Law*, (1997), at 88 ff.

¹⁴⁰¹ 93/13/EEC, O.J. No. L. 95, 21.

controls applicable to exclusion and similar clauses in contracts even though the two separate controls may generally produce the same results in many respects, but one must note that they differ in some important respects. It is accordingly crucial for the seller seeking to rely on exclusion clauses as to his liability for non-conformity to pass through the double barrier of UCTA and the Regulations. This is not only because of the different tests used but also the different scope of application between them. In UCTA, exemption clauses as to the seller's liability for non-conformity are divided into two categories;¹⁴⁰² clauses always ineffective¹⁴⁰³ and clauses subject to the test of reasonableness.¹⁴⁰⁴ Unlike UCTA, which treats different clauses in different ways, the Regulations control exemption clauses invariably by virtue of the test of fairness.¹⁴⁰⁵

2.2.2.2. UCTA

2.2.2.2.1. Clauses always ineffective

If a clause purports to exclude or restrict liability under the implied conditions under the SGA (the seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose),¹⁴⁰⁶ it is always of no effect insofar as the buyer is dealing as a consumer.¹⁴⁰⁷ The buyer deals as a consumer if three conditions are satisfied; first, he is not buying in the course of a business, second, the seller is selling in the course of a business, three, the goods are of a type ordinarily supplied for private use or consumption.¹⁴⁰⁸

¹⁴⁰² For varieties of exemption clauses, see UCTA s. 13; Guest, Beale (ed.), *supra* n. 846, at para. 14-060 ff.

¹⁴⁰³ UCTA s. 6(2).

¹⁴⁰⁴ UCTA ss. 3, 6(3).

¹⁴⁰⁵ Regulation 5, 6.

¹⁴⁰⁶ The SGA ss. 13, 14 and 15.

¹⁴⁰⁷ UCTA s. 6(2).

¹⁴⁰⁸ UCTA s. 12(1). Anyhow s. 14 of the SGA attaches only where the seller sells in the course of a business.

The concept of a sale ‘in the course of a business’ is defined in light of the contractor’s status in the particular contract rather than its general status. In *R & B Customs Brokers Ltd. v. UDT Finance Ltd.*, the Court of Appeal held that the buyer only makes a contract ‘in the course of a business’ within UCTA, either where the purchase was an integral part of the business, or where it is one of a regular kind of contract made by the buyer.¹⁴⁰⁹ In addition to the above three conditions, for the buyer to deal as a consumer, a sale must not be by auction or by competitive tender.¹⁴¹⁰

2.2.2.2.2. Clauses subject to reasonableness test

Unlike the above category of clauses always ineffective, some clauses in the other category may be valid but only if they satisfy the requirement of reasonableness. In relation to our discussion about the seller’s liability for defective goods, clauses subject to the requirement of reasonableness can be divided into two groups; clauses regarding quantitative and qualitative defects.

First, if a clause excludes or restricts the seller’s liability about quantitative defects, it is invalid where it does not fulfil the requirement of reasonableness.¹⁴¹¹ The requirement applies whether or not the buyer is dealing as a consumer but, if he is not, then it only applies where the buyer is dealing on the other party’s ‘written standard terms of business’.¹⁴¹²

¹⁴⁰⁹ [1988] 1 All ER 847 (this case relied on decisions on the meaning of ‘in the course of a business’ in cases under the Trade Description Act; *Davies v. Sumner* [1984] 1 WLR 1301; *Havering London Borough v. Stevenson* [1970] 3 All ER 609). See also *Rasbora Ltd. v. JCL Marine Ltd.* [1977] 1 Lloyd’s Rep. 645; *Peter Symons & Co. v. Cook* [1981] 131 NLJ 758. Cf. *Stevenson v. Rogers* [1999] 1 All ER 613 (holding that any sale by a business, whatever incidental or one-off, is deemed to be a transaction ‘in the course of a business’ under the meaning of s. 14 the SGA). De Lacy, “Selling in the Course of a Business under the Sale of Goods Act 1979” (1999) 62 *M.L.R.* 776; De Lacy, “Business Seller’s Liability for the Implied Terms under the Sale of Goods Act 1979” (Jan., 2000) *Insolv. L.* 27.

¹⁴¹⁰ UCTA s. 12(2).

¹⁴¹¹ UCTA s. 3(2).

¹⁴¹² UCTA s. 3(1). Cf. *McCrone v. Boots Farm Sales Ltd.* [1981] SLT 103 (a Scottish case on the meaning of the equivalent phrase ‘standard form contract’ where Lord Dunpark said that the term is wide

Second, if an exclusion clause relates to the implied conditions in ss. 13-15 of the SGA, but the buyer is not deemed to deal as a consumer within the scope of s. 6(2) of UCTA, the reasonableness requirement applies.¹⁴¹³ Unlike the exclusion clause as to the seller's liability about quantitative defects, it is immaterial whether the buyer is purchasing on the other party's written standard terms of business.¹⁴¹⁴

The reasonableness requirement, strictly speaking, differs according to whether an exclusion clause is related to quantitative and qualitative defects. As to the former, the test is whether the term was a fair and reasonable one to have included in the contract, having regard to circumstances which were, or ought reasonably to have been, known to the parties at the time when the contract was made.¹⁴¹⁵ Regarding the latter, there are guidelines set out in Schedule 2.¹⁴¹⁶ They include following factors: (a) the relative strengths of the parties' bargaining positions, taking into account alternative means by which the customer's requirements might be met; (b) whether the customer received any inducement to agree the term, or in accepting it had an opportunity of entering into a similar contract with any other person without accepting a similar term;¹⁴¹⁷ (c) whether the customer knew or ought reasonably to have known of the

enough "to include any contract, whether wholly written or partly oral, which includes a set of fixed terms or conditions which the proposer applies without material variation to contracts of the kind in question"). Although the object of the concept of standard terms is in principle to identify contracts which are not individually negotiated, a buyer may deal on standard terms even where there has been negotiation, which may depend on the question of fact. See *St Albans City and District Council v. International Computers Ltd* [1996] 4 All E.R. 481; see also *Salvage Assn. v. Cap Financial Services Ltd* [1995] F.S.R. 654; *The Flamar Pride* [1990] 1 Lloyd's Rep. 434.

¹⁴¹³ UCTA s. 6(3).

¹⁴¹⁴ Atiyah and Adams, *supra* n. 421, at 208; Reynolds, Guest (ed.), *supra* n. 515, at para. 13-083.

¹⁴¹⁵ UCTA s. 11(1).

¹⁴¹⁶ UCTA s. 11(2). The onus of proving that it was reasonable to incorporate a term in a contract lies on the party so contending. UCTA s. 11(5).

¹⁴¹⁷ *Woodman v. Photo Trade Processing Ltd.* (7 May 1981, unreported), cited in Lawson, "The Unfair Contract Terms Act: A Progress Report" (1981) 131 *NLJ* 933, at 935. In this case, a clause in a contract for the processing of a roll of photographic film which provided the limitation of the developer's liability to the cost of replacement of the unprocessed film was held unreasonable where the customer claimed damages for the loss of pictures of a family wedding. The court was influenced by the fact that the

existence and extent of the term;¹⁴¹⁸ (d) where the term excludes or restricts liability unless some condition is complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;¹⁴¹⁹ (e) whether the goods were manufactured, processed or adapted to the special order of the customer. Where an exclusion clause seeks to restrict the liability of the seller to a specified sum of money, regard is to be had in particular to: (a) the resources available to the party relying on the term for the purposes of meeting the potential liability; (b) how far it was open to him to protect himself by insurance.¹⁴²⁰ Although Schedule 2 is applicable strictly only to the cases of the exclusion clauses as to the implied conditions, one must note that the courts are likely to consider the guidelines in other cases.¹⁴²¹

2.2.2.3. Regulations

The Regulations impose two requirements; the requirement that the terms be ‘plain, intelligible language’ which applies only to any written term¹⁴²² and the requirement of fairness which

customer had little choice: few film processors accepted greater liability than the defendants and the industry code of practice required processors to offer a two-tier service whereby the processor would accept greater liability on payment of an increased price.

¹⁴¹⁸ Terms in small print or in difficult language are likely to be held unreasonable. See *The Zinnia* [1984] 2 Lloyd’s Rep. 211; *Knight Machinery Holdings Ltd. v Rennie* [1995] S.L.T 166 (a clause requiring notification of rejection within 7 days in a contract for the supply of a printing machine was held ineffective partly because of its lack of clarity as to what was required).

¹⁴¹⁹ *R.W. Green Ltd. v. Cade Bros. Farms* [1978] Q.B. 574 (a short time limit on claims on a bulk sale of seed potatoes was held unreasonable as to latent defects).

¹⁴²⁰ UCTA s. 11(4). Cf. *Salvage Assn. v. Cap Financial Services Ltd* [1995] F.S.R. 654 (a clause limiting liability to £25,000 was held unreasonable when the party relying on the clause had indemnity insurance of £5,000,000).

¹⁴²¹ *Stewart Gill Ltd. v. Horatio Myer & Co. Ltd.* [1992] QB 600; *The Flamar Pride* [1990] 1 Lloyd’s Rep. 434; *Singer Co. (U.K.) Ltd. v. Tess and Hartlepool Port Authority* [1988] 2 Lloyd’s Rep. 164, 169. See Bradgate, *supra* n. 1397, at 86; Beale, *supra* n. 1400, at 235; Reynolds, Guest (ed.), *supra* n. 515, at para. 13-085; Guest, Beale (ed.), *supra* n. 846, at para. 14-082.

¹⁴²² Regulation 7(1).

applies to any term (whether written or oral).¹⁴²³ In relation to the former, where there is doubt as to the meaning of a written term, it shall be interpreted in a way most favourable to the consumer.¹⁴²⁴ This effect does not seem to add more than the principle of *contra proferentem* that has been long recognised in English law. The particular importance of the Regulations in English law, concerning exclusion clauses as to the seller's liability for non-conformity, is found where their scope of application is wider than UCTA and where their test of fairness differs from the test of reasonableness in UCTA.

As to the scope of Regulations, it applies to any contract made between a 'seller or supplier' and 'consumer', subject to certain exclusions.¹⁴²⁵ 'Consumer' is defined as 'a natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession'.¹⁴²⁶ This definition seems wider than that of UCTA in that, first, as regards contracts for the sale of goods, it does not require that the goods be 'of a type ordinarily supplied for use or consumption'¹⁴²⁷ (but note that insofar as ss. 13-15 of the SGA are concerned, such goods will be still within UCTA),¹⁴²⁸ and second, it covers the consumer's purchase at an auction sale or by competitive tender.¹⁴²⁹ 'Seller or supplier' for the purpose of the Regulations is meant 'any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'.¹⁴³⁰ This definition could be also wider than that of UCTA in that, if

¹⁴²³ Regulation 5(1).

¹⁴²⁴ Regulation 7(2).

¹⁴²⁵ Regulation 4(1).

¹⁴²⁶ Regulation 3(1).

¹⁴²⁷ UCTA s. 12(1)(c).

¹⁴²⁸ UCTA s. 6(3).

¹⁴²⁹ UCTA s. 12(2). See Whittaker, Beale (ed.), *supra* n. 846, at para. 15-017; Atiyah, Adams and Macqueen, *The Sale of Goods*, (2001), at 257. Cf. It is also narrower than that of UCTA in that it clearly excludes a company so that the buyer in *R & B Customs Brokers* would not be a 'consumer' under the Regulations. Whittaker, *id.*; Bradgate, *supra* n. 1397, at 86; Beale, Beatson and Friedmann (ed.), *supra* n. 812, at 238.

¹⁴³⁰ Regulation 3(1).

the *R & B* case¹⁴³¹ is applied to the question whether the seller acted ‘in the course of a business’ under UCTA,¹⁴³² it may cover the case, for instance, where a company sells off one of its old cars because the sale may not be ‘in the course of a business’ under UCTA¹⁴³³ (but note that so far as ss. 13-15 of the SGA are concerned, it may be still caught by UCTA).¹⁴³⁴ In addition, one must also note that the scope of the Regulations is wider in that unlike UCTA,¹⁴³⁵ it does not require that the contract as a whole be on standard terms;¹⁴³⁶ the Regulations apply to individual terms and it expressly stipulates that the fact that an individual term has been negotiated shall not impede the application of the Regulations to the rest of the contract if an overall assessment of it indicates that it is a pre-formulated standard contract.¹⁴³⁷

Regarding the test of fairness, the Regulations set out two sets of criteria to be taken into consideration in determining the fairness of a term; first, the term must create a significant imbalance in the rights and obligations of the parties under the contract, to the detriment of the consumer, and second, the creation of that imbalance must be contrary to the requirement of good faith.¹⁴³⁸ In assessing the fairness of a term, the following factors should be also taken into account; first, the nature of the goods or services, second, all the circumstances attending the

¹⁴³¹ *Supra* n. 1409.

¹⁴³² It is submitted that the position in English law is not clear because *R & B* case concerns the status of the buyer rather than the seller. Bradgate, *supra* n. 1397, at 81 ff.

¹⁴³³ *Id.*, at 89. However, if *Stevenson v. Rogers* case (*supra* n. 1409) is applied, any transaction other than a purely private one may be ‘in the course of a business’, which leads the case to fall within the scope of both the Regulations and UCTA. Bradgate, *supra* n. 1397, at 89.

¹⁴³⁴ UCTA s. 6(3).

¹⁴³⁵ However, it is also narrower in that while UCTA can be applied to both negotiated and non-negotiated terms in consumer contracts (see *supra* n. 1412), the Regulations are applicable only to terms which have not been ‘individually negotiated’, as defined in Regulation 5(2). Bradgate, *supra* n. 1397, at 91; cf. Scott and Black, *Cranston’s Consumers and the Law*, (2000), at 90 f.

¹⁴³⁶ Bradgate, *supra* n. 1397, at 91. Thus, the Regulations do not raise the difficulties under s. 3 of UCTA where a standard term is used as a basis for negotiation leading to variation of some of its terms. *Id.* Cf. Guest, Beale (ed.), *supra* n. 846, at para. 14-069; Whittaker, Beale (ed.), *supra* n. 846, at para. 15-024.

¹⁴³⁷ Regulation 5(3).

¹⁴³⁸ Regulation 5.

conclusion of the contract, and third, all other terms of the contract or of a contract on which it is dependent.¹⁴³⁹ One must note that the assessment of fairness does not extend to the matters of core terms; the main subject matter of the contract and the adequacy of the price.¹⁴⁴⁰ Although it is not expressly stipulated in the Regulations, the requirement of plain and intelligible language in any written term of a contract¹⁴⁴¹ is likely to constitute an important factor in the assessment of fairness because an unintelligible term may deprive a consumer of a real opportunity of becoming acquainted with its effect.¹⁴⁴² In addition, the Regulations contain an ‘indicative and non-exhaustive list(s) of the terms which may be regarded as unfair’.¹⁴⁴³ This list is a list for the terms which it contains are not necessarily to be held unfair, but they will provide a general presumption of unfairness.¹⁴⁴⁴

In most cases, the crucial criteria in the assessment of fairness are likely to be the general

¹⁴³⁹ Regulation 6(1). For the detailed explanations on these factors, see Whittaker, Beale (ed.), *supra* n. 846, at para. 15-039 ff.

¹⁴⁴⁰ Regulation 6(2); cf. *Director General of Fair Trading v. First National Bank plc.* [2000] 2 All ER 759 (it was held that a term in a consumer credit agreement which provided that, in the event of default by the consumer, interest should continue to be payable on any outstanding sums at the contract rate and that interest on the debt would continue to run after any judgment, did not define the main subject matter because it related to default interest and did not concern the adequacy of the price or remuneration); *Falco Finance Ltd. v. Gough* [1999] C.C.L.R. 208. Although Regulation 6(2) may possibly involve the implied conditions under the SGA, it is submitted that it is unlikely to exclude the conditions from the test of fairness because otherwise the Regulations may lose their substantial power to control unfair terms. Bradgate, *supra* n. 1397, at 91. One must note that, in any case, the exclusion of the core terms applies only if the term in question is expressed in plain and intelligible language (Regulation 6(2)) and the terms can be taken into account when assessing the fairness of individual terms covered by the Regulations. Bradgate, *supra* n. 1397, at 92; Whittaker, Beale (ed.), *supra* n. 846, at para. 15-027.

¹⁴⁴¹ Regulation 7.

¹⁴⁴² Whittaker, Beale (ed.), *supra* n. 846, at para. 15-071; Beale, *supra* n. 1400, at 248; cf. UCTA Schedule 2(c). However, one must note that it may overlap with the factor of “all the circumstances attending the conclusion of the contract” in Regulation 6(1). Whittaker, Beale (ed.), *supra* n. 846, at para. 15-041.

¹⁴⁴³ Regulation 5(5), Schedule 2.

¹⁴⁴⁴ The main concern in this thesis that is the seller’s liability for non-conformity in quality and quantity draws one’s attention in particular to para. 1(b) of Schedule 2.

requirement of good faith and its relationship with the requirement of ‘significant imbalance’.¹⁴⁴⁵ Although there is little guidance as to the requirement in the Regulations, the recitals to the EC Directive on Unfair Terms in Consumer Contracts provide the following factors to which regard should be had in the assessment of good faith; (a) the strength of the bargaining positions of the parties, (b) whether the consumer had an inducement to agree to the term, (c) whether the goods or services were sold or supplied to the special order of the consumer, and (d) whether the seller or supplier has dealt fairly and equitably with the consumer.¹⁴⁴⁶ These factors seem more or less similar to the guidelines in the assessment of ‘reasonableness’ under UCTA as the first three factors are found in Schedule 2 of UCTA.¹⁴⁴⁷ The fourth factor appears to suggest that it differs from UCTA in that the seller’s conduct after the conclusion of the contract may also form a factor for the test of good faith.¹⁴⁴⁸ However, one must note that insofar as the requirement of good faith is intended to qualify the fairness of the term, it seems irrelevant to the fairness of a party’s post-conduct, and consequently it seems to become clear that the fourth factor is already included in the general test’s reference to “all the circumstances attending the conclusion of the contract.”¹⁴⁴⁹

2.3. The Directive

The rules in the Directive are of a mandatory nature in that any clauses in the contract of sale which seek to directly or indirectly waive or restrict the rights of a consumer resulting from the

¹⁴⁴⁵ Regulation 6(1). See Bradgate, *supra* n. 1397, at 92.

¹⁴⁴⁶ Recital 16. These factors were included in Schedule 2 of the 1994 Regulations, which was omitted from the 1999 Regulations because the Schedule was not justified by the text of the EC Directive on Unfair Terms in Consumer Contracts.

¹⁴⁴⁷ UCTA Schedule 2(a), (b) and (e).

¹⁴⁴⁸ Whittaker, Beale (ed.), *supra* n. 846, at para. 15-044. While UCTA clearly stipulates the burden of proof of reasonableness on the party seeking to rely on the exclusion clause in question (s. 11(5)), neither the Regulations nor the EC Directive on Unfair Terms in Consumer Contracts provides a rule for the burden of proof of fairness. *Id.*, at para. 15-047.

¹⁴⁴⁹ *Id.*

Directive will not bind the consumer.¹⁴⁵⁰ However, it is permissible for the seller or consumer to agree that the seller's liability for non-conformity of second-hand goods can be for a shorter period of no less than one year.¹⁴⁵¹

This mandatory nature is applied insofar as the contract of sale is within the scope of the Directive, which must be examined in the following aspects. First, a consumer must be "any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession".¹⁴⁵² It has been submitted that the intentional omission of the word, 'directly', in the definition of consumer that was inserted in the previous draft Directive seems to exclude all purchases either directly or indirectly connected to his trade, business or profession.¹⁴⁵³ The clear wording of 'natural person' in the definition of a consumer, as contrasted with that of a seller, seems to exclude a company or other legal person however small from the definition of a consumer. Second, a seller must fall within the definition of a seller under the Directive which describes it as "any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession".¹⁴⁵⁴ It is not clear whether a sale "in the course of his trade, business or profession" under the Directive is extended to the cases of a seller's any incidental or one-off sale, although it was submitted by a scholar that the cases may be out of the scope of the Directive on the basis of its use of languages of "in the course of 'his' business" rather than "in the course of 'a' business".¹⁴⁵⁵ Third, subject-matter must be consumer goods which are defined widely as "any tangible movable item" with the exception of (a) goods sold by execution or otherwise by authority of law, (b) water and gas where not sold in a limited volume or set quantity and (c)

¹⁴⁵⁰ Directive(99/44) Art. 7.1.

¹⁴⁵¹ *Id.*

¹⁴⁵² Directive(99/44) Art. 1.2(a).

¹⁴⁵³ See *supra* n. 631-633 and accompanying texts. *E.g.*, a car dealer purchasing a computer for his office is out of the scope of the Directive.

¹⁴⁵⁴ Directive(99/44) Art. 1.2(c).

¹⁴⁵⁵ See *supra* n. 634-635 and accompanying texts.

electricity.¹⁴⁵⁶ Fourth, the transaction in question must be a “contract of sale”.¹⁴⁵⁷ Although the Directive does not define it, it clearly includes a contract for the supply of consumer goods to be manufactured or produced¹⁴⁵⁸ and a contract for the supply of consumer goods to be installed.¹⁴⁵⁹

2.4. CISG

Under CISG, it is expressly stated that the parties may derogate from or modify the effect of any of its provisions.¹⁴⁶⁰ Therefore, the parties under CISG are in principle free to insert a clause in the contract to exclude or restrict the seller’s liability for defective goods. The validity of the clause is controlled by virtue of the rules of domestic laws because CISG only concerns the rules as to sales contract formation and the rights and obligations of the parties to the sale, whereas it does not deal with the matters of validity of the contract, of any of its provisions or of any usage, and of the effect the contract may have on the property in the goods sold.¹⁴⁶¹

2.5. Comparative view

As was examined, the approaches to control of exclusion clauses in English law and Korean law are similar in general that in order to be effective, the clause is subject to the following tests; whether it is properly incorporated into the contract, whether its proper interpretation covers the loss which has arisen, and whether it is fair or reasonable. There seems no particular difference in the second test in a sense that the construction of the clause is executed in a

¹⁴⁵⁶ Directive(99/44) Art. 1.2(b). The Member States have an option that second-hand goods sold at public auction when consumers have the opportunity of attending the sale in person are not within the meaning of “consumer goods”. Directive(99/44) Art. 1.3. Cf. Williams & Hamilton, “The Impact in the U.K. of the E.U. Directive on the Sale of Consumer Goods and Associated Guarantees: Part 1”, (2000) 11(9) *I.C.C.L.R.* 318, at 320 f.

¹⁴⁵⁷ Directive(99/44) Art. 2.1.

¹⁴⁵⁸ Directive(99/44) Art. 1.4.

¹⁴⁵⁹ Directive(99/44) Art. 2.5.

¹⁴⁶⁰ CISG Art. 6.

¹⁴⁶¹ CISG Art. 4. Cf. Hartnell, “Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods” (1993) 18 *Yale J. Int’l L.* 1.

restrictive way in each jurisdiction,¹⁴⁶² whereas the first and the third test seem to show some dissimilarities.

Regarding the first test, it seems different in that unlike English law, the buyer's signature on a document including a clause in question is not necessarily a crucial factor to decide whether the clause is incorporated into the contract in Korean law¹⁴⁶³ and in that there is no counterpart in English law of the seller's duty to explain the essential part of the contract.¹⁴⁶⁴

In respect of the third test, one needs a further examination, particularly, in the ambit of the application of the reasonableness or fairness test and in the factors to be considered for the test. First, as to the ambit of the application of the reasonableness or fairness test, UCTA seems broader than KARST in that it is not restricted to the terms which have not been individually negotiated.¹⁴⁶⁵ Although the Regulations are similar to KARST in this light,¹⁴⁶⁶ the requirement in KARST that it be intended to be incorporated into numerous contracts has no counterpart in the Regulations.¹⁴⁶⁷ However, given that most standard terms in consumer contracts are generally intended to be incorporated into numerous contracts, this seems to bear no significance in practice. Second, regarding the factors to be considered in defining reasonableness or fairness, the tests of 'unreasonable disproportion'¹⁴⁶⁸ and 'unreasonable ground' under KARST¹⁴⁶⁹ seem similar to the test of fairness under the Regulations¹⁴⁷⁰ in that

¹⁴⁶² See *supra* n. 1368-1370, 1393-1394 and accompanying texts. Although there is no requirement in English law that it must be construed by virtue of the principle of good faith, it is unlikely that thorough examination of the cases in English law would produce different results from Korean law.

¹⁴⁶³ See *supra* n. 1360, 1389 and accompanying texts.

¹⁴⁶⁴ See *supra* n. 1364-1366 and accompanying texts. But it seems similar in light of their application of stringent rules requiring the clause to be effectively incorporated into the contract (*e.g.*, both jurisdiction requires the seller to give the buyer a reasonable notice of the clause (*supra* n. 1361-1362, 1390-1392 and accompanying texts)).

¹⁴⁶⁵ See *supra* n. 1354-1355, 1412 and accompanying texts.

¹⁴⁶⁶ See *supra* n. 1435-1437 and accompanying texts.

¹⁴⁶⁷ See *supra* n. 1356 and accompanying texts.

¹⁴⁶⁸ See *supra* n. 1381-1383 and accompanying texts.

¹⁴⁶⁹ See *supra* n. 1371-1375 and accompanying texts. Cf. The prohibition of an exclusion clause of the seller's guarantee liability unless it is proved 'a reasonable ground' in KARST may be ensured by the

they appear to focus on imbalance in terms of value for money and all other terms of an agreement. In addition, the test of ‘unexpectedness’¹⁴⁷¹ and ‘contradiction of material terms’ under KARST¹⁴⁷² and that of ‘reasonableness’ in UCTA¹⁴⁷³ look alike in the respect that they are both most concerned with the matter of the customers’ reasonable awareness.¹⁴⁷⁴ The difference is in that, compared to KARST, English law has relatively detailed rules along with the guidelines for the application of reasonableness test under UCTA¹⁴⁷⁵ that are similar to the criteria for the assessment of good faith under the EC Directive on Unfair Terms in Consumer Contracts.¹⁴⁷⁶ However, one must note that the general requirement of good faith in KARST¹⁴⁷⁷ may consider the same guidelines as English law, producing the same results in practice.

The striking feature of English law and the Directive from the point of view of Korean law is that any attempt by the seller to exclude or restrict the seller’s liability for defective goods in quality is invariably void in consumer sales.¹⁴⁷⁸ In contrast, Korean law must look at the same test of fairness¹⁴⁷⁹ and that of reasonable grounds as in commercial sales.¹⁴⁸⁰ Although it is submitted that those tests must be construed in a stricter way in consumer sales,¹⁴⁸¹ it does not necessarily render the clause always invalid. As to the extent to which the seller’s liability is not excludable, English law may be broader than the Directive in the following aspects. First,

operation of the general test of unfairness to some extent on the basis of ‘unreasonable disproportion’ or ‘unusual clause’.

¹⁴⁷⁰ See *supra* n. 1438-1439 and accompanying texts.

¹⁴⁷¹ See *supra* n. 1384-1386 and accompanying texts.

¹⁴⁷² See *supra* n. 1387-1388 and accompanying texts.

¹⁴⁷³ See *supra* n. 1415-1419 and accompanying texts.

¹⁴⁷⁴ For the similar concern in the Regulations, see *supra* n. 1441-1442 and accompanying texts.

¹⁴⁷⁵ See *supra* n. 1416-1421 and accompanying texts.

¹⁴⁷⁶ See *supra* n. 1446 and accompanying texts.

¹⁴⁷⁷ See *supra* n. 1379 and accompanying texts.

¹⁴⁷⁸ See *supra* n. 1406-1410 and accompanying texts.

¹⁴⁷⁹ See *supra* n. 1379-1388 and accompanying texts.

¹⁴⁸⁰ See *supra* n. 1371-1375 and accompanying texts.

¹⁴⁸¹ Eun-young Lee, *supra* n. 1353, at 48.

the buyer in *R & B Customs Brokers*¹⁴⁸² who is a limited company would not fall within the definition of consumer within the Directive which requires being a natural person.¹⁴⁸³ Second, the intentional omission of ‘directly’ from the definition of consumer in the Directive seems to make it clear that, for instance, while a car dealer who purchases a computer is excluded from the definition of consumer under the Directive, he may be within that under UCTA.¹⁴⁸⁴ However, English law may be narrower than the Directive in that unlike in UCTA, the Directive does not require that the goods be “of a type ordinarily supplied for private use or consumption”.¹⁴⁸⁵

3. Evaluating accounts

3.1. Internal evaluation

It has been submitted that the problems of fairness associated with the use of standard terms occur in the following cases; first, where the customer is unfairly taken by surprise due to his ignorance of the terms, and second, where even if he knows of the substance of the terms and objects to it, he is met with a take-it-or-leave-it situation.¹⁴⁸⁶

The first case is related to the situations where had the customer been aware of the

¹⁴⁸² [1988] 1 All ER 847.

¹⁴⁸³ Directive(99/44) Art. 1.2(a).

¹⁴⁸⁴ See *supra* n. 1409, 1452-1453 and accompanying texts. In addition, if the use of languages of “in the course of ‘his’ trade” under the Directive means that, as a scholar submitted, it excludes any incidental or one-off sale, the position in English law may be broader than the Directive because the sale may be within the meaning of “in the course of ‘a’ business” under UCTA in accordance with *Stevenson v. Rogers*. See *supra* n. 634-635, 1454-1455 and accompanying texts.

¹⁴⁸⁵ UCTA s. 12(1). The inclusion of a contract for the supply of consumer goods to be installed under the Directive appears that it is broader than English law. However, this is not true because the contract in English law may be governed by the Supply of Goods and Services Act 1982 and s. 6(2)(b) of UCTA renders the supplier’s liability as to quality unexcludable.

¹⁴⁸⁶ Beale, “Unfair Contracts in Britain and Europe”, (1989) 42 *Current Legal Problems* 197, at 201 ff.; cf. *Suisse Atlantique Société d’Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406, *per* Lord Reid.

implications of exclusion clauses, he would not have accepted it or would have taken steps to safeguard his position. Given that the vast majority of customers' complaints about exclusion clauses of the seller's guarantee liability are likely questions of unfair surprise,¹⁴⁸⁷ one's first question should be whether he was aware of the clauses and their implications. However, in light of the useful functions of standard terms for mass-contracts, the test of unfairness does not necessarily require that the clauses provide the customer with individualised information, but it should suffice that they are conspicuous and transparent from the point of view of the run of average customers.¹⁴⁸⁸ Although both English law and Korean law do not expressly require that the clauses be conspicuous and transparent, English law may protect the run of average buyers from an unintelligible clause because the requirement of conspicuousness and transparency is likely to constitute a factor in assessing the test of unreasonableness under UCTA¹⁴⁸⁹ and possibly the test of fairness under the Regulations.¹⁴⁹⁰ In contrast, it is not clear that the buyers are properly protected in Korean law in relation to an exclusion clause of the seller's guarantee liability. The reason for this is that it is arguable that the test of unexpectedness in KARST which undoubtedly takes into account the matter of conspicuousness and transparency¹⁴⁹¹ should be imposed on an exclusion clause of the seller's guarantee liability even after it has satisfied with the test specifically designed for the clause in KARST which does not seem to concern the matter.¹⁴⁹²

The second case is of relevance where the customer is well aware of the implications of an exclusion clause, but he has no choice but to accept the clause because he has no bargaining power to get it changed and is unable to find another supplier who will offer better terms. One

¹⁴⁸⁷ In the present state of empirical knowledge, this proposition can be made only at a guess. See Beale, *supra* n. 1486, at 201; Beale, Beatson and Friedmann (ed.), *supra* n. 812, at 247.

¹⁴⁸⁸ Beale, *supra* n. 1486, at 202; Beale, Beatson and Friedmann (ed.), *supra* n. 812, at 247.

¹⁴⁸⁹ UCTA Schedule 2(c); *Stag Line Ltd. v. Tyne Shiprepair Group Ltd* [1984] 2 Lloyd's Rep. 211.

¹⁴⁹⁰ See *supra* n. 1441-1442 and accompanying texts.

¹⁴⁹¹ See *supra* n. 1384-1386 and accompanying texts.

¹⁴⁹² See *supra* n. 1377-1378 and accompanying texts. For the specifically designed test, see *supra* n. 1371-1375 and accompanying texts.

of the reasons why one ever strikes down a clause which is well understood but cannot be negotiated rests on feelings that there are, as a matter of social policy, certain rights of which the customer should not be deprived and certain obligations that suppliers should not be able to avoid.¹⁴⁹³ This seems true where the law prohibits a clause excluding liability for death and injury resulting from negligence.¹⁴⁹⁴ However, regarding our main concern that is an exclusion clause of the seller's guarantee liability, the question arises whether the same is also true of the rule of English law forbidding a clause excluding certain implied conditions in consumer sales.¹⁴⁹⁵ It has been argued that it may be justified on the ground that cases in which a particular consumer is fully aware of the clause and willing to accept it are so rare that it is better to ban the exclusion clause in every case.¹⁴⁹⁶ In addition, it could be also justified on the basis that a control by virtue of the 'reasonableness' test and its likely uncertainty would weaken the consumer's bargaining position.¹⁴⁹⁷ If one assumes that these justifications are correct, it seems unfortunate in that Korean law does not allow the absolute ban. The same is also true that unlike the Directive, the absolute ban under UCTA does not apply where the goods are not "of a type ordinarily supplied for private use or consumption"¹⁴⁹⁸ because it is conceivable that many business items are commonly purchased for private use.¹⁴⁹⁹

¹⁴⁹³ Cf. Law Commission 69, *Second Report on Exemption Clauses in Contracts*, (1975), at para. 146; Beale, *supra* n. 1486, at 205.

¹⁴⁹⁴ UCTA s. 2(1); cf. KARST Art. 7(1) (it prohibits a clause excluding any legal liability caused by gross negligence or by intention). See Beale, *supra* n. 1486, at 205.

¹⁴⁹⁵ See *supra* n. 1406-1410 and accompanying texts.

¹⁴⁹⁶ Beale, "Inequality of Bargaining Power", (1986) 6 *O.J.L.S.* 123, at 135.

¹⁴⁹⁷ Law Commission 24, *Exemption Clauses in Contracts; First Report*, (1969), at para. 73; Beale, *supra* n. 1496, at 135. Cf. It is also justified as paternalism that even if consumers are willing to take the clause, they should not be allowed to do so because it is not in their real interests. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power", (1982) 41 *Maryland L. R.* 563; cf. Ramsay, *supra* n. 54, at 54 f.

¹⁴⁹⁸ UCTA s. 12(1).

¹⁴⁹⁹ Bradgate, *supra* n. 1397, at 83. Cf. In addition, it is doubted the position in the Directive that a limited company and all purchases either directly or indirectly connected to the buyer's trade, business and profession would be excluded from the absolute ban (see *supra* n. 1482-1484 and accompanying

3.2. External evaluation

When the law controls terms in a contract, it is said that the law regulates the contract. The economic rationale for regulating contracts resembles the economic rationale for regulating markets.¹⁵⁰⁰ The economic rationale for regulating markets begins with a description of a perfectly competitive market, which requires no regulation.¹⁵⁰¹ Any departure from the perfectly competitive market is the central economic rationale for intervention by the law to remove barriers to the smooth operation of markets.¹⁵⁰² Therefore, the law to control standard form contracts should be evaluated in terms of the question of how efficiently it corrects market failures by regulating the terms of contracts.¹⁵⁰³

One market failure is related to the existence of monopoly or oligopoly. The use of standard terms itself was thought to indicate the existence of monopoly or oligopoly constituting some form of exploiting the weaker party in terms of value for money and the exploitation was used as a term of opprobrium to undermine the enforceability of a contract.¹⁵⁰⁴ However, this thought cannot be justified as long as sellers use standard terms to increase the efficiency of exchange; first, it can promote price competition by reducing product differentiation, and second, it

texts) because the justification based on an unequal bargaining power seems to make imperative the protection of the small merchant buyers as well who has no more ability to negotiate and understand a contract than does an ordinary consumer. Cf. For a study to recognise and protect the small merchant buyers, see Warkentine, "Article 2 Revisions: An Opportunity to Protect Consumers and 'Merchant/Consumers' Through Default Provisions" (1996) 30 *J. Marshall L. Rev.* 39.

¹⁵⁰⁰ Cooter & Ulen, *supra* n. 27, at 186.

¹⁵⁰¹ For the fundamental conditions for the optimal operation of a competitive market, see *supra* n. 24 and accompanying texts.

¹⁵⁰² For various kinds of market failures, see *supra* n. 45-49 and accompanying texts.

¹⁵⁰³ Cooter & Ulen, *supra* n. 27, at 186.

¹⁵⁰⁴ *A Schroeder Music Publishing Co. Ltd. v. Macaulay* [1974] 1 WLR 1308, 1316, *per* Lord Diplock; Kessler, "Contracts of Adhesion – Some Thoughts About Freedom of Contract" (1943) 43 *Colum L. Rev.* 629, at 631. Cf. Priest, "A Theory of the Consumer Product Warranty" (1981) 90 *Yale L. J.* 1297 (An empirical study shows no correlation between concentration and the use of exclusion clauses in guarantees offered by manufacturers in US).

reduces transaction costs for drafting, bargaining and agreement.¹⁵⁰⁵ Therefore, the use of standard terms may often indicate perfect competition rather than monopoly or oligopoly.¹⁵⁰⁶ In addition, as to the rules based on the test of exploitation in terms of value for money, they do not seem to properly correct every possible market failure. The reason for that is that where harsh terms are rather “the result of information costs”,¹⁵⁰⁷ the customer’s preference over the price and its likely result of the supplier’s offer of harsh terms with a lower price¹⁵⁰⁸ may not constitute a form of market failure in the traditional sense of divergence from market value.¹⁵⁰⁹

In this light, it is unfortunate that the test of fairness under the Regulations is based on “imbalance in the parties’ rights and obligations” which has connotations of exploitation in terms of value for money.¹⁵¹⁰ In addition, the view in Korean law that an exclusion clause of the seller’s guarantee should be controlled only by the specifically designed test for such a clause under KARST¹⁵¹¹ seems doubtful given that, as most scholars understand, the test is simply based on the existence of imbalance or disproportion in light of value for money or terms of an agreement.¹⁵¹² The reason for that is that otherwise it would open a possibility for the supplier to claim there was no overall imbalance as a harsh term is offset by a lower price. In this sense, it seems that another view in Korean law that even if an exclusion clause passes the specifically

¹⁵⁰⁵ Cooter & Ulen, *supra* n. 27, at 252.

¹⁵⁰⁶ *Id.*

¹⁵⁰⁷ Beale, Beatson and Friedmann (ed.), *supra* n. 812, at 232.

¹⁵⁰⁸ That is, when suppliers offer more favourable terms with a higher price, many customers often fail to understand the reason for the higher price and even think not worthwhile to scrutinize it so that they will naturally seek a less expensive contract elsewhere. It may, thus, result in that the suppliers are likely to find it more profitable if he shifts more risks expressly to the ignorant customers by using standard terms. At the end, the customers’ preference over the price may produce a tendency toward harsh standard terms with a lower price where they are ignorant of full information about the standard terms. See Goldberg, *supra* n. 58, at 483 ff.; Trebilcock, “An Economic Approach to the Doctrine of Unconscionability”, in: Reiter and Swan (ed.), *Studies in Contract Law*, (1980), at 379 ff.; Beale, Beatson and Friedmann (ed.), *supra* n. 812, at 232; cf. for other possible explanations of harsh terms, see Beale, *supra* n. 1486, at 200.

¹⁵⁰⁹ Beale, Beatson and Friedmann (ed.), *supra* n. 812, at 233.

¹⁵¹⁰ Beale, *supra* n. 1486, at 200 f.; Beale, Beatson and Friedmann (ed.), *supra* n. 812, at 242.

¹⁵¹¹ See *supra* n. 1377 and accompanying texts.

designed test, it must be also examined by the general rules for the unfairness test,¹⁵¹³ is more plausible because a presumption of unfairness in the general rules is not limited to the cases of “any unreasonable disproportion” which has connotations of imbalance in terms of value for money and all other terms of an agreement,¹⁵¹⁴ but can be made on the basis of “unexpectedness”.¹⁵¹⁵

Then, the question moves to a market failure in information. In the absence of adequate information as to an exclusion clause, the buyers (particularly consumers) may misjudge the costs or benefits of the transaction they are contemplating so that it may cause inefficient results.¹⁵¹⁶ Therefore, the efficiency of the law to control the clause in a standard form contract relies on the fundamental question of how it redresses the market failure. Although it is unfortunate that both English law and Korean law do not provide a stricter sanction for the seller’s failure to produce enough information, the test of unreasonableness under UCTA and that of fairness under the Regulations seem to consider this failure. In this regard, the position in Korean law depends upon one’s interpretation as to the applicability of the test of unexpectedness to an exclusion clause of the seller’s guarantee liability.¹⁵¹⁷ However, it is worth noting that it is not necessary for all the buyers to be well informed in order for markets to be behaving competitively in light of one’s consideration that information has the properties of a public good and a market perfecting effect because the small group of individuals who search for information and complain about the clause provide benefits to other buyers by

¹⁵¹² See *supra* n. 1371-1375 and accompanying texts.

¹⁵¹³ See *supra* n. 1378 and accompanying texts.

¹⁵¹⁴ See *supra* n. 1381-1383 and accompanying texts. Prof. Eun-young Lee argues that an exclusion clause offset by a lower price does not necessarily satisfy the test of unreasonable disproportion in every case, *e.g.*, where it is economically or socially better to distribute some risks to the customers even if a higher price is inevitable. Eun-young Lee, *supra* n. 1363, at 186.

¹⁵¹⁵ See *supra* n. 1384-1386 and accompanying texts.

¹⁵¹⁶ For the various kinds of inefficient results due to a market failure in information, see *supra* n. 50.

¹⁵¹⁷ See *supra* n. 1377-1378 and accompanying texts.

keeping the sellers in line.¹⁵¹⁸ Therefore, one's question should not be on whether individuals are uninformed, but on whether this lack of information has produced non-competitive prices and terms.¹⁵¹⁹

In respect of the controls of a clause to restrict or exclude certain implied conditions in English law, the prohibition of the clause seems plausible in most consumer sales because if consumers who are assumed risk-averse fully understood the clause, they probably would not agree to purchase the goods with the clause. Besides, it appears to acknowledge the realities of consumer transactions and help eliminate the economic inequalities in those transactions, redressing a possible market failure in a standard form transaction between consumer and business seller. Against the absolute ban and its justifications, some would argue that the rules provided by the law should not be the benchmark so that exclusions of the implied conditions should be allowed because some consumers may be often willing to purchase the goods that are flawed, *e.g.*, a junked car on which to learn auto mechanics. The response to this argument can be made that eliminating exclusions of the implied conditions would not necessarily impose some kind of strict liability on all consumer sales because, for instance, 'salvage' or 'seconds' goods clearly labelled as such would have a lower quality as the expectation for fulfilling the conditions.¹⁵²⁰ However, it is doubted that the response would also apply to other situations where a clause restricts the consumers' rights rendered in the event of breach of the implied conditions; *e.g.*, exclusion of the liability for consequential losses.¹⁵²¹ The real question is 'should the seller be always liable for the consequential losses even where the true intention of the parties is the consumers who will take the risk because the consumers are in a better position to insure the risk in question?' It seems that this is not what the parties would expect.¹⁵²² In this

¹⁵¹⁸ Ramsay, *supra* n. 50, at para. 4.8. ff.

¹⁵¹⁹ *Id.*

¹⁵²⁰ Miller, *supra* n. 651, at 1583; Rosmarin, *supra* n. 651, at 1611, n. 72.

¹⁵²¹ Hellner, "Consequential Loss and Exemption Clauses" (1981) 1 *O.J.L.S.* 13, at 26; Beale, *supra* n. 1486, at 205 f.

¹⁵²² Beale, *id.*, at 206. Cf. Collins, *Regulating Contracts*, (1999), at 290 f.

light, unlike the above internal evaluation, the position in English law is seen as surprising from the point of view of Korean law that invariably relies on the test of reasonableness or fairness even in consumer sales, which has at least a room to uphold the clause by asking the question of ‘whether a known and understood risk exposes both the consumer and other most consumers to an unacceptable degree of risk, even if it is compensated by a lower price’.¹⁵²³

4. Concluding Remarks

This study investigated the rules as to the exclusion of the seller’s liability for defective goods in light of one of the purposes of this thesis to examine how effectively each law protects the reasonable expectation of the parties. In this light, the main questions were twofold; first, whether the rules reflect the interests of consumer which may be different from those of commercial buyers, and second, even if an issue is not related to the particular interests of consumers, whether they reflect the common interests of all the parties.

4.1. Consumers’ interests

The position in Korean law that, unlike English law, it does not absolutely ban a clause excluding or limiting the seller’s liability for defective goods in consumer sales does not seem to properly protect the consumers’ interests because most consumers would not generally enter into a contract providing such a clause. In addition, the position in English law was inadequate to reflect the consumers’ interests in that the absolute ban under UCTA does not apply where the goods are not of a type ordinarily supplied for private use or consumption because it is conceivable that many business items are commonly purchased for a private use. However, the proposition that the absolute ban would provide a right answer in a consumer context was doubted where the consumers are in a better position to insure the risk of consequential losses.

¹⁵²³ Beale, *id.* Cf. Eun-young Lee, *supra* n. 1363, at 186.

4.2. Common interests

Given that harsh terms are rather the result of information costs, some scholars' view in Korean law and possibly the Regulations do not seem to correct a market failure in information insofar as they base the control of the terms on the existence of imbalance or disproportion in light of value for money or terms of agreement. That is, their basis for the control of the terms may not correct a market failure in information which may cause the consumer's preference over the price and its consequences of the supplier's offer of harsh terms with a lower price because it may be possible for the supplier to claim that there was no overall imbalance or disproportion where a harsh term is offset by a lower price.

VI. Conclusion

This study has discussed all the relevant rules as to the seller's liability for goods that do not conform to the contract in quality or quantity for the purposes of investigating, first, whether there is any need to introduce the unified liability system into Korean law and, if there is the need, how to achieve the unified liability system under the existing law; second, how effectively the relevant rules as to the seller's liability for non-conforming goods protect the reasonable expectations of the parties.

1. The unified liability system in Korean law ?

1.1. Dual liability system vs. Unified liability system

As to the first purpose of this study, it asked the question of how the problems inherent in the dual liability system are exposed in light of the unified liability system, whether the problems are properly resolved in the unified liability system, and which liability system provides more clarity. It found that the dual liability system causes various complexities owing to the separate existence of general liability and the seller's guarantee liability which relies on its artificial distinction between 'non-performance' and 'defective performance'. Insofar as the complexities are inherently due to the separate existence of two liabilities, it was shown that the unified liability system can resolve most problems Korean law faces because in English law and CISG all the matters of non-performance are homogeneously dealt with under the name of breach of contract. In addition, all the complexities in Korean law prove by themselves that the unified liability system gives more clarity.

1.2. Legal liability vs. Contractual liability

Along the same line as the above findings, the study re-examined the two existing theories as to the nature of the seller's guarantee liability, which are closely related to the possible

unification of the dual liability system in Korea, in the light of the logic and reasonableness of each theory. The examination of the legal liability theory and its theoretical background based on the principle of *impossibilium nulla obligatio* and *specific goods dogma* revealed themselves illogical and unreasonable under the existing legal system. Nevertheless, the further examination of the contractual liability theory which is much appreciated for its contribution for the unification of the dual liability system showed that its rationale to unify and simplify the dual liability system is proved somewhat illusive because it draws another casuistic distinction between fault and no-fault liability. That is, insofar as the distinction is ultimately based on the artificial idea that all the remedies in the general liability are governed by the fault principle and those in the seller's guarantee liability exist regardless of the fault principle, it has caused other complexities in its attempts to distinguish the remedies of rescission and damages in the general liability from those in the seller's guarantee liability.

1.3. Introducing unified liability system into Korean law

On the basis of the above examinations, the study set out two matters which need to be settled for the ultimate purpose of achieving a genuine unified liability system in Korean law which is free from all the complexities each theory faces; the matter of whether and how the seller's guarantee liability is understood as a contractual one in its nature and the matter of how to resolve the casuistic distinction between fault liability and no-fault liability.

In relation to the former, it seems apparent that it should be a contractual one as was proved by the above further examination of two theories. However, given that the contractual nature is still arguable in terms of the theories themselves, the study suggested a legislative consideration to introduce a provision that there should be a contractual duty to deliver conforming goods in the sale of both generic and specific goods, which is similar to English law, CISG and the Directive.

As to the latter, it submitted that the matter could be resolved by another way of thinking. This is that rescission and damages in the seller's guarantee liability should be as they are in the

general liability and the focus of the distinction should be based on the requirements of each remedy rather than resting on the artificial idea that all the remedies in the general liability are governed by the fault principle and those in the seller's guarantee liability exist regardless of the fault principle. That is, each remedy should be dealt with individually in terms of its own requirements so that, unlike the artificial idea, not all the remedies in the seller's guarantee liability are necessarily free from the fault principle. The interpretation may have the result that the remedy of damages requires fault, whereas that of rescission arguably does not. In order to realise this thinking under the existing law, the study suggested that one needs to find a new unitary concept of non-performance, such as 'breach of contract' in English law and CISG, which is free from the fault principle because the previous concept of non-performance assumes the existence of fault in a sense that, where there is no fault, the existence of non-performance itself is denied. The use of the new concept isolated from the fault principle may enable one to deal with each remedy individually in terms of the requirement of fault.

1.4. The substance of the rules as to the seller's guarantee liability in light of "Dual liability system vs. Unified liability system" and "Legal liability vs. Contractual liability"

The complexities caused by having the dual liability system and by adopting either the legal liability theory or the contractual liability theory was further examined in relation to the substance of the rules as to the seller's guarantee liability.

First, the separate treatments on the basis of the artificial distinction between 'non-performance' and 'defective performance', so that non-conformity both in quantity in the sale of specific goods and in quality is governed by the seller's guarantee liability, whereas delivery of *aliud* and non-conformity both in quantity in the sale of generic goods and in packaging are governed by the general liability, was proved itself unreasonable in light of the practicability and appropriateness of the rules, comparative study, the parties' preference and the rules' certainty. The reason for this is that, although all these aspects of non-conformity are interrelated, the distinction has substantial consequential differences in the requirements and the

remedies available.

Second, it was argued that the objective criterion theory to judge the existence of non-conformity, based on an ordinary standard alone regardless of the parties' intention and supported by the legal liability theorists, is inferior to the subjective criterion theory based on the parties' intention and supported by the contractual liability theorists, in terms of history and logic, comparative study and the parties' preference.

Third, an examination in the light of comparative study and the parties' preference showed that the relevant time when non-conformity must exist to raise the seller's guarantee liability should be at the time of the passage of risk, as is argued by the contractual liability theory.

Fourth, the legal liability theory that does not allow the buyer's right of suspension under the seller's guarantee liability is criticised in the light of its practical importance where the seller has failed to perform his reciprocal contractual duties and its efficiency function in providing information on whether non-performance will occur. The problem of the legal liability theory is that its theoretical basis of the *specific goods dogma* may be interpreted as requiring that it be extended to substitutable and repairable goods and consequently the buyer's right to require the seller's cure under the seller's guarantee liability is available only after performing his duty to pay and take delivery; therefore, if he wants to invoke the right to require the seller's cure under the seller's guarantee liability, he has to part with money even before the completion of the seller's cure and run a greater risk of non-performance by the seller. The reason for that is that the seller's delivery of defective goods as they were at the time of contract or specification is deemed to be complete performance of his duty.

Fifth, the various views as to the scope of damages, along with the interpretation of price reduction, under the legal liability theory and the contractual liability theory were examined in light of the logic, practicability and appropriateness of each view, the argument that the expectation measure is the only measure of contract damages to enhance efficiency, and certainty in the interpretation of damages under the seller's guarantee liability. The examination revealed that none of the views submitted by either theory is adequate insofar as all the

problems each view has are basically related to the complexities inherent in the disputes as to the nature of the seller's guarantee liability and in the artificial distinction of fault and non-fault based liability. Consequently, it justified once more the arguments raised for the ultimate purpose of achieving a genuine unified liability system in Korean law in order to resolve the inadequacy in all those views.

2. Protecting the reasonable expectations of the parties?

In order to achieve another purpose of this study of investigating how effectively each law protects the reasonable expectation of the parties, the main question was posed whether the rules reflect the different interests of consumer and commercial buyers as well as those of private and business sellers, and even if an issue is not related to the particular interests of consumers or private sellers, whether they reflect the common interests of all the parties.

2.1. Private sellers' interests

In relation to private sellers' interests which may be distinguished from business sellers', the study found that Korean law and CISG seem to fail to reflect the former interests in that, unlike English law, the rules as to the existence of a defect under the seller's guarantee liability are correspondingly applied to sales even between private seller and commercial buyer, even if in many cases the extent of liability of the private seller may be considerably different from that of the business seller.

2.2. Consumers' interests

As regards consumers' interests, which may be differentiated from commercial buyers', each system showed its own drawbacks in various aspects. The drawbacks are summarised as follows.

2.2.1. The requirements for the seller's liability for non-conforming goods

First, the study revealed that the position in English law was doubted in that its separate treatment between breaches of quality duties and quantity duties results in that the absolute ban on the business seller's attempt to exclude or limit his liability in consumer sales is not applied to the matter of quantity.

Second, it showed that the position in English law, Korean law and CISG, which does not take account of public statements made by the producer or his representative as a factor to decide the existence of non-conformity, does not seem to reflect the interests of consumers, who often rely on such statements in making their decisions.

Third, it was found that the requirement of absence of negligence in failing to discover non-conformity at the time of sale in Korean law, which is more than the requirement of mere knowledge as to the existence of a defect in CISG, does not seem to reflect the interests of consumers, who decide to purchase the goods relying on the name of brand and the reputation of retailer even without looking at the goods and do not know when they are supposed to examine the goods at the time of purchase. The uncertain position in this matter under the Directive should be resolved in this light.

Fourth, it was revealed that it is unfortunate that the Directive allows the Member States an option to impose a notice duty on the consumer and, fixes a minimum period of two months because most consumers are normally ignorant of the duty and even if they are aware of it, there may be many cases where the consumers take more than two months to appreciate they have a legal right and to prepare themselves for a claim.

2.2.2. The effects of the seller's liability for non-conforming goods

First, the study found that the absolute rights of suspension and termination seem crucial in consumer sales so that the position in Korean law and CISG under which the right of suspension depends on the slight or trivial nature of a defect, and the position in Korean law, the Directive and CISG under which the right of termination depends on a certain degree of seriousness of

breach and the seller's right to cure after the delivery date, is inadequate in light of protecting consumers' interests.

Second, it showed that non-recognition of a long-term right to reject in English law where there is a latent defect that could not be discovered within a reasonable time may be adverse to consumers' interests.

The reason for the above two arguments is in the consumers' real interests that what they generally want is goods of the proper quality at the full price, not defective goods at a lower price.

2.2.3. The exclusion of the seller's liability for non-conforming goods

First, the thesis revealed that the absence of an absolute ban on a clause excluding or limiting the seller's liability in consumer sales under Korean law does not seem to properly protect the consumers' interests as they generally would not enter into the contract which has the clause.

Second, by the same token, it is unfortunate in English law that the absolute ban under UCTA does not apply where the goods are not of a type ordinarily supplied for private use or consumption even though many business items are commonly purchased for a private use.

However, it was doubted that the absolute ban is the right answer where consumers are in a better position to insure the risk of consequential losses.

2.3. Common interests

Although the issue was not directly related to the interests of consumers or private sellers as opposed to those of commercial buyers or sellers, the study tried to examine whether each jurisdiction properly reflects the common interests of all the parties and it showed in what aspects each jurisdiction fails to reflect those interests.

2.3.1. The requirements for the seller's liability for non-conforming goods

First, the separate treatment between non-conformity in quality and in quantity and its

consequences under Korean law may not reflect the contracting parties' preference, given that the matter of quantity is, in its nature, generally similar to that of description as to quality.

Second, the English position that the passage of risk, which is the relevant time when non-conformity must exist, is linked with the transfer of property rather than the handing over of the goods was unfortunate in light of the parties' preference because the parties are likely to put the risk of damage on who is in a better position to take care of the goods. This is rather more closely related to the matter of delivery than to the transfer of property.

Third, it was found that the position in Korean law and the Directive that the relevant requirements as to ignorance of the existence of non-conformity and absence of negligence in failing to discover non-conformity are applicable to the cases of the contractual guarantees may interfere with the basis of bargain the parties have agreed where a buyer genuinely relies on a specific contractual guarantee by a seller who is supposed to remedy a non-conformity.

Fourth, the study showed that CISG and the Directive, which provide a fixed time limit running from the time of delivery after which the buyer may lose any right to rely on a lack of conformity, may often face a criticism that it does not pay sufficient regard to the diversity in the goods and any arbitrary time limit may be contrary to the parties' intentions in some cases where non-conformity is hardly discovered until the expiry of the time limit.

Fifth, Korean law which excludes the following two cases from the application of the notice duty was shown to be inappropriate to reflect the parties' interests; (a) where some professionals (*e.g.*, artists, lawyers, and doctors who are not recognised as merchants) purchase goods either directly or indirectly relating to their profession, (b) where a merchant buyer purchases goods relating to his commercial purposes from a private seller whose transaction is not regarded as a commercial act. The reason for that is that the sellers in those cases are most likely to demand such a duty in order to prevent the buyers, who are deemed professional, from speculating at the expense of the seller and enable the seller to be sure that he does not need to reckon with claims at any particular time.

Sixth, the silence as to the earliest time when the notice duty could emerge in documentary

sales in Korean law should be resolved in the light that most sellers in the documentary sales are likely to require the buyer to give a reasonable notice even before the seller's delivery of the goods if the buyer learns of non-conformity of the goods upon receiving documents.

Seventh, it was found that a requirement in Korean law to raise the notice duty that the seller must be unaware of the existence of non-conformity at the time of delivery does not fully reflect the parties' intention. The reason for that is that, given that one of their purposes of imposing the notice duty on the buyer is to provide the seller with an opportunity to redress a non-conformity and to prepare for any negotiation or dispute with the buyer, the parties may prefer the relevant time to be the time when the period the buyer should give notice expires rather than at the time of delivery.

Eighth, the requirement to specify the nature of non-conformity in the notice in Korean law and CISG seems inadequate in light of the parties' intention in a modern age of electronic communication. This is because insofar as a notice of mere dissatisfaction is likely to achieve the essential purpose of the notice duty to prevent the buyer's opportunistic behaviour, the seller is supposed to make inquiries with the buyer to learn of what is the nature of non-conformity by a simple phone call in the modern age of electronic communication.

Ninth, it was found that the position in Korean law and the Directive depriving the buyer of all the rights he can rely on in the event of his failure to give notice in timely and proper fashion is inappropriate to reflect the parties' intention since it may be harsh on most buyers in the context that a minor oversight would mean the loss of all their rights as to non-conformity even if the oversight was understandable and does not cause any substantial prejudice to the seller. The inappropriateness is even more apparent from the point of view of consumers who are not familiar with the notice.

2.3.2. The effects of the seller's liability for non-conforming goods

First, the rule in CISG that the relevant time for the foreseeability of substantial detriment to the buyer in the event of non-conformity as a requirement for a right of termination is at the

time of breach, rather than at the time of contract, interferes with the basis of the bargain between the parties which was agreed at the time of contract because the understanding provides the buyer with an opportunity to escape a bad bargain which was a risk originally born by the buyer.

Second, in CISG and Korean law, allowing termination despite the buyer's inability to return the goods in substantially the same condition as he received them where he has transformed or consumed the goods in the course of normal business or use seems inappropriate in some cases where there has been a substantial drop in the market price because it may encourage the buyer's opportunism, transferring to the seller a market risk originally allocated to the buyer.

Third, given that sales in the modern world are largely standardised and they are quickly and painlessly executed, one view in Korean law requiring the seller's fault on non-conformity for the expectation damages claim seems contrary to the parties' general preference that they are likely to guarantee the envisaged result rather than merely to do their best to procure it.

Fourth, it was shown that a remedy of price reduction and its proportional calculation method in Korean law, CISG and the Directive seems to distort the original distribution of the risks of market fall which was agreed between the parties at the time of contract.

Fifth, even if the price reduction remedy was agreed between the parties, the rules in CISG and possibly the Directive as to the relevant time for estimating the value of the goods actually delivered and that of the hypothetical conforming goods, which set it at the time of contract rather than that of delivery, would be also adverse to the parties' intention where there is a market fall because at the time of contract the buyer contemplates only to obtain the conforming goods rather than any inferior goods and the value of inferior goods is totally irrelevant until after the time of delivery when he discovers the lack of conformity.

Sixth, the reluctance and uncertainty in English law of ordering specific performance based on the discretionary power does not reflect the parties' preference because the order is either uncertain or rather negative where the purchase of substitute goods elsewhere is not a satisfactory solution in many cases.

Seventh, the position in Korean law which has no limitation on the right to require specific performance is likely to be both unfair and contrary to the parties' intention where the buyer's exercise of such right may impose on the seller unreasonable costs or effort for providing substitute goods or remedying non-conformity.

2.3.3. The exclusion of the seller's liability for non-conforming goods

Assuming that harsh terms are rather the result of information costs, some scholars' view in Korean law and possibly the Regulations does not seem to correct a market failure in information as long as they control the terms to exclude or limit the seller's guarantee liability on the basis of the existence of imbalance or disproportion in light of value for money or terms of agreement. This is because where there is a market failure in information which often causes the consumer's preference over the price and its consequences of the supplier's offer of harsh terms with a lower price, their basis to control the terms would open a possibility for the supplier to claim that there was no overall imbalance or disproportion where a harsh term is offset by a lower price.

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1. Methodology

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APPENDIX

A. KOREAN CIVIL CODE (KCC)

Book I. General Rules (1-184)

Chap. V. Juristic Acts (103-154)

Sec. 1. General rules (103-106)

Article 105 (Optional Provisions) If the parties to a juristic act have declared an intention which differs from any provisions of laws or ordinances which are not concerned with good morals or other social order, such intention shall prevail.

Chap. VII. Extinctive Prescription (162-184)

Article 162 (Extinctive Prescription of Claims or Property Right)

- (1) A claim shall lapse if it is not exercised for ten years.
- (2) A property right other than a claim or ownership shall lapse if it is not exercised for twenty years.

Book II. Real Rights (185-372)

Chap. I. General Provisions (185-191)

Article 188 (Effect of Changes in Real Rights over Movables, Easy Delivery)

- (1) The assignment of real rights over movables takes effect by delivery of the article in possession.
- (2) When an assignee holds the movables, the assignment takes effect by a mere declaration of intention by the parties.

Book III. Claims (373-766)

Chap. I. General Provisions (373-526)

Sec. 1. Subject of Claims (373-386)

Article 374 (Duty of an Obligor to Deliver a Specific Thing with Good Manager’s Care) If the delivery of a specific thing is the subject of a claim the obligor is bound to preserve such thing with the care of a good manager until it is delivered.

Article 375 (Claim in Species)

- (1) Where the subject of a claim is designated in species only, and its quality cannot be determined by the nature of the juristic act or by the intention of the parties, the obligor is bound to perform with a thing of medium quality.

(2) If in the cases mentioned in the preceding Paragraph the obligor has completed all acts that are necessary for the performance or has with the consent of the obligee designated a thing to be performed, such thing shall thenceforth constitute the subject matter of the claim.

Sec. 2. Effect of Claim

Article 387 (Time for Performance and Delay of Performance)

- (1) Where a definite time for the performance of a claim is fixed, the obligor shall be responsible for delay as from the commencement of such time. If an indefinite time for the performance of a claim is fixed, the obligor shall be responsible for any delay as from the time when the obligor has become aware of the arrival of the time for performance.
- (2) If a time for the performance of a claim is not fixed, the obligor shall be responsible for the delay as from time when demand for performance has been made upon him.

Article 388 (Forfeiture of the Benefit of Time) The obligor cannot claim the benefit of time under the following circumstances: 1. If the obligor has destroyed, diminished or extinguished the security; 2. If the obligor has failed to perform the obligation to furnish the security.

Article 389 (Forced Execution of Obligation)

- (1) If an obligor does not perform his obligation on purpose, the obligee may apply to the court for specific performance thereof; but this shall not apply to cases where the nature of an obligation does not so permit.
- (2) If the obligation mentioned in the preceding Paragraph has a juristic act for its subject, application may be made to a court for a decision which shall act as a substitute for a declaration of intention by the obligor; if it has an act which is not entirely personal to the obligor for its subject, application may be made to the court to compel performance by a third person at the expenses of the obligor.
- (3) Where the obligation has forbearance for its subject, and the obligor has violated it, application may be made to the court to have that which has been violated by the obligor removed at the obligor's expense, and that reasonable precautionary steps be taken against future repetition.
- (4) The provisions of the three preceding Paragraph shall not affect a demand of compensation for damages.

Article 390 (Non-performance of Obligations and Claim for Damages) If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may claim damages; but this shall not apply to cases where performance has become impossible and this is not due to the obligor's intention or fault.

Article 391 (Intention or Negligence (Culpa) of the Helper for Performance) Where a legal representative (proxy) for the obligor effects performance in lieu of (proxy) the latter or the obligor effects performance through the other person as an employee, the intention or fault of the legal representative or other person shall be deemed as that of the obligor.

Article 392 (Claims for Damages Arising from in the Course of Delayed Performance) The obligor shall be responsible for damages during delay of the performance even where he is not at fault; but this shall not apply to cases where the damage is inevitable even if he performed at the time when the time of performance became due.

Article 393 (Extent of Demand for Damages)

- (1) The compensation for damages arising from the non-performance of an obligation shall be limited to ordinary damages.
- (2) The obligor is responsible for reparation for damages that have arisen through special circumstances, only if he had foreseen or could have foreseen such circumstances.

Article 394 (Method of Reparation for Damages) In the absence of any different agreement the damages shall be recovered in money.

Article 395 (Performance Delay and Reparation for Damages in Lieu of Performance) Where the obligor has delayed the performance of an obligation, and the obligor fails to perform within a reasonably fixed

time that the obligee has given notice, or performance after delay is no longer profitable for the obligee, the obligee may refuse to accept performance and claim damages in lieu of (in return for) performance.

Article 396 (Compensatio Culpa) If there has been any fault on the part of the obligee in regard to the non-performance of the obligation, the court shall take it into account in determining the liability for and assessing the amount of the damages.

Sec. 6. Extinction of Claim (460-526)

Sub-Sec. 1. Performance

Article 462 (Delivery of a Specific Thing in its Existing Condition) If the delivery of a specific thing is the subject of the obligation, the obligor must deliver the thing in the condition in which it exists at the time when the delivery thereof is due.

Chapter II. Contract (527-733)

Sec. 1. General Rules (527-553)

Sub-sec. 1. Formation of Contract (527-535)

Article 535 (Culpa in Contrabendo)

- (1) In case the objective of a contract is unattainable and the contract is concluded, a party to the contract who was aware of, or should have been aware of such unattainability, shall be liable for damages suffered by the other party who relied upon the contract as valid. However, the amount of damages to be recovered may not exceed the profit which have accrued, if the contract was valid.
- (2) The provisions of the preceding Paragraph shall not apply in cases where the other party was aware of or could have been aware of such unattainability.

Sub-sec. 2. Effect of Contract (536-542)

Article 536 (Exceptio non adimpleti contractus)

- (1) One of the parties to a bilateral contract may refuse performance of his own obligation until the other party tenders performance of his obligation. However, this shall not apply where the obligation of the other party is not due.
- (2) If one of the parties to a contract is bound to tender performance of his own obligation first to the other party, and if there is any significant cause existing by which the other party's performance becomes difficult, the main stipulation of the preceding Article shall apply.

Article 537 (Obligor's Burden to Bear the Risk) If the performance of an obligation of one of the parties to a bilateral contract becomes impossible by any cause for which neither of the parties is responsible, the obligor may not be entitled to counter-performance.

Sub-sec. 3. Rescission for the Future and Rescission of Contract (543-553)

Article 544 (Delay of Performance and Rescission) If one of the parties does not perform his obligation, the other party may fix a reasonable period and demand its performance, and may rescind the contract, if no performance is effected within such period. However, if the obligor declares in advance his intention that he will not effect such performance, no demand shall be required.

Article 545 (Periodic Acts and Rescission) If, according to the nature of the contract or by a declaration of intention of the parties, the objective for which the contract has been entered is unattainable unless it is performed at a designated time and date or within a designated period, and one of parties has not effected performance on his part, the other party may without making a demand mentioned in the preceding Article rescind the contract.

Article 546 (Impossibility of Fulfilment and Rescission) If performance has become impossible for any cause for which the obligor is responsible, the obligee may rescind the contract.

Article 548 (Effect of Rescission and restitutio naturalis)
(1) If one of the parties has rescinded the contract, the other party shall be liable to restore the former to his original position. However, the rights of third persons shall not be prejudiced thereby.
(2) Interest shall be paid upon any money to be repaid in the case mentioned in the preceding Paragraph as from the day on which such money has been received.

Article 549 (Restitutio naturalis and Concurrent Fulfilment) The provisions of Article 536 shall apply mutatis mutandis to the case mentioned in the preceding Article.

Article 551 (Rescission for the Future or Rescission and Claims for Damages) Rescission for the future or rescission of a contract shall not effect any claim for damages.

Article 552 (Right of Demand as to Whether the Other Party Exercises the Right of Rescission or not) (1) If no period is fixed for the exercise of a right of rescission, the other party may demand of the person entitled to rescission to make a definite answer by fixing a reasonable period as to whether he rescinds the contract or not.
(2) If no notice of rescission has been received within the period mentioned in the preceding Paragraph, the right of rescission shall lapse.

Article 553 (Extinction of Right of Rescission due to Injury, etc.) If a person entitled to a right of rescission has by his wilful act or negligence materially damaged the subject-matter of the contract, or has become unable to return it, or has caused it to be converted into another object by processing or altering it, the right of rescission shall be extinguished.

Sec. 2. Gift (554-562)

Article 559 (Donor's Liability for Warranty)
(1) A donor shall not be liable for any defect or deficiency in the thing or right which forms the subject of his gift. However, this shall not apply to cases where he was aware of such defect or deficiency and has nevertheless failed to inform the donee thereof.
(2) In respect of a gift subject to a charge, the donor shall assume the same liability in respect of warranty as that of a seller to the extent of such charge.

Sec. 3. Sale (563-595)

Sub-sec. 1. General Rules (563-567)

Article 567 (Mutatis Mutandis Application to Contract for Value) The provisions of this section shall apply mutatis mutandis to contracts for value other than sales. However, this shall not apply in case where the nature of such contracts does not so admit.

Sub-sec. 2. Effect of Sale (568-589)

Article 569 (Sale of a Right Belonging to Another Person) In case where a right, which has been made the object of a sale, belongs to another person, the seller shall acquire such right and transfer it to the buyer.

Article 570 (Sale of a Right Belong to Another person-Seller’s Liability for Warranty) If in the case mentioned in the preceding Article the seller is unable, by acquiring the right he has sold, to transfer it to the buyer, the buyer may rescind the contract. However, if he was aware at the time the contract was made that the right did not belong to the seller, he may not claim damages.

Article 571 (Sale of a Right Belonging to Another Person-bona fide Seller’s Liability for Warranty)
(1) If the seller was unaware at the time the contract was made that the right which has been made the object of a sale did not belong to him, and the seller is unable, by acquiring the right he has sold, to transfer the right to the buyer, the seller may, paying damages suffered by the buyer, rescind the contract.
(2) If, in the case of the preceding Paragraph, the buyer was aware at the time the contract was entered that the right did not belong to the seller, the seller may, by giving notice that he is unable to transfer the right to the buyer, dissolve the contract.

Article 572 (The Case Where Part of the Right Belongs to Another Person and the Seller’s Liability for Warranty)
(1) If the seller is unable to acquire and transfer the right to the buyer by reason of the fact that a part of the right which forms the object of a sale belongs to another, the buyer may demand a reduction of the purchase-price in proportion to the part.
(2) If in the case of the preceding Paragraph the buyer would not have bought the remaining part, had such alone been the object the sale, the buyer acting in good faith may cancel the contract.
(3) The bona fide buyer may claim damages besides claiming for a reduction of the purchase-price or the dissolution of a contract.

Article 573 (Period during Which the Right Mentioned in the Preceding Article is to be Exercised) The right mentioned in the preceding Article shall be exercised within one (1) year from the time when the buyer became aware of the fact, if the buyer was acting in good faith, and from the time when the contract was entered if the buyer was acting in bad faith.

Article 574 (Partial Shortage and Loss of the Items Sold and the Seller’s Liability for Warranty) The provisions of the preceding two (2) Article shall apply mutatis mutandis to the cases where the items sold by quantity shows a shortage or part of it had already been lost at the time when the contract was entered and the buyer was unaware of such shortage or loss.

Article 575 (The Case Where Restricted Real Rights Exist in a Contract and the Seller’s Liability for Warranty)
(1) Where the subject-matter of a sale is subject to a superficies, servitude, registered lease (chonsegwon), right of retention, or pledge and the buyer was unaware thereof, the buyer may rescind the contract only if the objective of the contract is not unattainable thereby. In other case the buyer may only claim damages.
(2) The provisions of the preceding Paragraph shall apply mutatis mutandis to the cases where a servitude which has been represented as existing in favour of the immovable which is the subject of the sale does not exist or where a registered lease exists on such immovable.
(3) The rights mentioned in the preceding two (2) Paragraphs shall be exercised within one (1) year from the time when the buyer became aware of the fact.

Article 580 (Seller’s Liability for Warranty Against Defect)

- (1) If any defects exist in the subject-matter of a sale, the provisions of Article 575, Paragraph (1) shall apply mutatis mutandis. However, if the buyer was aware of or was not aware due to his negligence of any defects, this shall not apply.
- (2) The provisions of the preceding Paragraph shall not apply to the cases of compulsory sale by public auction.

Article 581 (Sale in Kind and the Seller’s Liability for Warranty)

- (1) Even where the subject-matter of a sale has been specified in kind, if there exist any defects in the specified subject-matter, the provisions of the preceding Article shall apply mutatis mutandis.
- (2) In the cases of the preceding Paragraph, the buyer may demand the non-defective item without rescinding a contract or claiming for damages.

Article 582 (Period during Which the Rights Mentioned in the Preceding Two Articles are to be Exercised) The rights mentioned in the preceding two Articles shall be exercised by the buyer within six months from the time when he was aware such fact.

Article 583 (Liability for warranty and Concurrent Fulfilment) The provisions of Article 536 shall apply mutatis mutandis to the cases of Articles 572 through 575, 580 and 581.

Article 584 (Special Stipulation for Relief of Liability for Warranty) Even where the seller has made a special stipulation that he is not liable in respect of the warranties mentioned in the preceding fifteen Articles, he may not be relieved of liability in respect of any fact of which he was aware and nevertheless failed to disclose or in respect of any right which he himself created in favour of, or assigned to, a third person.

Article 588 (The Buyer’s Right to Refuse Payment Where a Third Person Claims the Right) If a third person claims a right over the subject-matter of the sale, and in consequence there is a danger of the buyer’s losing what he has bought in whole or in part, he may refuse payment for the purchase-price within the limit of danger. However, this shall not apply when the seller furnishes adequate security.

Sec. 9. Contract for Work (664-674)

Article 667 (Contractor’s Liability for Warranty)

- (1) If any defect exists in the completed subject-matter of a work or in a certain part of the subject-matter of a work which has been finished before the completion of all the work, the person who ordered the work may fix a reasonable period for the contractor to repair and rectify such defect. However, this shall not apply if the defect is not material and its rectification would involve excessive expense.
- (2) The person who has ordered the work may claim damages in lieu of, or together with, rectification of the defect.
- (3) In the cases of Paragraph (2), the provisions of Article 536 shall apply mutatis mutandis.

Article 668 (Contractor’s Liability for Warranty-Right of Rescission of the Person who Ordered a Work) If, by reason of some defect in the finished subject-matter of the work, it cannot be used for the purpose for which it was ordered, the person who ordered the work may rescind the contract. However, this shall not apply to a building or any other structure on land.

Article 669 (Contractor’s Liability for Warranty-Release from Responsibility in the Event the Defect has Arisen through the Nature of the Materials Supplied or Instructions Given by the Person who Ordered the Work) The provisions of Articles 667 and 668 shall not apply, if the defect in the finished subject-matter of the work has arisen through the improper type or defective quality of the materials supplied by the person who ordered the work, or by reason of insufficient or incorrect instructions given by him. However, this shall not apply if the contractor, knowing the unfitness of the materials or of the

insufficiency and incorrect nature of the instructions, has failed to advise the person who ordered the work.

B. KOREAN COMMERCIAL CODE (KCmC)

Book I. General Rules (1-45)

Chap. I. General Propvisions (1-3)

Art. 3 (Unilateral Commercial Activities) If an act of a party among the relevant parties is considered as a commercial activity, this act shall apply to all the parties involved.

Book II. Commercial Acts (46-168)

Chap. I. General Provisions (46-66)

Art. 46 (Basic Commercial Activities) The following activities which are effected as business are called commercial activities: Provided, that this shall not apply to such activities as are effected by persons who manufacture articles or render services solely for the purpose of earning wages. 1. Sales of movables, immovables, valuable instruments and any other properties; 2. Lease of movables, immovables, valuable instruments and any other properties; 3. ; 21. Act concerning purchase, recovery, etc. of any business claims.

Chap. II. Sale (67-71)

Article 69 (Buyer's Duty to Examine Subject-Matter and to Notify Defects therein)
(1) In the case of a sale between merchants, the buyer shall, upon taking delivery of the subject-matter, examine it without delay, and if he discovers any defects therein or any deficiency in quantity, he shall immediately dispatch notice thereof to the seller, otherwise, he has no right to rescind the contract, to demand a reduction in the price or to claim damages thereby. The same shall apply in cases where, within six months, the buyer discovers in the subject-matter of the sale a defect which was not immediately discoverable.
(2) The provisions of the preceding paragraph shall not apply to the seller acting in bad faith.

C. Korean Act on Regulation of Standard Terms (KARST)

Chap. I. General Provisions (1-5)

Article 2 (Definitions)
(1) In this Act, the term "standardized contracts" means the general terms and conditions of a contract, regardless of their name, type, or scope, prepared in advance by one party in a certain form for the purpose of entering into a contract with a large number of persons.

- (2) In this Act, the term "enterprise" means a person who is a party to a contract and offers a standardized contract to another party as the content of the contract.
- (3) In this Act, the term "customer" means a person who is a party to a contract and has received from an enterprise an offer to incorporate a standardized contract into the contract.

Article 3 (Obligation to Specify and Explain Standardized Contracts)

- (1) Prior to entering into a contract, an enterprise shall explain to its customers the content of a standardized contract in a way that it would generally be expected for the type of contract in question and shall, upon the request of the customer, deliver a copy of the standardized contract to the customer to help the customer understand the standardized contract: Provided, That this does not apply to a standardized contract which is approved by an administrative agency under other Acts and which is provided for in the Presidential Decree of the Act because of the need to effect a speedy transaction.
- (2) An enterprise shall explain the important particulars of a standardized contract so that customers can understand them: Provided, That this does not apply where such an explanation is extremely difficult due to the nature of the contract.
- (3) If an enterprise enters into a contract in violation of the provisions of paragraphs (1) and (2) above, it may not claim that the pertinent standardized contract forms a part of the contract.

Article 4 (Precedence of Individual Agreement) If an enterprise and a customer agree on a matter that is addressed in standardized contracts in a manner that is different from the standardized contracts, such agreement shall prevail over the standardized contracts.

Article 5 (Construction of Standardized Contracts)

- (1) A standardized contract shall be construed impartially in accordance with the principle of trust and good faith and shall not be construed differently depending on the Customer.
- (2) If the meaning of a standardized contract is not clear, it shall be construed in favor of the Customer.

Chap. II. Unfair Clauses in Standardized Contracts (6-16)

Article 6 (General Principles)

- (1) Any clause in a standardized contract which is not fair or is contrary to the principle of trust and good faith shall be null and void.
- (2) Any clause in a standardized contract that falls under any of the following subparagraphs shall be presumed to be unfair: 1. A clause which is unreasonably unfavorable to customers; 2. A clause which customers would have difficulty anticipating in light of various circumstances such as the type of transaction, type of contract, and etc.; or 3. A clause which is so restrictive of essential rights under a contract that the purpose of the contract may not be achieved.

Article 7 (Prohibition of Exemption Clause) Any clause of a standardized contract concerning the liability of contraction parties that falls under any of the following subparagraphs shall be null and void: 1. A clause that exempts an enterprise from liability for intentional wrongdoing of gross negligence on the part of the enterprise, its agents, of employees; 2. A clause which limits, without substantial reason, the extent of damages payable by the enterprise; or 3. A clause which, without substantial reason, excludes or limits the warranty liability of an enterprise, tightens requirements that customers must meet to exercise their rights under the warranty of, where the enterprise has provided a sample of the subject matter of the contract or has indicated the quality of performance, and etc. of the subject matter, excludes or limits the warranty for the subject matter.

Article 9 (Cancellation or Termination of Contract) Any clause of a standardized contract concerning the cancellation or termination of a contract which falls under any of the following subparagraphs shall be null be and void: 1. A clause which excludes or limits the right of customers to cancel or terminate the contract under Acts; 2. A clause which grants an enterprise the right to cancel or terminate the contract which is not provided for by the Act or which reduces the requirements enterprises must meet to exercise the right to cancel or terminate the contract as provided for by the Act, therefore putting customers at an unreasonable disadvantage; 3. A clause which, without substantial reason, obligates customers to pay excessive restitution if they cancel or terminate a contract, or which unreasonably provides for customers to waive their claim to restitution; 4. A clause which unreasonably reduces the restitution obligation of an enterprise or its duty to pay damages in the event of cancelling or terminating a contract; or 5. A clause in a contract providing for a continuous creditor-debtor relationship

which might put customers at an unreasonable disadvantage by providing for a duration that is unreasonably short long by allowing implied extensions or renewals of the contract.

Note: The above statutes are translated by Korean Legislation Research Institute (<http://www.klri.re.kr>).