Exclusion and Limitation of Liability for Non-conformity of Goods: A Comparative Study on CISG, UCC and UK Law

Nan Kham Mai

A dissertation paper submitted for the Degree of

Doctor of Laws

March 2017

Graduate School of Modern Society and Culture

Niigata University

Exclusion and Limitation of Liability for Non-conformity of Goods: A Comparative Study on CISG, UCC and UK Law

Under the Supervision of

Professor SAWADA Katsumi

Professor KOMAMIYA Fumihiro

Professor UMETSU Akihiko

Submitted by

Nan Kham Mai

A dissertation paper submitted for the Degree of

Doctor of Laws

Graduate School of Modern Society and Culture

Niigata University

March 2017

TABLE OF CONTENTS

ACKNOWLEDGEMENT vii
ABBREVIATIONS viii
LIST OF TABLE & FIGURE ix
ABSTRACT x

Introduction 1
1. Scope of the Study 1
2. Purpose of the Research 2
3. Statement of Problems 4
4. Research Questions and Methodology 8
5. Outline of the Research 9
6. What is Liability? 10
7. Definition of Goods 10
8. Non-conformity of Goods 11
9. Freedom of Contract Rule 12
10. Sources of Laws 13
A. United Nations Convention on Contract for International Sale of Goods 13
B. Uniform Commercial Code 15
C. Sale of Goods Act, 1979 16
D. Unfair Contract Terms Act, 1977 16
E. Consumer Rights Act, 2015 18
F. The Limitation Act 19

CHAPTER I 20
Scope of Seller's Liability under the CISG, UCC and UK Law 20
Introduction 20
1.1. Express Terms 21
1.1.1. CISG 21
1.1.2. UCC 23
1.1.3. UK Law 25
1.2. Implied Terms 25
1.2.1. CISG 25
1.2.2. UCC 30
1.2.3. UK Law 33
1.3. Latent Defect 40
1.3.1. CISG 40
1.3.2. UCC 41
1.3.3. UK Law 42
1.4. Product Liability 43
1.4.1. CISG 43
1.4.2. UCC 44
1.4.3. UK Law 47
1.5. Buyer's Knowledge of Non-conformity 48
1.5.1. CISG 48
1.5.2. UCC 50

1.5.3. UK Law 50
Summary 51

CHAPTER II 52
Buyer's Remedies under the CISG, UCC and UK Law 52
Introduction 52
2.1. Specific Performance 52
2.1.1. CISG 52
2.1.2. UCC 55
2.1.3. UK Law 56
2.2. Damages 59
2.2.1. CISG 59
2.2.2. UCC 64
2.2.3. UK Law 70
2.3. Termination 77
2.3.1. CISG 77
2.3.2. UCC 81
2.3.3. UK Law 82
2.4. Others Remedies 83
2.4.1. Price Reduction in CISG 83
2.4.2. UCC 84
2.4.3. Remedies in Consumer Sales Contract under the UK Law 85
Summary 88

CHAPTER III 90
Time Limitation under the CISG, UCC and UK Law 90
Introduction 90
3.1. CISG 91
3.2. UCC 94
3.3. UK Law 95
3.4. Incorporation of Time Limitation Clause 96
3.5. Reasonableness of Time Limitation Clause 97
Summary 97
CHAPTER IV 98
Right to Exclude and Limit Liability 98
Introduction 98
4.1. Purpose of Exclusion or limitation clause 100
4.2. Right to Exclude or Limit Liability 102
4.2.1. CISG 102
4.2.2. UCC 103
4.2.3. UK Law 104
4.4.2. Consumer Sales Contract 106
4.3. Types of Exclusion or Limitation clause 106
4.3.1. Exclusion Clause 106
4.3.2. Limitation clause 107
4.3.3. Time Limitation 108
Summary 109

CHAPTER V 110
Incorporation of Exclusion or Limitation Clause 110
Introduction 110
5.1. CISG 111
5.1.1. CISG Governs the Exclusion and Limitation Clause 111
5.1.2. Freedom from Form Requirement 112
5.1.3. Exclusion or limitation Clause required to be incorporated 113
5.1.4. Incorporation of Standard Terms 113
5.2. UCC 115
5.2.1. Disclaimer of Express Warranty 115
5.2.2. Disclaimer of Implied Warranty 116
5.2.3. Limitation or Modification of Default Remedies 120
5.3. UK Law 124
5.3.1. Signed Contract 125
5.3.2. By Course of Dealing 126
5.3.3. By Notice 127
5.3.4. Standard Contract 127
Summary 128

CHAPTER VI 129
Interpretation of Exclusion or Limitation Clause 129
Introduction 129
6.1. CISG 129
6.2. UCC 131
6.3. UK Law 134
Summary 135

CHAPTER VII 136
Reasonableness of Exclusion or Limitation Clause 136
Introduction 136
7.1. CISG 136
7.2. UCC 139
7.2.1. Article 2-302 139
7.2.2. Unconscionability and Standard Contract 143
7.2.3. Why the current theories do not fit in the standard contract? 146
7.3. UK Law 149
7.3.1. Reasonableness of Business Sales Contract 149
7.3.2. Reasonableness of Consumer Sales Contract 154
7.4. Reasonableness of Standard Contract 156
Summary 158

Chapter VIII 160
Consequences of Invalidity of Exclusion or Limitation Clause 160
Introduction 160
8.1. Consequences of Invalidity of Exclusion and Limitation Clause in CISG 160
8.2. Consequences of Invalidity of Exclusion and Limitation Clause in UCC 163

8.3. Consequences of Invalidity of Exclusion and Limitation Clause in UK Law ... 165
Summary ... 166

Conclusion ... 167
1. Overview of the Three Legal Systems ... 167
2. Validity of Exclusion or Limitation Clause in Comparative Perspective ... 169
B. UCC ... 170
C. UK Law ... 172
3. A Brief Sketch of Myanmar Sale Law ... 174
A. Seller's Liability ... 175
B. Buyer's Remedies ... 176
C. Time Limitation ... 176
D. Exclusion or Limitation Clause ... 177
E. Why Myanmar needs to amend the Sale Law? ... 178
F. When Myanmar should amend the Sale Law? ... 180
4. Proposal for reform of Myanmar Sale Law ... 181
Summary ... 181

BIBLIOGRAPHY ... 184

ACKNOWLEDGEMENT

Firstly, I would like to express my sincere thanks to the Ministry of Education, Culture, Sports, Science and Technology, Japan for granting me a financial aid during my study in Japan. This scholarship has enabled me to spend more time on my research, which was so valuable and helpful for me in pursuing my ambition of obtaining the doctoral degree.

I would also like to thank the Ministry of Education of Myanmar for giving me such an opportunity to study abroad.

I am also heavily indebted to Dr. Tin Mg Hla, Rector of Mandalay University of Distance Education, Professor Dr. Khin Swe Oo, Head of Department of Law, MUDE and all my colleagues from Department of Law, MUDE for their kindness and encouragement.

I would like to express my infinite gratitude to Professor SAWADA Katsumi, my chief supervisor, for his kind support and patient guidance throughout my study in Niigata University. Without his support and guidance with his expertise, I could not have finished this dissertation paper successfully.

I am also genuinely grateful to Professor KOMAMIYA Fumihiro and Professor UMETSU Akihiko, my sub supervisors, for their invaluable guidance and suggestions to complete my study work.

Additionally, I am indebted to all staffs of Niigata University for their sincere assistance to me.

To my family and friends, I tender my special thanks for their love, care, understanding, and encouragement that they have given to me.

ABBREVIATIONS

A.P	Law Reports, Appeal Cases
ALL ER	All England Law Reports
APP.L.R.	Arbitration, Practice& Procedure Law Reports
C.P.D	Law Reports, Common Pleas Division
CISG	United Nations Convention on Contract for International Sales of Goods, 1980
CRAs	Consumer Rights Act of the UK.
Ch.	Chancery Division
Civ.	Civil Division
Comm.	Commercial Division
EWCA	England and Wales Court of Appeal
Exch.	Exchequer Reports
KB	Law Reports, King's Bench
L.IL	Lilly's Assize Report
Lloyd's Rep	Lloyd's Law Reports
QB	Law reports, Queen Bench
SGA	Sale of Goods Act, 1979
UCC	Uniform Commercial Code of the US
UCTA	Unfair Contract Terms Act, 1977.
UK	United Kingdom
UKHL	United Kingdom House of Lords
US	United States
WLR	Weekly Law Reports

LIST OF TABLE & FIGURE

1. Figure of Functions of Exclusion Clause, Limitation Clause
and Time Limitation Clause ……101
2. Table of Seller's Liabilities and Buyer's Remedies
under the CISG, UCCC and UK Law……... 169

ABSTRACT

In this paper, the UN Conventions on Contract for International Sales of Goods (the CISG), the Uniform Commercial Code of the United States (the UCC) and the Sale Law of the UK are selected to study comparatively. This paper expresses the research undertaken in the field of exclusion and limitation of liability for non-conformity of goods in business sales, consumer sales and international sales contract.

Nowadays, contract with exclusion and limitation clause is common in modern business transaction. Exclusion or limitation clause intended to limit the seller's liability imposed by the Sale Law. The Sale Law usually provides for the default liability of the seller relating to the quality of the goods, which called the implied terms, such as goods must possess the satisfactory quality for ordinary purpose or the goods must conform to the quality states in the contract description, sample or model. According to the Rule of Freedom of Contract, the parties can make their contract terms as their will. Thus, the seller can incorporate the terms, which will exclude or limit his liability for non-conformity of goods in three forms of clauses: exclusion of liability clause, limitation of liability clause and time limitation clause.

All kinds of exclusion and limitation clause aim to eliminate or reduce the seller's liability for breach of contract. However, in order to enforce the exclusion and limitation clause, such clause needs to be fair and reasonable. The issue of enforceability and validity of the exclusion and limitation clause determined by the rule of incorporation, interpretation and reasonableness test.

From the comparative perspectives, there are similarity and differences in the three systems. In all three systems, the exclusion and limitation clause must be written expressly and clear meaning, noticeable, and made known to the buyer of the incorporation of the contract. In addition, the buyer understands the terms and consequences clauses. The differences are, there is no form requirement for incorporation in the CISG, but, in the UCC, the limitation clause must follow the methods of incorporation. Under the SGA, there are optional methods of incorporation.

In interpreting the exclusion and limitation clause, the interpretation rule applied in each system is different to one another. As the CISG governs the international business

sales contract, the interpretation rule must maintain the uniformity of application. Therefore, the interpretation rule based on good faith, general principles, which the CISG based on, or the rule under the domestic applicable law. The interpretation rule of the UCC is the *parol evidence* rule which strike out the previous oral evidence which contrary to the written clause because the written document is considered the best description of the intention of the parties. The rule of *contra proferentem* is applied to interpret the intention of the parties by means of narrowly against the interest of the person relying upon it.

Under the CISG, the reasonableness test subject to the applicable domestic law which does not contrary to the general principle of the CISG and internationally accepted usages. Under the UCC, the reasonableness of the exclusion or limitation clause is required to be tested by two steps, procedural reasonableness and substantive reasonableness. Under the UK Law, the reasonableness of terms in business sales contract is decided by bargaining power, the ability to acquire goods elsewhere, the existence of inducement, buyer's knowledge. In consumer sales contract, the seller is restricted to exclude his liability and any term which excludes liability listed in section 31 of the Consumer Rights Act are unreasonable.

From this study, the proposal for law reform in Myanmar would be the solutions for insufficiency of Myanmar Sale Law. First, for business sales contract, the restriction on seller liability should be added for maintaining the fairness. Second, for consumer sales contract, the *caveat venditor* rule should be introduced. The consumer remedies are necessary to make known. Furthermore, the rule that restrict the seller to exclude the liability of implied terms should be added to the existing Sale Law. Third, for international sales contract, Myanmar should learn more to understand the current principles of international trade and take into consideration to enter into the CISG.

Introduction

1. Scope of the Study

This paper is the comparative and analytical study, which comprises of the rules of three legal systems: the UN Convention on Contract for International Sale of Goods, 1980 (hereinafter the CISG), the Uniform Commercial Code of the United States (hereinafter the UCC) and the UK Sale Law. Nowadays, the US and the UK have appropriate Sale Laws, which balance the interest of the parties to the sales contract in modern business transaction. For international sales contract, the CISG is the most successful international treaty that governs the international sales of goods contract of many major trading countries.

As for Myanmar, the existing laws are outdated and need appropriate legal reforms to be compliant with the modern business transactions. By comparing the three systems, it may be understandable how the laws were developed through history and how they performed for the best interest of the seller and the buyer. After studying, an ideal solution will consider to improve the current practice in Myanmar. This is the main reason for choosing the CISG, the UCC and UK Sale Law as targets of this research.

The scope of this paper will be limited to the exclusion and limitation of seller's liability under those legal systems. It is mainly concerned with the issue of the validity of exclusion and limitation of seller's liability for non-conformity of goods. It will not extend to the liability for late delivery or failure to perform other obligations. Of the aspect of seller's liability, nonconformity of quality will be the special ground of seller's liability and the issue of seller's right to exclude and limit liability will emphasize in this paper. In addition, the rules as to the validity of exclusion and limitation clause vary in business

sales contract, consumer sales contract and international sales contract under the different legal systems: the CISG, the UCC and UK Law. The rules as to exclusion and limitation of liability will be examined in the order of scope of seller's liability, the buyer remedies for non-conformity of goods, the rationale for limitation clause, limitation and exclusion clause in various forms, statutory control and judicial control on exclusion or limitation of liability and the consequences of invalidity of exclusion and limitation clause.

2. Purpose of the Research

The purposes of this research are as follows:

1. to examine the rules relating the exclusion and limitation of seller's liability under the CISG, UCC and UK Law;
2. to highlight the similarities and differences of those three systems;
3. to discuss the importance of comparative analysis of different legal systems and
4. to suggest areas that would benefit law reform of Myanmar Sale Law.

As for the first purpose, the increasing use of standard form contract with exclusion or limitation clause, which enables the seller to avoid the liability for non-conformity of goods, bars the buyer from claiming for damages and other remedies. The buyer expects to receive the goods with quality and quantity agreed in the contract. However, when the seller excludes liability for non-conforming goods, the common issue is that the buyer loses the right to claim for nonconforming goods. Therefore, the crucial point is to learn the rules of exclusion and limitation of liability under the current sale laws.

For the second purpose, although the United Kingdom and the United States share the same Common Law tradition, commercial contract law in the those countries differ in

many ways. First, in the area of the international sale of goods, the US is signatory to the CISG but the UK is not; Second, the UK is a member of the EU so far. As such, numerous EU Directives and Regulations have preempted the functioning of Common Law. The US Federal and States governments also intervene in numerous area of private law preempting the existing Common Law. The UCC codified and modernized the Common Law that substantially harmonized vast areas of commercial law among the fifty American States. The UK Sales of Goods Act did the same but did not capture many areas of Commercial Law found in the UCC. Thus, some of the differences between the UK and US commercial contract are associated with various legislative enactments.

For the third purpose, it is hoped to bring to light to those points where the development of three systems and their similarity and divergence in the result of their goals. Another potential objective is to deepen understanding of nature of the liability and the rights to exclude and limit liability under the law. To accomplish these goals, it is natural to adopt the comparative approach. Obviously, the goal of the study is not simply to study those three systems of Sale of Goods Laws, but rather to produce an integrated and comparative study, which would lead to a better understanding of the three systems.

As to the last purpose, I would like to present Myanmar Sale of Goods Act briefly. Myanmar introduced Sale of Goods Act in 1930, during the British Colonial era, so that such law was similar to the Sale of Goods Act of England and Wales. At first, it was a part of the Indian Contract, 1872[1] and it was separated as the Sale of Goods Act in 1930.

Despite time passed over many years, there is no amendment of this sale law in Myanmar. Perhaps, it was not necessary to amend because of Myanmar economic policy

[1] During the Colonial Era, Myanmar was a part of British India and the Indian Contract Act was enacted for the whole India. Except the name of the Law, the Contract Act is still being in force in Myanmar until the present day. There is no amendment of the Contract Act.

and political situation. From 1962 to 1988, Myanmar applied socialist economic system and during the military regime from 1988 to 2010, Myanmar faced sanctions from the US and European countries. For Myanmar, in which Common Law system is rooted deeply for many years, it is suitable to study the development of the legal systems of the countries like the United Kingdom and the United States. On the other hand, it is very important to study the UN Convention on Contract for International Sale of Goods (CISG) as its two-third of members are major trading countries and it is a uniform substantive law in the form of the convention that is to be adopted and applied in a uniform manner at international level.

3. Statement of Problems

Contract lies at the heart of commercial life and development in national. Business activities have become increasingly global and international sale contracts are entered into day by day. In every sales contract, both international and national, the seller has an obligation to deliver goods conforming not only to contract terms but also to the conditions required by law. If the seller fails to comply with them, the seller is liable for the nonconforming goods. A buyer may reject, accept all, or accept some of the goods that are nonconformity. If the buyer rejects the nonconforming goods within a reasonable time after delivery, the buyer has no liability to pay for the goods rejected.

Liability means responsibility for compensating for failure to perform in accordance with the contract terms and the law. The common principles relating to the liability are as follows:

(i)The contracting party cannot avoid the performance of the contractual obligations incurring any negative consequence.

(ii)Remedies for any breach of contract can be provided either by contract or by the courts.

Thus, according to the common principles, the seller is liable to perform the contractual obligation and otherwise liable for remedies for breach of contract. According to the Law, the buyer's remedies for non-conformity of goods are not only monetary remedy, but also alternated remedies such as specific performance, right to reject the non-conforming goods, repair or replacement and repayment of the price.

However, there are cases where the seller's liability is excluded despite the lack of conformity of the goods. Seller's liability for non-conformity can be excluded by the law provisions and by contract terms. Under the Law, the seller is not liable for non-conformity, if, at the time of conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity.[2] According to the rule of freedom of contract, the seller can exclude liability by including the limitation clause in the contract. However, the rule of freedom of contract is not unlimited. Such exclusion of liability clause must be within the law admitted. The general principle of freedom of contract must be balanced against public policy concerns. It must subject to provisions of the law which are related to the balancing of rights and obligations between buyer and seller.

This thesis attempts to explore the issues of the seller's liability and buyer's remedies widely and deeply. It will analyze two issues as two sides of the same coin because the seller's liability and the buyer's remedies are interrelated. The liability of the seller makes the buyer entitled to the remedy. The main problem is, according to the rule of freedom of contract, the seller's liability within the legal framework can be excluded or

[2] Seller's liability for non-conformity here refers to the liability for implied terms as to description, quality, sample or model set under the respectively Sale Law.

limited by the contract term. At the same time, in order to deal with the unfairness of contract terms, the law's provision sets out the categories to justify the contract terms. The courts are granted the power to invalidate the unfair contract terms. The clash exists between the rule of freedom of contract and the boundary of law which limits the freedom of contract. The principal issue is how the current laws deal with the issue of balancing the buyer's right to remedy and the exclusion of seller's liability.

The whole issue is settled by the validity of contract because the contract defines the rights and obligations of the parties and such rights and obligations can be enforced only if the contract is valid.[3] In other words, whether the whole contract or its clause can be enforced depends on whether it is valid or not. The validity of exclusion or limitation clause of sales contract is decided on the fairness rule, which is called "reasonableness" in UK law and "unconscionability" in the UCC.

The seller's liability and remedies available for the buyer under the law can be varied by parties' agreement. Instead of complying with implied terms under the law provisions, the seller may exclude implied terms of goods quality so that according to the exclusion clause there is no liability for non-conformity of implied terms. Or the seller can shorten period of the statute of limitation for instituting the case. Or the seller limits the types of remedies available under the law.

When the claim for the non-conformity case brought before the court, primarily, the court usually looks at contract terms to decide the case in accordance with the intention of the parties. In case of contract with exclusion or limitation clause, the rights and obligations set under in the contract and what the law provided for are different. For those issues,

[3] The contract is void for other reasons of misrepresentation, unlawful, unable to perform or breach by one of the parties.

the court has to decide should whether the issues of rights and obligations of the parties should be decided by their contract or by the law. The validity of exclusion clause plays as the crucial factor to decide the buyer rights and remedies.

In this thesis, the issue of validity of exclusion or limitation of liability clause will be discussed in three kinds of contract: business sales contracts, international sales contract and consumer sales contract.

In a negotiated business contract, as the contract law recognizes the freedom of contract rule, the parties conclude their contract as their will. In the legal text of sale of goods, the law provides for the seller liability for non-conformity as well as the seller right to limit or exclude the liability for non-conformity. Because there is an element of risk inherent in most business contracts, limitation of liability clause is common in all areas of the contracts. Some contracts conclude especially for the seller to avoid liability for non-conformity of goods or to bar the buyer from claiming for damages and other remedies. Such limitation clause can take a number of different forms. Some clauses seek to exclude liability. Others may include a limit on liability by setting the amount payable in damages on a breach: restricting the types of loss recoverable or remedies available or limiting a short time limit for claims. However, the seller may use them as taking advantages by excluding liabilities under the law that can cause unfairness for the buyer.

The parties may use one's standard contract for convenience or contractual advantages. The standard contract is a contract between two parties, where the terms and conditions of the contract are set out by one of the parties and the other party has little or no ability to negotiate more favorable terms and thus placed it in a "take it or leave it" position. It is difficult to avoid using standard contracts in many business sales contracts. Using standard contracts is increasing day by day due to its conveniences. The problems

of the standard contract relate to three situations: the unfairness of contract terms, unawareness of the buyer of the inclusion of exclusion or limitation clause and misunderstanding of the buyer of the terms. Until now, the issue of fairness of limitation clause in the business standards contract is decided by the Court.

Nowadays the consumer sales contract also becomes very important in a business transaction. As the consumer buyer usually at the inferior bargaining position, the law protects the right of consumer buyer by means of limiting the seller's right to exclude liability for nonconformity of goods. When the consumer buyer receives the nonconforming goods, the available remedies are rejection of goods, reduction price and getting a refund or the right to claim damages, even if the standard sales contract says there is limited liability. Limitation clause typically favors whichever party drafted the agreement, usually the seller, therefore, even the seller cannot exclude implied terms in consumer sales contract, and he can set out the limit of compensation and types of remedy that the buyer can recover from the seller.

4. Research Questions and Methodology

The research questions can be summarized as follows:

(1) To define whether the limitation clause is fair or not, the first question is what are the seller's liabilities for nonconformity of goods under the law and the contract?

(2) To what extent the law allows the seller to limit or exclude liability.

(3) When the seller choses the available remedy in the standard contract and if the agreed remedy for non-conformity is not covered by the loss suffered by the buyer, should the buyer be entitled to the other remedies.

(4) When the limitation clause is perfectly included in the contract but unfair for the

weaker party, how can the Court justify the limitation clause?

(5) In the case is brought before the Court and the Court does not alter the agreement of the parties to the contract, what remedies are available for the buyer if the limitation clause fails to pass the reasonableness test?

In order to answer the research questions mentioned above and fulfill the research goal, I wish to draw attention to two features of the methodology adopted in this research. The first is the analysis of provisions of different laws related to liability issues. At the starting point of the research, a thorough analysis will be made on the existing law both international and nationals. Literatures and information concerning the topic will be taken into account. The second is to compare and evaluate the efficiency of the three systems based on the case study. Case Law is important study in order to discover how the question is solved in practice.

5. Outline of the Research

In the first part of the research, it will deal with the general issues such as an introduction to the research, international legal source and national legislations. Furthermore, it will explain the notion of liability, non-conformity, etc. Chapter I will focus on the scope of seller's liability under the law and contract terms and compare under the International and National legislations. In chapter II, it will study the remedies available to the buyer under the CISG, UCC and UK Law. In Chapter III, the time limitation of notification of non-conformity of goods and Statute of Limitation will be examined. Chapter IV will analyze the seller's right to exclude and limit the liability according to the rule of freedom of contract and will focus differently on the limitation of liability, exclusion of liability and remedy clause. Chapter V will study on the statutory control on seller's right of limitation

under international and national legislations. In chapter VI and VII, the study intends to examine the court's role on validity issue of exclusion and limitation clause, interpretation and reasonableness test. In chapter VIII, it will study the consequences of the invalidity of exclusion or limitation clause with relevant cases. Finally, the thesis will discuss and compare the three legal systems and it will conclude with the suggestion for the reform of Myanmar Sale Law.

6. What is Liability?

Liability means responsibility for compensating for failure to perform in accordance to contract terms and the law. According to the Contract Law, liability is an obligation of the parties who entered into a contract, made by an agreement between those parties and which can bring before the court if one of the parties failed to perform the duty under the contract. Liability is the term, which has a broad meaning in different kinds of contract and related laws (such as Insurance Law, Labor Law, Sale Law, etc.). Regarding the sales contract, a buyer's obligations are to accept the goods and to pay for the price. A buyer is liable for non-acceptance of the goods, for late payment, and other remedies of the seller, which granted under the contract and the law. A seller's obligations are to deliver the conforming goods and transfer the title of the goods according to the contract. A seller is liable for failure to deliver the conforming goods and goods defect in title and other buyer's remedies, which are agreed in contract or admitted under the law.

7. Definition of Goods

The CISG does not define the term "goods". Subject to Article 2, however, it can be construed that the "goods" means the tangible things. Article 2 states:

"This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity."

Under the Consumer Rights Act, 2015, "goods" mean any tangible moveable items (including water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity).

According to the SGA, "goods" consists of existing goods and future goods. Existing goods are the goods which the seller possesses at the time of making the contract. Future goods are the goods which will be manufactured or acquired after making the contract.

According to UCC 2-103(k), "goods" means all things that are movable at the time of identification to a contract for sale. The term includes future goods, specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to realty as described in Article 2-107.

8. Non-conformity of Goods

Non-conformity of goods is the most frequent issue brought to the court and it paves the way of choosing the remedies. Therefore, it is very important to understand the term of non-conformity in a broader meaning to assess whether the goods quality is in conformity or not. There are various aspects of non-conformity, for example, non-conformity of goods in quality, quantity and title.

Non-conformity of goods means the quality and quantity of the goods are not conformed to the quality and quantity as agreed in contract terms or the Sale Law. The goods must be conformed to the *express terms* which are agreements of contract and *implied terms* which do not appear in express terms in the contract, but mean the quality of the goods must comply with the standard stipulated in the law.

Thus, the term "non-conformity" is relevant when the goods delivered are not in accordance with the contract or the required quality under the law.

9. Freedom of Contract Rule

Exclusion or limitation of liability is based on the freedom of contract rule. The freedom of contract is a well-accepted-principle and adopted in nationals and international conventions on contract law.

In Common Law, freedom of contract is defined as individuals with full capacity being able to freely choose who they contract with and on what terms within that contract. This began in the nineteenth century when judges believed that people should be able to make their own decisions, since they know what is best in their interests, under the assumption that nobody would choose unfavorable terms. The courts simply acted as an umpire, ensuring parties were upholding their promises. They only interfered in special cases, including those involving misrepresentation, undue influence or illegality and it was not within their role to question whether the contract was fair.

According to article 1.1 of the UNIDROIT Principles on International Commercial Contract, 2010, the parties are free to enter into a contract and to determine its content.[4] The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order.[5]

10. Sources of Laws

A. United Nations Convention on Contract for International Sale of Goods

In the international trade area, from the work of UNCITRAL, the United Nation Convention on Contract for the International Sale of Goods (CISG) emerged in 1980.[6] The CISG, sometimes referred to as the Vienna Convention, is a treaty that is a uniform international sales law. Currently, it is successful as a uniform International Sale Law that is ratified by world major trading countries such as US, Japan, France, Germany, etc. As of the end of 2015, it has been ratified by 84 states that account for a significant proportion of world trade, making it one of the most successful international uniform laws. Vietnam was the most recent state to ratify the Convention, having acceded to it on 18 December 2015. However, among EU members, the UK, Ireland, Malta, and Portugal have not ratified the CISG yet. In international sales contract, the CISG represents a compromise of

[4] The UNIDROIT Principles on International Commercial Contract, 2010.
Article 1.1. Freedom of Contract
The parties are free to enter into a contract and determine its content. Cited from http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/414-chapter-1-general-provisions/863-article-1-1-freedom-of-contract.
[5] Comment 1 on Freedom of contract as a basic principle in the context of international trade.
[6] http://www.uncitral.org/uncitral/uncitral_texts/sale_goods.html.

Civil Law and Common Law systems and sometimes creates concepts that are unique to one system and not to the other. Because of the divergence between the two systems, several issues became the subject of debate during negotiations. In certain provisions, the rules of common law prevailed, while in others, the rules of civil law.

The CISG governs only international business sales contracts. According to Article 1, "*the Convention applies to contracts of sale of goods between parties whose places of business are in different States:*

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State."

With respect to the issue of seller's liability for nonconformity of goods and the right of limitation of liability, the CISG provided for in Article 35(3) in which the seller is not liable for nonconforming goods, if, at the time of conclusion of contract, the buyer knew or could not have been unaware of such lack of conformity.

As the CISG recognizes the rule of freedom of contract, the seller may exclude or limit the extent of liability for non-conformity of goods. The implied obligations set forth in Article 35(2) apply on the condition "except where the parties have agreed otherwise". For example, an express contract term in the seller's standard form whereby the seller accepts no responsibility whatsoever that the goods are fit for any particular purpose, whether or not such purpose has been made known to him will ordinarily serve to displace the obligation set forth in Article 35(2)(b). The parties may derogate from or vary the effect of any Convention provisions pursuant to Article 6.

B. Uniform Commercial Code

The Uniform Commercial Code (UCC),[7] first published in 1952, is one of a number of Uniform Model Acts that have been enacted to harmonize the law of sales and other commercial transactions in all 50 states within the United States of America, the District of Columbia, and the US territories.

Relating to the seller's liability for non-conformity of goods and limitation of liability, Article 2-106 (2) provides that goods are conformed to the contract or conduct including any part of a performance are conforming or conform to the contract when they are in accordance with the obligations under the contract. Obligations under the contract are called as *express and implied warranties* for the sale of goods and the whole purpose of warranties is to determine what the seller has agreed to the buyer. Non-conforming goods are the goods which differ from quality or description or sample or promise that the seller has made in the contract. Article 2 -313 provides for express warranty and article 2-314 and 315 provides for implied warranties in contracts.

Under Article 1-103, the code has to be liberally construed and applied and recognizes the rule of freedom of contract. Freedom of contract in this context means the ability of the contracting parties not merely to enter a mutually satisfactory agreement but to change the relationships set out in the law. The effect of the UCC's provision may be varied by agreement. The seller's right and the methods of exclusion or modification of warranties are provided for in Article 2-316 of the UCC. There is no difference between business sales contract and consumer sales contract regarding required criteria for exclusion or limitation clause.

[7] See e.g. Legal Information Institute, Uniform Commercial Code, https://www.law.cornell.edu/ucc (last accessed on 2 Jan 2017).

C. Sale of Goods Act, 1979

The UK Sale Law has evolved over many years and it is now principally set out in the Sale of Goods Act 1979 (SGA)[8] which has been amended by the Sale and Supply of Goods Act 1994[9], by the Sale and Supply of Goods to Consumers Regulations 2002[10] and more recently by the Consumer Rights Act, 2015. [11]These laws cover business sales contract and consumer sales contract. It covers not only traditional sales contract but also online sales (e-commerce) and services.

The goods must comply with *express terms* which are properly incorporated in the contract and the *implied terms* concerning the description, fitness, quality and sample unless the parties excluded them within the limit permitted by the Law. Goods do not conform to a contract of sale if there is, in relation to the goods, a breach of an express term of the contract or a term implied by section 13, 14 and 15.

Under the SGA, the seller may exclude or limit liabilities for non-conforming goods. According to section 55 of the SGA, the implied terms as to description, fitness for purpose, satisfactory quality and sample can be excluded, subject to Unfair Contract Terms Act, 1977, by express agreement or by course of dealing and usage between the buyer and the seller.

D. Unfair Contract Terms Act, 1977

The Unfair Contract Terms Act 1977(UCTA)[12] of the UK is the Act which regulates contracts by restricting the operation and legality of some contract terms. It extends

[8] http://www.legislation.gov.uk/ukpga/1979/54 (last accessed on 2 Jan 2017).
[9] http://www.legislation.gov.uk/ukpga/1994/35/contents (last accessed on 2 Jan 2017).
[10] http://www.legislation.gov.uk/uksi/2002/3045/contents/made (last accessed on 2 Jan 2017).
[11] The numbers of amendment of the SGA, http://www.legislation.gov.uk/changes/affected/ukpga/1979/54 (last accessed on 2 Jan 2017).
[12] http://www.legislation.gov.uk/ukpga/1977/50/contents (last accessed on 2 Jan 2017).

to nearly all forms of contract and one of its most important functions is limiting the applicability of disclaimers of liability. The terms extend to both actual contract terms and notices that are seen to constitute a contractual obligation.

The Act renders terms excluding or limiting liability ineffective or subject to reasonableness, depending on the nature of the obligation purported to be excluded and whether the party purporting to exclude or limit business liability, acting against a consumer.

It is normally used in conjunction with the Unfair Terms in Consumer Contracts Regulations 1999,[13] as well as the SGA and the Supply of Goods and Services Act 1982.[14] The followings are provisions which limit the seller's right to exclude the implied terms and other liabilities.

Implied Terms (section 6(1), (2))

It limits the right to exclude the implied terms as to title and implied terms as to description, quality or sample (Sale of Goods Act 1979 ss13-15) cannot be excluded against a consumer.

Terms subject to reasonableness:

Negligence (section 2(2))

Exclusion of liability for negligence other than for death or personal injury must satisfy the requirement of reasonableness.

Contractual Liability (section 3)

This applies against a party that deals on standard written terms or where the other party deals as a consumer. Any exclusion by that party for liability arising from a breach

[13] http://www.legislation.gov.uk/uksi/1999/2083/contents/made (last accessed on 2 Jan 2017).
[14] http://www.legislation.gov.uk/ukpga/1982/29 (last accessed on 2 Jan 2017).

committed by that party under the same contract (s 3(2)(a)) or performance under a contract which is substantially or totally different of that which is reasonably expected of him (s(3)(b)) shall be void except insofar as it satisfies the requirement of reasonableness.

Indemnity clauses (Section 4)

A party dealing as a consumer cannot contract to indemnify a third party on behalf of the other party, except insofar as it satisfies the requirement of reasonableness.

Sale of Goods (section 6(3))

Implied terms as to description, quality and sample (Sale of Goods Act 1979 ss. 13-15) may only be reasonably excluded where neither party is dealing as a consumer.

E. Consumer Rights Act, 2015

The Consumer Rights Act 2015(CRAs)[15] is an Act that consolidates existing consumer protection law legislations and also gives consumers a number of new rights and remedies. Provisions for secondary ticketing and lettings came into force on 27 May 2015 and provisions for alternative dispute resolutions (ADR) came into force on 9 July 2015 as per the EU Directive on consumer ADR. Most other provisions came into force on 1 October 2015. The Act is divided into three parts:

Part 1 concerns consumer contracts for goods, digital content and services, Part 2 concerns unfair terms and Part 3 concerns other miscellaneous provisions.

The Act was introduced to parliament by *Jo Swinson MP*, then parliamentary Under-Secretary in the Department of Business, Innovation and Skills, on 23 January 2014

[15] http://www.legislation.gov.uk/ukpga/2015/15/contents (last accessed on 2 Jan 2017).

with the aim of consolidating and updating consumer protection law and therefore providing a "modern framework of consumer rights."

The pieces of legislation that have been combined into the CRAs are:

1. Unfair Terms in Consumer Contracts Regulations 1999
2. Unfair Contract Terms Act 1977
3. Sale of Goods Act 1979
4. Supply of Goods and Services Act 1982.

F. The Limitation Act [16]

The Limitation Act was enacted in 1980 and it is applicable only to England and Wales. It is a statute of limitation which provides for timeframes within which action may be taken for breaches of the law. For instance, it stipulates that breaches of an ordinary contract are actionable within six years after the event of breach of contract occurred. In most cases, the court may not take any action in respect of those breaches after the expiry of the time periods stated in the Act. Therefore, the remedies available for breaches are barred.

[16] http://www.legislation.gov.uk/ukpga/1980/58/pdfs/ukpga_19800058_en.pdf (last accessed on 2 Jan 2017).

CHAPTER I

Scope of Seller's Liability under the CISG, UCC and UK Law

Introduction

In order to discuss the issues of limitation of liability it must understand the scope of seller's liability. In other words, it must fully comprehend what are the seller's liability and to what extent the seller is liable for non-conformity of the goods. It can describe as liability to performance and liability of remedies. It means the seller is liable to perform in accordance with the contract and the Law; otherwise, he is liable for remedies. Liability to perform in accordance with contract means to deliver the goods, which comply with the parties' agreement in the contract, to the buyer.

In most jurisdictions, the buyer's cause of action for non-conformity of goods may be based on contractual liability or product liability. Contractual liability is a claim based on the breach of contract for the different quality of the goods that the seller guaranteed in the contract. Terminologically, it can be varied as *terms* in CISG and UK Sale of Goods Act, and *warranty* in UCC. Whereas, a claim based on the fault of manufacturer's negligence in producing the product which is not suitable to use and harm the consumer is a product liability.

Due to the product increasing sophisticated in the present day, product liability becomes crucial for both the manufacturer and the consumer buyer. Product liability emerged with the background idea which intended to protect the inferior bargaining party. According to the doctrine of ***privity***, the third party has no right to sue because the contract governs only the relationship between the contracting parties. This doctrine is not going

well in current consumer sales which the product is transported through a larger distribution chain. The buyer will not buy the product directly from the manufacturer rather from the retailer. When the goods are non-conformity with the contract and it causes personal injury or death or damage to property, for the consumer buyers, the contractual liability is not enough to protect them and the law governs the consumer sales is needed to provide a means of recovery of damages. Liability for non-conformity includes not only contractual liability but also product liability. Seller has liability for non-conformity of goods and if such non-conforming goods cause the consumer or third party's death or personal injury or damage to property. In the following discussion, it will discuss liability for breach of express and implied terms and product liability which is widely applied in the case of defective goods in consumer sales.

In this chapter, it will discuss the liability to performance which is a contractual liability and product liability. It will add the issue of the latent defect after the risks passed to the buyer and the limitation of the extent of seller's liability based on the situation of the buyer knowledge of the lack of conformity.

1.1. Express Terms

1.1.1. CISG

According to the CISG's provision, the goods must conform to quality, quantity and packaging manner as expressed in the contract, so that the important of the contract is stressed. [17] In ***Granulated Plastic*** case, a delivery of raw plastic that contained a different percentage of a particular substance that specified in the contract, as a result, when using

[17] Article 35 of the CISG.

that raw plastic to produce window blinds that did not effectively shade sunlight. The raw plastic did not conform to the contract, and the seller had therefore breached its obligations.[18]

In ***the Coke*** case, a contract stated that "the goods (Organic barley) will meet the requirements under Council Regulation EEC No.2092/91 on organic production of agriculture products, the state of origin Germany, the shipment of barley divided six partial shipments. With the last partial shipment, the buyer received a certificate affirming that the last delivered goods met the standards of Council regulation EEC No.2092/91. For the first five partial shipments, the buyer received no such certificates. It was decided that the barley that delivered did not conform to the contract as required by Article 35(1) CISG. Goods were to be delivered that complied with Council regulation EEC No.2092/91. As organic barley cannot distinguish from other barley, the consumer pays a substantially higher price for an organic product not for a proven quality but for the observation of the inspection scheme at production, transport and processing. [19]

It has also been found in the ***Cable Drums*** case, a shipment of goods containing less than the quantity specified in the contract breached Article 35(1). Article 35 clearly states that non-conformity includes both non-conformity in quality of the goods delivered and quantity; partial deliveries.[20] And also in the ***Potting soil*** case, where a contract required that potting soil contain 40 kg of clay per cubic meter of potting soil, but the goods

[18] Granulated Plastic case, Germany 8 February 1995 Appellate Court München[7 U 3758/94] http://cisgw3.law.pace.edu/cases/950208g2.html (last accessed on 2 Jan 2017) .
[19] Coke case, Germany 2 March 1994 Appellate Court München http://cisgw3.law.pace.edu/cases/940302g1.html (last accessed on 2 Jan.2017).
[20] Cable Drums Case, Switzerland 7 July 2004 Supreme Court http://cisgw3.law.pace.edu/cases/040707s1.html (last accessed on 2 Jan 2017).

delivered contained a different proportion of clay, the court found a violation of Article 35(1).[21]

1.1.2. UCC

Express warranties can be an affirmative promise about the quality or feature of the goods, description or sample of the goods. Article 2-313 states -

(i) Any statement of fact or promise made by the seller to the buyer relating to the goods which are part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise;

(ii) A description of the goods which is part of the basis of the bargain creates an express warranty that the goods will conform to the description; and

(iii) A sample or model which is part of the basis of the bargain creates an express warranty that the goods will conform to the sample or model.

The Phrase "affirmative promises about the quality and features of the goods being sold" mentioned in Article 2-323 of the UCC can be the phrase of words as "a watch is waterproof to 250 feet, a car gets 35 mpg on the highway, or a brand of concrete cures rock-hard in 5 minutes, no matter what the weather." And the phrase "descriptions of the goods being sold or samples were shown to the buyer" can be "a floor sample of the kind of television and actually sold is the same type and same quality as the floor sample." A description need not be by words. Technical drawings, prototypes and the like can make more exact description than mere language and if it is part of the basis of the agreed goods must conform to them. In ***Rite Aid Corp. v. Levy-Gray,*** the consumer bought a prescription

[21] Potting Soil case, Netherlands 18 July 2006 Appellate Court Arnhem http://cisgw3.law.pace.edu/cases/060718n1.html (last accessed on 2 Jan 2017).

drug from the chain to treat her Lyme disease. She followed the package insert's instructions to take the drug with food or milk if it caused an upset stomach. She alleged her consumption of milk and other dairy products while taking the drug reduced its absorption, thereby proximately causing her post-Lyme syndrome. The intermediate appellate court held that (1) pharmaceuticals could be the subject of an express warranty; (2) the insert's language was an affirmation of fact constituting an express warranty; and (3) the jury reasonably could have inferred that the consumer relied on the accuracy of the affirmation when taking the drug. The instant court agreed. The interplay between the insert's general disclaimer and the instruction was properly before the jury. An express warranty could arise after the sales contract was consummated. That the insert's assertions were not labeled as a warranty was immaterial. The "learned intermediary" doctrine did not preclude the chain from being held liable for breach of express warranty based on a package insert that could provide the basis for such a warranty. [22]

Express warranties are required to contain in the contract. If they are not mentioned in the contract, then they are not part of the contract. It is not needed to use words like "warranty" or "guarantee" to make express warranties. But, the seller was required to demonstrate that the written warranty was made known to the buyer when making the sales contract.[23]

[22] Rite Aid Corp. v. Levy-Gray, 894 A.2d 563, 570-71 (Md. 2006).
[23] Durant v. Palmetto Chevrolet Co., 241 S.C. 508 (1963) Supreme Court of South Carolina. http://law.justia.com/cases/south-carolina/supreme-court/1963/18018-1.html (last accessed on 2 Jan 2017).

1.1.3. UK Law

Unlike the CISG and the UCC, there is no clear provision regarding the express terms under the Sale of Goods Act. However, the express term here means the term which is properly incorporated in the contract.

1.2. Implied Terms

1.2.1. CISG

Under the CISG, the question whether the goods are in conformity or not has to be tested by four criteria; fitness for ordinary purpose, fitness for particular purpose, quality as a sample or model and packaged or contained as usual manner, except the parties agreed otherwise.

i. Fitness for Ordinary Purpose

Relating to the ordinary quality of the goods, Article 35(2) (a) states as follows:

"Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used." [24]

In other words, the goods quality need not to be perfect or flawless, unless perfection is required for the goods to fulfill their ordinary purposes. The word of "ordinary" is variously described as the goods required to be average quality, marketable quality, or reasonable quality. It has also been stated that "machinability" of the goods is an aspect of their fitness for ordinary purposes under Article 35(2) (a). For instance, the foods produced for human consumption must, at least, not be harmful to health, and that mere suspicion

[24] Article 35(2) (a) of the CISG.

that the goods are harmful to health may cause non-conformity under the meaning of Article 35(2) (a).

Discussions in many decisions relates to the question whether the quality standard prevailing in the buyer's or seller's jurisdiction is to apply when determining non-conformity of the goods under Article 35 (2) (a). This is especially relevant to the issue of compliance with a particular public law.

In the ***Mussels*** case, the parties have not agreed on anything, the goods are non-conformity with the contract if they are not suitable for the ordinary use or for a specific purpose, the buyer must expressly or impliedly informed the seller at the time of making contract. The delivered mussels are not inferior quality and there is no evidence that the parties agreed to comply with the ZEBS-standards. [25]Therefore, the court denied the buyer's right to declare the contract void and the law of buyer's country cannot apply in determining whether the goods conformed to the contract. [26]

In ***Medical Marketing v. Internazionale Medico Scientifica,*** conformity with Article 35(2) (a) is determined by reference to the quality standards prevailing in the buyer's jurisdiction. In this case, the seller violated Article 35(2) (a) because the delivered medical devices failed to meet the safety regulations of the buyer's jurisdiction.[27]

A general rule can be distilled from the above two cases. Accordingly, the seller is not responsible to deliver goods which comply with the regulatory provisions or standards of the importing country even if he or she knows the destination of the goods unless:

[25] ZEBS standards is issued by Central Registration and Evaluation Office of the Federal Public Health Agency for Environmental Chemical.
[26] New Zealand mussels case, Germany 8 March 1995 Supreme Court, http://cisgw3.law.pace.edu/cases/950308g3.html. (last accessed on 2 Jan 2017).
[27] Medical Marketing v. Internazionale Medico Scientifica, United States 17 May 1999 Federal District Court [Louisiana], http://cisgw3.law.pace.edu/cases/990517u1.html (last accessed on 2 Jan 2017).

a. The same regulations exist in the seller country.

b. The buyer noticed the seller's in respect of the regulatory provisions and the buyer relied on the seller's skills.

c. The seller knew or should have known of the requirements because of special conditions. Special conditions may include:

-The fact a branch of the seller's business is existing in the importing country.

-The existence of a long-lasting relationship between the parties.

- The seller used to export the goods into the buyer's country.

-The products have been promoted in the buyer's country.[28]

ii. Fitness for Particular Purpose

According to Article 35(2), the goods must be fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract. Although the buyer informed the seller relating to the particular purpose of the goods, if the buyer did not rely on the seller's expertise or it was unreasonable to rely on the seller's skill or judgment, the seller is excused from the obligation to make goods that match the particular purpose. [29] The standard of knowledge is expressed in the CISG as "expressly or impliedly made known to the seller." Therefore, it would seem that no problem arose when the seller has express knowledge of a particular purpose and the problem arise only with respect to implicit knowledge. [30]

[28] RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller, New Zealand 30 July 2010 High Court of New Zealand, http://cisgw3.law.pace.edu/cases/100730n6.html (last accessed on 2 Jan 2017).
[29] Article 35(2) (b) Goods are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
[30] *Ibid.*

Suppose that the buyer knows about some particular purpose of the goods but may not know enough about such goods to give exact specifications. In such case, the buyer may describe the desired goods by describing the particular use to which the goods are to be put. In such case, the buyer relies on the seller's skill and judgment and the seller must deliver goods fit for that purpose.[31]

It would also be unreasonable for the buyer to rely on the seller's expertise if the seller did not seem to have any special knowledge with respect to the goods in question. In the ***Second Hand Bulldozer*** case, the buyer inspected and tested before buying Second Hand Bulldozer, therefore, the risk of defects in a used bulldozer was held by the buyer because the buyer did not rely on the seller's judgement in examining the goods.

Therefore, to meet the standard of fitness for particular purpose, the buyer must make known the particular purpose of the goods to the seller before the conclusion of the contract and must rely on the skill and judgment of the seller.[32]

iii. Quality as Sample or Model

According to Article 35(2) (c), except the parties have agreed otherwise, the delivered goods must possess the qualities of goods, which the seller has held out to the buyer as a sample or model. However, the seller still has liability to delivered goods as sample or model, even the buyer held out sample or model, if the parties agreed that the goods shall conform to such sample or model. [33]

---

[31] Commentary on Article 35 of the CISG, http://www.cisg.law.pace.edu/cisg/text/secomm/newsecomm/secomm-35.html (last accessed on 2 Jan 2017).

[32] Second hand bulldozer case, Switzerland 28 October 1997 Appellate Court Valais, http://cisgw3.law.pace.edu/cases/971028s1.html (last accessed on 2 Jan 2017).

[33] Article 35(2) (c) the goods must possess the qualities of goods which the seller has held out to the buyer as a sample or model.

Conformity of the goods with a sample or model may not seem to be an issue raising significant concerns or problems. However, several cases where simple and complex, comprehensive and particular issues of conformity with a sample or model were in dispute. In ***Marble Slabs*** case, the delivery of stone with different color violate Article 35 (2) (c). In this case, the agreed color of the stone, that is, its quality, is of decisive significance for the assessment of this case. The desired stone 'Giallo Veneziano' was to be of a golden-yellow color; however, the court found that the stone delivered possessed a pink color-admittedly, the determination was made in comparison to the color sample.[34]

In ***Delchi Carrier v. Rotorex,*** regarding the non-conformity of sample's quality, the court held that the seller breached the contract and granted the buyer damages. *Judge Cholakis* held that "The agreement between Delchi and Rotorex was based upon a sample compressor supplied by Rotorex and upon written specifications regarding cooling capacity and power consumption. The fact was found that the compressors would actually generate less cooling power and consume more energy than the specifications indicated."[35]

iv. Packaged or contained as Usual Manner

The obligation under article 35(2) (d) is packaging in the manner usual for such goods or, where there is no such usual manner, in a manner adequate to preserve and protect the goods. An issue connected with the requirement of appropriate packaging is the conformity with contractual and generally reasonable packing requirements. Where packaging requirements are concerned, both express and implied contractual requirements are

[34] Marble slabs case, Germany 27 September 1991 Appellate Court Koblenz, http://cisgw3.law.pace.edu/cases/910927g1.html (last accessed on 2 Jan 2017).
[35] Delchi Carrier v. Rotorex, United States 9 September 1994 Federal District Court [New York] http://cisgw3.law.pace.edu/cases/940909u1.html (last accessed on 2 Jan 2017).

governed by article 35 (2) (d) of the CISG.[36] In ***the Agricultural Products*** case, the buyer objected to the fact that the mushrooms were not packaged in the manner stipulated in several contractual documents. The arbitral tribunal found that the mere fact that the packaging requirement set out in the contract was not met entailed non-conformity of the goods delivered.[37]

In ***Caito Roger v. Société française de factoring,*** the delivered cheese which had not been labeled in accordance with French Law on the composition and expiry date of food products. The seller was required to comply with the standard of the buyer's country because it had had dealings with the buyer for several months, therefore, must have known that the cheese was destined for the market in the buyer's country. The seller, therefore, violated its obligations under CISG article 35(2) (d) for delivering cheese that did not have its composition marked on the packaging, as required by marketing regulations. [38]

1.2.2. UCC

Implied Warranties are the obligations relating to the quality and nature of the goods which the law imposes upon the seller in a sales contract. Implied warranties are automatically included in a contract for the sale of goods unless they are excluded. There are two main types of implied warranties- merchantability and fitness for a particular purpose.

[36] Article 35 (2) (d), goods are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
[37]Agricultural products case, China 18 September 1996 CIETAC Arbitration proceeding http://cisgw3.law.pace.edu/cases/960918c2.html (last accessed on 2 Jan 2017).
[38] Caito Roger v. Société française de factoring, France 13 September 1995 Appellate Court Grenoble, http://cisgw3.law.pace.edu/cases/950913f1.html (last accessed on 2 Jan 2017).

i. Merchantability

Merchantability simply states that a product will reasonably perform the purpose for which it was designed. Relating to the quality of the goods, merchantability is a warranty that the goods will pass without objection in the trade. They are adequately packaged, conform to all promises or affirmations of fact on the container, they are fit for the ordinary purposes for which such goods are used. The implied warranty of merchantability also includes a promise that multiple goods will be of even kind and quality.

In determining whether a product is reasonably fit, a court focuses on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners. When a product is widely sold and easily purchased, the mere fact that an infinitesimal number experienced a discomforting reaction is not sufficient to establish that the product was not fit for the purpose intended.

In ***Sparks v. Total Body Essential Nutrition, Inc.,*** the consumers sued the retailer and other companies, alleging that a supplement the retailer sold made them sick. The retailer bought the supplement in pre-packaged, sealed containers. One of the companies had the case removed on the grounds that diversity jurisdiction existed because of the retailer, the only named Alabama defendant, had been fraudulently joined. If the claims against the retailer alleging breach of implied warranties of merchantability and fitness for a particular purpose were barred by the sealed container doctrine, then joinder of the retailer as a defendant was fraudulent. The high court rephrased the latter part of the trial court's question as follows: "Whether the UCC imposed liability on a retailer without the availability of the defense of lack of causal relation provided to retailers under the Alabama Extended Manufacturer's Liability Doctrine." It held that there was no provision for a defense to a claim of a breach of an implied warranty based on the sealed container doctrine.

The recourse of the retailer under the circumstance presented was a claim against its seller on its breach of implied warranty, not absolution. The high court answered the certified question in the affirmative and held that the sealed container defense was not available to the retailer in claims asserting a breach of implied warranty under the UCC.[39]

ii. Fitness for Particular Purpose

The implied warranty as to fitness for a particular purpose means where the seller has reason to know the buyer's particular purpose for which the goods are required and the buyer is relying upon the seller to select the suitable goods to meet those purpose goods. And the seller does so, the seller warrants that the goods will meet the particular purpose for which the buyer intends to use them. A particular purpose differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business. Whereas, the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and uses which are customarily made of the goods in question. For example, shoes are generally used for walking upon the ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

In ***Ole Mexican Foods, Inc. v. Hanson Staple Co.,*** the seller alleged that the buyer failed to purchase packaging which was specially manufactured by the seller for the buyer. The settlement agreement provided that the buyer would purchase a fraction of the product originally contracted for, would test the remainder of inventory, and would purchase additional inventory if it met quality expectations. The trial court ordered the buyer

[39] Sparks v. Total Body Essential Nutrition, Inc., 27 So. 3d 489, 496 (Ala. 2009).

to purchase the minimum amount, but ruled that the buyer retained the right to reject the seller's product pursuant to the UCC. The intermediate appellate court held that the trial court erred by applying the implied warranties to the settlement agreement, as the agreement's purpose was to resolve a dispute between the parties about whether the buyer was obliged to purchase any of the seller's goods and whether they were merchantable. The high court agreed. [40]

1.2.3. UK Law

Under the Sale of Goods Act, 1979, when the seller delivered the non-conforming goods, it is a breach of contract. Breach of contract is classified into the breach of conditions and warranty. Breach of the condition is serious and it can cause the contract to an end. Whereas, breach of warranty does not give the right to the buyer to end the contract but to be entitled to damages.[41]Implied terms as to ***description satisfactory quality, fitness for purpose and sample*** are provided for in Sections 13, 14 and 15. All implied terms are conditions.[42] However, every non-conformity of goods which is a breach of implied terms does not constitute a breach of condition. The minor defect will consider as a breach of warranty. [43] The seller's liability for non-conformity of goods can vary depends on the sales contract, business sales or consumer sales. In business sales contract, the seller has an obligation to deliver the goods which correspond with the description where the buyer has not seen the goods but is relying on the description alone.[44]

[40] Ole Mexican Foods, Inc. v. Hanson Staple Co., 676 S.E.2d 169 (Ga. Sup. Ct. 2009.
[41] Section 11 of the Sale of Goods Act, 1979.
[42] Sections 13(1) A, 14(6), 15(3) of the Sale of Goods Act, 1979.
[43] Section 15(A) of the Sale of Goods Act, 1979.
[44] Section 13 of the Sale of Goods Act, 1979.

Fitness for Purpose is a term into all contracts for the supply of goods in the course of a business that the goods are reasonably fit for the purpose for which they were bought. Therefore, if a buyer discloses to the seller what he intends to use the goods for, or if this should be apparent to the seller for any reason (such as a statement made by the buyer or the business usually conducted by the buyer), then the goods should be fit for that purpose.[45]

Conformity as to sample is provided for in Section 15 of the SGA, once the sale is by sample, the goods' quality must correspond with the sample's quality existing at the time of which was examined reasonably and the goods will be free from any defect. This is the question of fact, easier to resolve than the test of satisfactory quality.[46]

Seller's liability for non-conformity of goods in consumer sales in the UK are subject to the new Consumer Right Act, 2015.[47] Implied terms for goods quality under this Act are the goods must have satisfactory quality,[48] must be fit for particular purpose,[49] match the description of the contract[50], sample, [51]and model as has seen and check before signing the contract.[52] The difference between the liability of the seller in business sales and consumer sales is the seller cannot exclude the liability for implied terms in consumer sales contract and the exclusion of liability clause is not binding on the consumer buyer.[53]

[45] Section 14 of the Sale of Goods Act, 1979.
[46] Section 15 of the Sale of Goods Act, 1979.
[47] Before 2015, the consumer sales governed by the Sale of Goods Act,1979, Unfair Contract Terms Act,1977, Unfair Terms in Consumer Contracts Regulations, 1999 and Supply of Goods and Services Act 1982.
[48] Section 9 of the Consumer Rights Act, 2015.
[49] Section 10 of the Consumer Rights Act, 2015.
[50] Section 11 of the Consumer Rights Act, 2015.
[51] Section 13 of the Consumer Rights Act, 2015.
[52] Section 14 of the Consumer Rights Act, 2015.
[53] Section 31 of the Consumer Right Act, 2015.

i. Description

Implied term as to description is provided for in Section 13 of the SGA, "where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description." In order to determine whether the goods correspond with the description, it may be necessary to determine the exact scope and meaning of description.

First, the implied term as to description is application to all sale contracts, both business sales and consumer sales. Second, the goods are sold by description where the buyer has not seen the goods but is relying on the description alone. In the land mark case of Consumer Law, ***Grant v Australian Knitting Mills***, Lord *Wright* states " t*here is a sale by description even though the buyer is buying something displayed before him on the counter; a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description.*"[54]

In ***Beale v Taylor***, an advertisement to sell a car describing it as "white, 1961, herald convertible…."and later it was found that the car was made up of two cars welded together, the front portion was one 948 model while the rear portion was the 1200 model. It was held that it is a sale by description even though the buyer saw the car before purchasing it. A thing is sold by description as long as it is not sold merely as a specific thing but as something corresponding to a particular description. The buyer relied in part on that particular description in buying the car. [55]

Third, the goods which is defective in quality is not relevant fact in deciding whether they correspond with their description. In ***Arcos v Ranaason,*** a contract for the

[54] Grant v The Australian Knitting Mills [1935] UKPC 2, [1936] A.C. 562.
[55] Beale v. Taylor, [1967] 3All ER 253.

sale of a quantity of wooden staves for making barrels described the staves as being 1/2 an inch thick. Some of the staves delivered were not 1/2 an inch thick but very slightly out. There was nothing wrong with the quality of the wood and they could still be used for the intended purpose of making barrels. The buyer rejected the goods as the price of wood had fallen and he could purchase them cheaper elsewhere House of Lords held that the buyer was entitled to reject the goods under Section 13 as they were not as described.[56]

ii. Quality

Regarding the implied term as to quality, there are two conditions which may be implied by Section 14: satisfactory quality and fitness for purpose. Satisfactory quality required where the seller sells the goods in the course of business, the goods supplied shall be of satisfactory quality. Unlike sale by description, this implied term applies only to when the seller sells the goods in the course of business. In ***William Stevenson and Anthony Stevenson v Martyn Rogers CA***, a sale of vessel by a fisherman was a sale in the course of business and it was required to be of merchantable quality because the fact that his boat was the principal asset of his business of fisherman.[57]

There are three exceptions in Section 14(2). First, if the defect is specially drawn to the buyer's attention before the conclusion of contract; second, if the defect ought to reveal by the examination the goods before the conclusion of contract; third, if the defect would have been apparent on a reasonable examination of the sample in case of contract sale by sample.[58]

[56] Arcos v Ronaasen & Son v Arcos Ltd [1933] APP.L.R. 02/02.
[57] William Stevenson and Anthony Stevenson v Martyn Rogers CA, 1998] EWCA Civ. 1931, [1999] QB 1028.
[58] Section14 (2) of the SGA.

The goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory. The words satisfactory quality indicates that the goods are not necessarily required to be of the very best quality but the level of quality demanded depends upon the circumstances of the case, including the price, any description of the goods. In the case of a book, video cassette, or computer disk containing a software program, the two conditions extend, apparently, not just to the physical book, disk or video, but also contents. [59]

In ***Bartlett v Sidney Marcus,*** *Lord Denning* held that "merchantable means of some use though not entirely efficient use for the purpose and there is no requirement of perfection." Before him was the issue of the merchantability of a second hand-car which, he held, was reasonably fit for the purpose if in a roadworthy condition, fit to be driven along the road in safety, even though it was not as perfect as a new car. [60]

The quality of goods includes fitness for all the purposes for which goods of the kind in question are commonly supplied, appearance and finish, freedom from minor defects, safety and durability. [61] Regarding the durability, in ***KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co KG v Petroplus Marketing AG***, as the Gasoil is not a perishable good, the satisfactory quality of gasoil is not only when the cargo was delivered on the vessel but also required to remain for a reasonable time after delivery. In addition, under the term implied, the gasoil had to remain in accordance with the contractual specification after delivery on the vessel for a reasonable period."[62]

[59] Section 14 (2-A) of the SGA.
[60] Bartlett v Sidney Marcus ltd [1965] 1WLR 1013 Court of Appeal.
[61] Section 14(2-B) of the SGA.
[62] KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co KG v Petroplus Marketing AG, [2009] EWHC 1088 (Comm): 22 May 2009.

Fitness for a particular purpose refers "the goods' quality meets the buyer's requirement and purpose of using it." Therefore, if a buyer expressly or impliedly make known to the seller what he intends to use the goods for, then the goods should be fit for that particular purpose.[63]The importance case deciding on the issue of fitness for purpose is ***BSS Group v Makers (UK) Ltd***.

In this case, supplying Makers (the buyer) purchased adapters and valves for use in relation to a plumbing project from the BSS (the seller). The problem was that the threads on the adaptor and value were incompatible and the connection of two components become insecure under pressure and within hours the valve blew off resulting a damaging flood.

The question is whether the seller was in breach of implied term as to fitness for particular purpose under Section 14(3) of the SGA.

Whether the goods are fitness for particular purpose under section 14(3) was tested by three questions:

(1) Whether the buyer expressly or by impliedly made known to the seller the purpose for which the goods were being brought?

(2) If so, whether they are reasonable fit for that purpose.

(3) If they are not fit for purpose, whether the seller has shown

(a) that the buyer did not rely on its skill and judgement, or

(b) if it did, that it was unreasonable for him to do so.

In this case, the seller had known that because the buyer previously bought the goods for plumping project (a system using mention as Uponor system). Therefore, it is

[63] Section14 (3) of the SGA.

sufficient means for the buyer to request that it intended to use the valves for the same project. It can conclude that the buyer made a particular purpose for the valves known to the seller.

Therefore, the valves were not fit for purpose because "they were incompatible with the Uponor adaptors and would be likely to fail when used in conjunction with them. Since the buyer was satisfied to buy any valve and was relying on the sub-contractor to do the tests necessary to ensure that it worked was "unreal". It was "obvious" that "Makers was relying upon BSS to quote for and sell it, a valve that was compatible with that system".[64]

iii. Sample

Conformity as to sample is provided for in Section 15 of the SGA, once the sale is by sample, the bulk must correspond with the sample's quality and the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.[65] This is the question of fact, easier to resolve than the test of satisfactory quality. According to Section 61(1), 'bulk' means "a mass or collection of goods of the same kinds which is contained in a defined space or area and is such any goods in the bulk are interchangeable with any other goods therein of the same number or quantity." [66] Sale by sample is applied to all sales contracts as a condition irrespective of whether it is a private sales, consumer sales or business sales.[67] In ***Steels & Busks v Bleecker Bik & Co,*** where the sale of goods is recognized as a sale by sample, the

[64] BSS Group v Makers (UK) Ltd, [2011] EWCA Civ. 809.
[65] Section 15 (2) of the SGA.
[66] Section 61(1) of the SGA.
[67] Section 15(3) of the SGA.

bulk must correspond with the sample. However, that does not mean the bulk has to be the same, but only that it will be like as the sample as an ordinary comparison or inspection would reveal.[68]

1.3. Latent Defect

1.3.1. CISG

Seller's liability for non-conformity of goods is limited after the risk has passed to the buyer. Article 36 (1) provides that the seller is liable "in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after the time risk passes to the buyer." [69]Thus, to decide whether the seller is liable or not is the time that the lack of conformity comes into existence, not the time it is discovered (or should have been discovered), that is critical for the rule in article 36 (1). This can put many questions to judge the time of the existence of lack of conformity. According to the CISG rule, the burden of proof is on the buyer. If the buyer cannot prove the lack of conformity clearly, the seller is not liable for non-conformity of goods. This issue is learned in the following case.

In Hars & Hagebaeuer BV v. Amuyen SA case, the Argentinian company Amuyen SA had sold Argentinian cherries to Hars & Hagebaeuer BV in the Netherlands. The buyer claimed that he could rely on remedies when the delivered cherries were not in conformity with the contract. The court concluded that the risk in the goods passed to the buyer at the time when the goods were loaded onto the plane in Argentina. Thus the buyer

[68] Steels & Busks v Bleecker Bik & Co [1956] 1 Lloyd's Rep. 228.
[69] Article 36(1) of the CISG.

was requested by the court to provide evidence of what percentage of the delivered cherries were "dirty and dull looking" -- which was the buyer's complaint -- and, in addition, the buyer was also requested to prove that the reason therefore lay in the condition of the goods before they were loaded onto the plane. The court held that if the buyer provided evidence of the above, the goods would be held not to be in conformity with the contract.[70]

1.3.2. UCC

There is no similar provision of seller's liability for a latent defect after the risk passed to the buyer in the UCC; rather the goods must be delivered accordance with the contract terms, which is called the *perfect tender* rule.

Seller is also liable for latent defect of goods even after the buyer accepted the goods. According to the acceptance rule, the buyer will lose the right to reject the non-conforming goods after acceptance. However, the latent defect is a fault in the goods that could not have been discovered by a reasonably thorough inspection before the sale. The buyer usually finds out the latent defect after accepting the goods because if the buyer discovered at the time of inspection the buyer has the right to reject the non-conforming goods and there is no case of latent defect. The case of latent defect often appears in goods such as machinery, raw material to produce the product. Suppose, after applying the raw material, the buyer discovers that the goods are non-conformity with the agreed quality. The machine that bought for manufacturing product but the machine fail to work properly. For such problems, the UCC grants the buyer the right to revoke acceptance for a latent

[70] Hars & Hagebaeuer BV v. Amuyen SA, Netherlands 20 January 2000 District Court Rotterdam http://cisgw3.law.pace.edu/cases/000120n1.html (last accessed on 2 Jan 2017).

defect, by giving notice to the seller, in the situation of difficult to discover the non-conformity at the time of acceptance or if the seller assured for the quality of the goods.[71]

The right to revoke acceptance depends on two conditions: whether the defect is discoverable at the time of acceptance and whether the seller guaranteed the quality of the goods. More importantly, a failure to notice of the obvious defects cannot excuse the buyer.[72]

The seller who sold goods for a particular purpose was generally liable for latent defects.[73]The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. However, an examination under circumstances that does not permit chemical or another testing of the goods would not exclude defects which could be ascertained only by such testing.[74] Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe.[75]

1.3.3. UK Law

Under the SGA, where the right to reject is generally lost quite quickly and there is no long-term right to reject for **latent defects**. It relates to the acceptance rule of the SGA.[76] The buyer has the right to inspect the goods before accepting the goods to deter-

[71] Article 2-608 of the UCC.
[72] *Ibid.*
[73] J.S Farren Co. v. Daremon & Bailey, 99 Md.323, Jones v.Asgrow Seed Co., 749F.Supp.836.
[74] Official Comment of Article 2-316 of the UCC.
[75] General Food Corporation v Valley Lea Dairies, Inc. and Lyons Creamery Cooperative Association, 771 F.2d 1093 (7th Cir.1985).
[76] Section 35 of the SGA.

mine whether it is conformity or not. In the case of a contract of sale by sample, of comparing the bulk with the sample. Except that the buyer previously examined the goods, he is not deemed to have accepted them unless he has had a reasonable opportunity of examining them.[77] If the buyer retains the goods and does not notice the seller during the reasonable time of rejection the goods, the buyer is deemed to have accepted them. There is no provision of revocation of acceptance likes the UCC Article 2-608. It is unfair when the buyer accepts the goods or is deemed to have accepted the goods, if he is not entitled to reject the goods for latent defect appear later. However, subject to Section 14 -2(B) that the goods condition shall be durability and if the goods are sold by guarantee, the buyer discovers the latent defect after using the goods or the goods become unusable before the guarantee time is ended, the seller is liable for non-conformity.[78] If the goods sold without guarantee, durability will be decided by the price, nature of the goods mentioned in Section 14-2(A).[79]

1.4. Product Liability

1.4.1. CISG

Regarding the product liability, the CISG does not govern "the liability of the seller for death or personal injury caused by the goods to any person."[80] Liability would be based

[77] Section 34 of the SGA.
[78] Section 14 (2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition-
(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or
(b) the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.
[79] *Ibid* at Paragraph (a).
[80] Article 5 of the CISG.

on two elements- (A) failure of the goods to conform to the contract and (B) damage resulting from this defect. According to ***Honnold,*** the CISG excludes the product liability is to limit the Convention's scope to avoid collision with the special protection rules of domestic law which provide for the consumer. He explained as follow:

"In many countries another important feature of product liability is the opportunity to sue a manufacturer or distributor with whom the plaintiff had no direct contractual relationship. The Convention (Art. 4) governs only...the rights and obligations of the seller and buyer arising from the contract of sale."[81]

Since product liability is excluded from the Convention's scope of application, it was suggested that the buyer's claims for pecuniary loss resulting from a claim against the buyer for personal injury caused by the goods should be outside the Convention as well. In one case, however, a court applied the Convention to that kind of claims. The court allowed as damages the cost to repair the goods (readily calculable as money damages) and an indemnification of buyer's obligation to a third party.[82] Liability for damage caused to property is not excluded under the CISG,[83] however, claims based on damage to property caused by the defective goods require the seller to have been notified within the reasonable time period referred to in Article 39.[84]

1.4.2. UCC

[81] John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999), p 72.
[82] Veneer cutting machine case, Germany 2 July 1993 Appellate Court Düsseldorf http://cisgw3.law.pace.edu/cases/930702g1.html (last accessed on 2. Jan 2017); See also at CISG Advisory Council Opinion No. 12.
[83] CISG Advisory Council Opinion No. 12, Article 74 of the CISG.
[84] Saltwater isolation tank case, Switzerland 26 April 1995 Commercial Court Züric, http://cisgw3.law.pace.edu/cases/950426s1.html (last accessed on 2 Jan 2017).

The UCC provides contract-based liability for product liability in most consumer sales contract. Products liability is generally considered a *strict liability,* the degree of care exercised by the manufacturer is irrelevant, as long as the product is proven to be defective, and they will be held liable for the harm resulting from the defect.[85]

There are three types of product defects: design defects, manufacturing defects, and defects in marketing. Design defects exist when a product is unreasonably dangerous to use due to a design flaw. Manufacturing defects occur during the construction or production of the item, so that only a few out of many products of the same type are flawed. Defects in marketing deal with improper instructions and failures to warn consumers of latent dangers in the product.

Product liability is found mainly in the Case law and in Article 2 of the Uniform Commercial Code, which deals with the implied and express warranties of merchantability in the sale of goods.[86]

In addition, Article 2-318 creates three alternatives to extent of seller's liability for non-conformity of goods for the protection of the third party who are non-buyer and consume or use the seller's goods. **Alternative A** extends seller liability of non-privity party who suffer personal injury due to the defect of the goods or breach of warranty: they may be family members or guest of the buyer. **Alternative B** extends the seller's liability for any express or implied warranty or promised remedy to any individual whom the seller reasonably could have foreseen would be harm by the goods and who suffered personal

[85]**Strict liability**, sometimes called absolute liability, is the legal responsibility for damages, or injury, even if the person found strictly liable was not at fault or negligent. In product liability cases involving injuries caused by manufactured goods, strict liability has had a major impact on litigation since the 1960s.

[86] Article 2-314, 315 of the UCC.

injury due to the defect of the goods. **Alternative C** covers not only the personal injury but also all injuries including economic loss and property damage.[87]

Greenman v. Yuba Power Products case[88]

Fact of the case

The donee received the combination power tool as a gift from his wife. The tool could be used as a saw, drill, and wood lathe. The donee brought his action after suffering serious injury while using the tool for its intended purpose. The donee gave defendants a written notice of the claimed breaches of warranties and then filed his complaint. The jury returned a verdict in favor of the retailer and in favor of the donee as against the manufacturer. The manufacturer and the donee both appealed from a judgment of the Superior Court of San Diego County (California).

Holding

In upholding the judgment of the trial court, the court held that the manufacturer was strictly liable in tort because the power tool that was placed on the market, without inspection for defects, had a hidden defect that caused injury. The court further held that there was no requirement of a contract between the manufacturer and the donee. The donee was not bound by the notice requirement of Cal. Code Civ. Proc. § 1769. It was sufficient that the donee proved that he was injured while using the product in a way it was intended and that his injury was as a result of a defect in the design and manufacture, of which he was not aware and which made the product unsafe for its intended use. The court affirmed

[87] Article 2-318 of the UCC.
[88] Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897.

the judgment against the manufacturer and the judgment in favor the retailer. The California Supreme Court became the first court to adopt strict tort liability for defective products.

Comment

A plaintiff may recover damages even if the seller has exercised all possible care in the preparation and sale of the product. There are three points to note from this case-

First, an injured party must prove the product caused the harm but do not have to prove exactly how the manufacturer was careless.

Second, buyers of the product, as well as injured guests, bystanders, and others with no direct relationship with the product may sue for damages caused by the product.

Third, an injured party must prove that the item was defective, that the defect proximately caused the injury, and that the defect rendered the product unreasonably dangerous.

1.4.3. UK Law

The product liability under the UK law is set forth in section 14 as the seller's liability for the state and condition of the quality of goods as fitness for purpose. The manufacturer liability for the goods are stated as the goods condition shall be appearance and finish, freedom from minor defects, safety and durability.[89] Therefore, the good which is unsafe to use or which should be in good condition for a reasonable period is broken in a short time are included in the scope of product liability. According to ***M.G. Bridge***,

> "The question of which constitutes a defect has to be considered in the light of safety standards issued by the public body. Nevertheless, simply because a relevant industry

[89] Section 14 (2-B) of the SGA.

standard has not yet regulated the presence or quality of particular ingredients in the goods does not mean that the goods are of satisfactory quality despite containing harmful ingredients." [90]

Therefore, generally, the goods which complied with the public safety standard is satisfactory quality. However, the manufacturer cannot exclude the product liability if the goods harm the consumer, even the goods complied with the public safety rule.

1.5. Buyer's Knowledge of Non-conformity

1.5.1. CISG

According to Article 35(3), the seller is not liable for a lack of conformity of implied terms if the buyer "knew or could not have been unaware" of the non-conformity at the time of the conclusion of the contract. If the buyer did not rely, or that it was unreasonable for him to rely on the seller's skill and judgement, the seller has no liability. The seller is not liable for failing to deliver goods which did not fit for a particular purpose, even if the particular purpose for which the goods have been purchased has in fact been expressly or impliedly made known to him." [91]

The circumstances may show, for example, that the buyer selected the goods by brand name or that he described the goods desired in terms of highly technical specifications. In such a situation, it may be held that the buyer had not relied on the seller's skill and judgment in making the purchase. If the seller knew, the goods ordered by the buyer would not be satisfactory for the particular purpose for which they have been ordered it would seem that he would have to disclose this fact to the buyer. If the buyer went ahead

[90] Michael G. Bridge, The Sale of Goods, 3rd ed., Oxford University Press (2014), pp 377-378.
[91] Article 35 (3) of the CISG.

and purchased the goods it would then be clear that he did not rely on the seller's skill and judgment. [92]

In the ***Sports Clothing*** case, under Article 35(3), a buyer who elects to purchase goods despite an obvious lack of conformity must accept the goods "as is".[93] Also in the ***Hydraulic Press*** case, the buyer used to buy the same type of machine in question from the seller a year earlier. Thereupon, the tribunal concluded that the buyer had been aware of defects of the machine and as it did not mention any objection in the contract regarding such defects, the buyer had impliedly accepted them. Therefore, the tribunal ruled that the seller was exempted from liability for delivering goods with certain defects. [94]

However, if the seller knew the defect of the goods and failure to disclose to the buyer at the time of making the contract, the seller cannot excuse from the liability for non-conformity. In the ***Used Car*** case, the seller is liable for non-conformity of license term and mileage stated in the contract. It is clear that the seller would know about a used car had been licensed two years earlier than indicated in the cars documents. In addition, the seller knew that the odometer understated the cars actual mileage but did not disclose these facts to the buyer. The seller was liable for the lack of conformity even if the buyer irrespective of knowledge of the buyer as the used car dealer. A fraudulent seller cannot rely

[92] Teija Poikela, *Conformity of Goods in the 1980 United Nations Convention of Contracts for the International Sale of Goods,* Nordic Journal of Commercial Law (2003/1), http://cisgw3.law.pace.edu/cisg/biblio/poikela.html#iv (last accessed on 2 Jan 2017).
[93] Sport clothing case, Germany 5 April 1995 District Court Landshut, http://cisgw3.law.pace.edu/cases/950405g1.html (last accessed on 2 Jan 2017).
[94] Hydraulic press case, China 23 December 2002 CIETAC Arbitration proceeding, http://cisgw3.law.pace.edu/cases/021223c1.html (last accessed on 2 Jan 2017).

on the exception under Article 35(3), subject to the general principles of good faith embodied in Articles 40 and 7(1) CISG. Even a very negligent buyer deserves more protection than a fraudulent seller does. [95]

1.5.2. UCC

Under the UCC, the seller has no liability for non-conformity if the buyer has examined the goods, sample, or model as fully desired, before making a contract. The seller is excluded from liability for breach of implied terms if the buyer refused to inspect the goods which should have revealed the defect if the buyer inspects before signing the contract.[96] In the case of implied terms for fitness for purpose, the seller has liability for non-conformity of the goods if the buyer relies on the seller's skill or judgment to select or furnish suitable goods. Therefore, it is the same as CISG, if the buyer did not rely on the seller's skill there is no liability on the seller. [97]

1.5.3. UK Law

Under the SGA, the seller excludes his liability for implied terms as to satisfactory quality which the goods' quality especially draws attention to the buyer or if the buyer examines the goods or sample of the goods before the making of the contract. In such case, the doctrine of *caveat emptor* will apply. **In *Bartlett v. Sidney Marcus Ltd,*** the buyer purchased a second-hand car from the car dealer. The buyer had told the condition of the car and the seller gave him the choice of either taking the car as it was and knocking £25 off

[95] Used Car case, Germany 21 May 1996 Appellate Court Köln http://cisgw3.law.pace.edu/cases/960521g1.html (last accessed on 2 Jan 2017).
[96] Article 2-316 (3) (b) of the UCC.
[97] Article 2-315 of the UCC.

the stated price or he would repair it and charge the full price. The buyer chose to take it with the fault and get the discount. Later, however, the fault would cost £84 to repair and it cost more than the discount. The buyer sought to bring a claim based on non-conformity under Section 14. It was held that the seller has no liability for non-conformity as he had brought the defect to the attention of the buyer and the buyer know the condition of the car before making a contract.[98]

Summary

The scope of seller liability for non-conformity under the three legal systems discussed above is the overview of the liability of the seller according to the law when the goods delivered is differed from the agreed terms of the contract. If there is no other agreement, the goods must be in accordance with the description, or sample or model, and possess the satisfactory quality (merchantable quality in the UCC and satisfactory quality under the SGA). The seller's liability extent to the latent defect of the goods after acceptance. The seller has liability for consumer and third parties. The UK Law separates the seller liability for non-conforming goods in business sales and consumer sales contract. The UCC does not have such provisions.

[98] Bartlett v. Sidney Marcus Ltd, [1965] 1WLR 1013.

CHAPTER II

Buyer's Remedies under the CISG, UCC and UK Law

Introduction

Depending on the condition of the defective goods, the remedies can be different. And depending on the nature of sales contract, (international sales, business sales or consumer sales) different set of rules have to follow. The remedies that the buyer entitled can be divided into three groups. First, the buyer may ask for specific performance by either redelivery of conforming goods or repair. Second, he may claim damages for loss or reduction of the price. Third, he may reject the defective goods and avoid the contract. In each legal system, the remedies are based on the seriousness of the breach (fundamental breach or non-fundamental breach) and whether the buyer is entitled to reject the non-conforming goods. The following discussion will be the available remedies for the buyer: specific performance, damages and termination under the three systems; which conditions are beyond the scope of seller's liability, and the court's recognition of each remedy in all three legal systems.

2.1. Specific Performance

2.1.1. CISG

Under the CISG, specific performance of the breaching seller may arise in the form of the seller's right to substitute delivery and repair.[99] To require performance of substitute delivery, there are three conditions: the non-conformity of goods must be a fundamental breach, the buyer must give notice to the seller during a reasonable time and the

[99] Article 46 of the CISG.

goods must be able to return to the seller.[100]

The right to claim specific performance for non-conformity available to the buyer is stated in Article 46 as follows:

(2) If the goods do not conform to the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform to the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Under Article 46, specific performance of the breaching seller may arise in the form of the seller's right to substitute delivery and repair.[101] To require performance of substitute delivery, the non-conforming goods must constitute a *fundamental breach*.[102] When a fundamental breach has occurred, the buyer may ask the seller to redeliver substitute goods by either in conjunction with notice given under Article 39 or within a reasonable time.[103] It has to be noted that the right to require delivery of substitute goods can in principle only be exercised if the buyer is able to return the delivered goods in substantially the condition in which he received them.

The right to require repair is provided for in Article 46(3). When the breach is not

[100] Article 46(2) of the CISG.
[101] Article 46 (3) of the CISG.
[102] Article 25 of the CISG.
[103] Article 39 of the CISG.

fundamental, the buyer has recourse to repair. It is limited to situations where it is reasonable to repair under the circumstances. This means when repair by the seller is very onerous, the buyer cannot claim repair, especially when it may be possible for the buyer himself to do the repair. It is also unreasonable to require repair when the cost is higher than the cost of buying new goods. The reasonableness of the demand is judged according to the circumstances surrounding the contract and the conflicting interests of the parties. [104]

Article 28 limits the availability of specific performance which states-

"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

According to Article 28, a court is not required to grant specific performance of a foreign contract unless it would require specific performance of a similar domestic contract. This limitation was the result of a compromise between civil law countries, which tend to grant specific performance more routinely, and common law countries, which tend to view specific performance as an extraordinary remedy. A *"court is not bound"* to order the specific performance indicates that the decision is at the discretion of the court. As the CISG allows the court to consult with their own law, therefore, courts of common law countries can avoid ordering specific performance unless it thinks specific performance should be granted.

[104] Article 46 (3) of the CISG.

2.1.2. UCC

Under the UCC, the buyer's right of specific performance is granted only where the goods are unique or proper circumstances.[105] It has to pass the *uniqueness* test and *other proper circumstances* test. It is the extraordinary remedy where the monetary remedy or damages are not enough for the loss of the buyer. The court has the discretionary power to grant the specific relief if it thinks fit.

Specific performance includes a right to obtain substitute goods from other market and a right to ask the seller to tender the goods. Specific performance is applied when the buyer cannot buy from other marketplaces of such goods identified to the contract after reasonable effort he is unable to get such goods from other sources. The circumstances reasonably indicate that such effort will be unavailing. If the goods have been shipped under reservation and satisfaction of the security, interest in them has been made or tendered.[106]

In ***Colorado-Ute Electric Ass'n v. Envirotech Corp,*** a specially designed pollution-control device "unique" and "essentially irreplaceable" once installed. Despite the fact that, five other companies had initially bid on the project, no showing was made that another company could not bring the installed unit's performance to contract warranties, the breach for which specific performance was sought. The court implicitly recognized the availability of substitute service when it deemed the unit "essentially irreplaceable." Repair or replacement was not impossible. Therefore, in view of the irreparable harm Colorado-Ute would suffer if the plant were shut down for air quality violations, coupled with the uniqueness of the equipment and the uncertainty as to future damages, the Court finds that

[105] Article 2-716(1) of the UCC.
[106] Article 2-716(3) of the UCC.

specific performance is the appropriate remedy. [107]

Specific performance was granted even though the goods was not unique. It falls under the category of "other proper circumstances". In ***Laclede Gas Co. V. Amoco Oil Co.,*** the dispute involved a long-term requirements contract for the delivery of propane. In remanding the case with instructions to enter a decree of specific performance, the court found that propane was readily available on the open market. No evidence was presented to show that the quantity available was insufficient to satisfy the buyer's requirements. The court also accepted expert testimony that the buyer "probably" could not obtain another long-term contract. Determining that the buyer would face "considerable expense and trouble" in obtaining new contracts, the court held that specific performance was the proper remedy.[108]

2.1.3. UK Law

Specific performance is a decree by the court to impose a party to perform his contractual obligations.[109] Specific performance in the sales contract is usually an action for breach of contract to deliver goods to a buyer.[110] Specific performance for the seller is usually in the form of action for the price under Section 49 of the Sale of Goods Act, 1979.

Under the SGA, specific performance of the terms of a contract is an extraordinary remedy and it is granted in very limited circumstances. The reason for this is, in a contract of sale of goods, damages will be an adequate remedy since the buyer can go out and buy

[107] Colorado-Ute Electric Ass'n v. Envirotech Corp, 524 F. Supp. 1152 (D. Colo. 1981) U.S. District Court for the District of Colorado.
[108] Laclede Gas Co. V. Amoco Oil Co., 33 522 F.2d 33 (8th Cir. 1975) (United States Court of Appeals, Eighth Circuit).
[109] Section 52(1) of the SGA.
[110] *Ibid.*

substitute goods and be adequately compensated by a money payment.[111] Trace back to the history of common law, specific performance is granted by the court of equity. At common law, the court of equity refused to grant an injunction or issue of a decree for specific performance when it was possible for the wronged party to find an adequate remedy at law. The remedy of specific performance traditionally has been limited to those situations in which monetary damages will not put the injured party as good a position as enforcement of contractual obligation.[112] A leading case in which specific performance was granted was ***Behnke v Bede Shipping***, in which the subject matter of the contract was a ship.[113]

This position is reflected in Section 52(1) of the SGA, which reads:

"In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decrees direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."[114]

Section 52 (1) limits specific performance to those circumstances involving *specific or ascertained* goods. In other words, Section 52(1) only clearly applies to goods "identified and agreed on at the time of making the sales contract" or "identified in accordance with the agreement at the time of making the sales contract." [115]

However, in a leading modern case where the question arose, in fact, specific performance of a contract for uncertain goods was granted. In the case of ***Sky Petroleum v.***

---

[111] David Qughton & Martin Davis, Source Book on Contract Law, 2nd ed., Cavendish Publishing, London, 2000, p 528.
[112] Michael A. Schmitt & Michael Pasterczyk, *Specific Performance under the Uniform Commercial Code-Will Liberalism Prevail?*, 26 DePaul L.Rev.54 (1976), http://via.library.depaul.edu/law-review/vol26/iss1/4 (last accessed on 2 Jan 2017).
[113] Behnke v Bede Shipping, (1927) 27 Ll.L. Rep. 24.
[114] Section 52 of the SGA.
[115] Section 52(1) of the SGA.

VIP Petroleum, despite the goods are uncertain goods the judge apply its discretion and granted the specific performance on the ground that it is impossible for the buyer to go out the market and make a contract with the other seller due to the unusual state of the market made. Specific performance of supplying petrol is the appropriate remedy and damages were not adequate.[116]

As mentioned above, in order to grant specific performance, the court would have taken consideration of two criteria: the uniqueness of the goods and adequacy of damages. Moreover, the power to grant specific performance is at the court's discretion. Therefore, it should be noted that the court may refuse to grant specific performance under reasonable circumstances, for example, performance of contract which required court supervision. In ***Stickney v. Keeble, Lord Parker,*** explaining the rule: "Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do."[117]

Specific Performance in the consumer sales contract is granted under Section 23 of the Consumer Right Act, 2015. According to new Law, the consumer buyer has the right to require the seller to repair or replace the goods within a reasonable time. The question of reasonable time is to be determined by reference to the nature of the goods and the purpose for the goods was acquired.[118]

There are two limitations on the right to repair or replacement - the buyer must not require the seller to repair or replace if that remedy is impossible or disproportionate in comparison to other remedies. Second-hand good is a good example of the impossibility

[116] Sky Petroleum v. VIP Petroleum, [1974] 1 All ER 954.
[117] Stickney v. Keeble, [1915] A.C. 386 at 419.
[118] Section 48B (5) of the SGA; See also M.G. Bridge, The Sale of Goods, 3rd ed., Oxford University Press, 2014, p 636.

for the replacement.[119]

2.2. Damages

Damages is a monetary compensation for loss suffered as a consequence of breach of contract. Generally, damages divided into four kinds: general damages,[120] special damages,[121] liquidated damages and punitive damages.

2.2.1. CISG

The right to obtain damages for breach of contract plays an important role within the CISG. Buyer can claims damages as provided for in Article 74 to 77.[122] The scope of damages is provided for in Article 74, which states that:

> *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."*

i. General Damages

The purpose of granting damages remedy is to place the buyer at the same position if the seller did not breach the contract. Damages cover an equal sum of loss, including

[119] *Ibid*.
[120] General damages inflated with direct damages of the UCC.
[121] The UK's special damages inflated with the UCC's incidental and consequential damages.
[122] Article 45 of the CISG.

loss of profit caused by breach of contract. According to ***Jeffrey S. Sutton,*** "this provision seeks to give the injured party the "benefit of the bargain," as measured by expectation interests as well as reliance expenditures. The reference to "loss of profit" in article 74 creates this inference. In addition, the Commentary to article 70, an earlier version of article 74, of the 1978 Draft Convention (hereinafter 1978 Commentary) states the rule's goal of "placing the injured party in the same economic position he would have been in if the contract had been performed." [123]

In ***Castel Electronics Pty. Ltd. v. Toshiba Singapore Pte. Ltd.***, the Court found that the seller had breached the implied warranty of fitness for purpose or merchantable quality arising under Article 35(2) (a) CISG. With respect to damages, the Court awarded the buyer the costs incurred as a result of non-conformity of the goods, as well as loss of profit according to Article 74 of the CISG.[124] The right to receive interest is also available in addition to the right to damages.[125]

ii. Consequential Damages

The buyer's loss must have suffered as a consequence of the breach. Article 74 is particularly significant as regards the indirect consequences of breach. Such claims for "consequential damages" can include, e.g. compensation for a buyer, lost profits (pure economic loss) as well as physical damage to buyer's property, just as a seller will also

[123] Jeffrey S. Sutton, Measuring Damages under the United Nations Convention on the International Sale of Goods, 50 Ohio S. L.J. (1989) 737-752, http://cisgw3.law.pace.edu/cisg/biblio/sutton.html (last accessed on 2 Jan 2017).
[124] Castel Electronics Pty Ltd v Toshiba Singapore Pte. Ltd, Australia 20 April 2011 Federal Court http://cisgw3.law.pace.edu/cases/110420a2.html (last accessed on 2 Jan 2017).
[125] Article 78 of the CISG.

sometimes be entitled to compensation for consequential loss. In addition, damages sometimes characterized as "incidental" are easily subsumed under the general Article 74 rule. On the other hand, damages for lost profits may sometimes be limited or denied, *inter alia*, by the Convention's foreseeability and/or mitigation rules.[126]

In ***Jeans case,*** a Brazilian seller, the plaintiff, delivered jeans to a German buyer, the defendant. When inspecting the delivered jeans, the buyer found the quantity to be incorrect. The jeans were also incorrectly labeled and the sizes were wrong. Some pairs had also become moldy. The seller has committed a fundamental breach of contract under Articles 25, 35(1) CISG. The breach results from the fact that the goods delivered by seller did not comply with the agreed quality. The buyer declared the contract avoided and placed the jeans at the seller's disposal. When the seller refused to take the jeans back, the buyer sold them. The seller sued the buyer for the original purchase price and the buyer offset the claims with its own claim for damages. The buyer is not only entitled to set-off the claim for damages for breach of contract against the purchase price but also against the claim for payment of the profits from the sale.[127]

iii. Liquidated Damages

In many sale of goods contracts, the parties may agree on the terms of damages for breach of contract. They may limit the scope of liability in the event that a party terminates the contract because of certain events. In any case, with regard to the CISG, it is undisputed that Article 6 allows the incorporation of an agreed sum into the contract. It is

[126] Joseph Lookofsky, Damages for Breach, Published in J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000) 1-192. http://www.cisg.law.pace.edu/cisg/biblio/loo74.html (last accessed on 2 Jan 2017).
[127] Jeans Case, Germany 26 November 1999 Appellate Court Hamburg, http://cisgw3.law.pace.edu/cases/991126g1.html (last accessed on 2 Jan 2017).

also undisputed that the CISG governs the formation of the agreed sums. The remaining difficulties primarily pertain to the protection of the debtor.[128]

iv. Punitive Damages

The CISG does not provide for the payment of punitive damages. Punitive damages, also called exemplary damages, are sums awarded in excess of any compensatory or nominal damages in order to punish a party for outrageous misconduct. Such damages may not be awarded under Article 74 because it limits damages to "a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."[129] Furthermore, awarding punitive damages is precluded under the CISG even if the domestic law permits them for breach of contract because the CISG does not provide for their payment. However, parties may agree to allow a court or tribunal to award punitive damages, to the extent permitted under the domestic applicable law.[130]

v. Principles related to Damages

The scope of seller's liability for damages is subject to three principles. First, ***causation***, the loss must be caused by the breach of contract. Second, ***foreseeability,*** the loss must be foreseeable at the time of making contract. Third, ***mitigation***, the buyer has the duty to mitigate the loss. These three principles play a crucial role in deciding if the seller is liable to pay damages and the amount of claimed damages.

---

[128] Pascal Hachem, ACIArb, Agreed Sums in CISG Contracts, Belgrade Law Review, Year LIX (2011) no. 3 pp. 140-149, http://www.cisg.law.pace.edu/cisg/biblio/hachem1.html (last accessed on 2 Jan 2017).
[129] Article 74 of the CISG.
[130] CISG AC, Opinion No. 6: Calculation of Damages under Article 74 (Rapporteur: Gotanda), Black Letter Rule 1.

The first principle is ***causation***; the loss suffered by the buyer must be a consequence of the breach. The burden of proof is on the buyer that he suffered or will suffer from reasonable certainty the loss claimed. If the buyer can meet the burden of proving damages with reasonable certainty, they then have the burden to prove the extent of damages, but need not do so with mathematical precision.[131] The buyer must only provide a basis upon which a tribunal can reasonably estimate the extent of damages. The buyer may be able to do this through, for example, the use of expert testimony, economic and financial data, market surveys and analyses, or business records of similar enterprises. This requirement strikes a balance between the need for evidence upon which tribunals may base an award of damages and the recognition that the difficulty of proving that any damages, in fact arise from the breaching party's wrongful act.[132]

The second principle is ***foreseeability,*** which means damages which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.[133] The seller is liable for the loss which he foresaw at the time of making a contract.

"So far as the required degree of probability of loss is concerned, the CISG refers to foreseeability of the loss "as a *possible* consequence of the breach" and this provision has, on occasions, been interpreted as imposing a more extensive liability in comparison with those systems which provide for foreseeability of loss "as a *probable* result" of the breach." Foreseeability is concerned with the knowledge of the seller. In one case, foreseeability

[131] Rheinland Versicherungen v. Atlarex, Italy 12 July 2000 District Court Vigevano http://cisgw3.law.pace.edu/cases/000712i3.html (last accessed on 2 Jan 2017).
[132] CISG Advisory Council Opinion No. 6, http://www.cisg.law.pace.edu/cisg/CISG-AC-op6.html (last accessed on 2 Jan 2017).
[133] Djakhongir Saidov, The Law of Damages in International Sales: The CISG and other International Instruments, Hart Publishing (2008), pp 120-121. http://www.cisg.law.pace.edu/cisg/biblio/saidov5.html (last accessed on 2 Jan 2017).

refers to the loss of profit foreseeable at the time of signing the contract.[134]

The third principle is ***mitigation***; a party who is subject to a breach of contract must take "measures which are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach.[135] If a buyer fails to take measures to mitigate damages, the party in breach may claim a reduction in damages in the amount by which the loss should have been mitigated.[136]

2.2.2. UCC

i. Direct Damages

Relating to the direct damages, Article 2-714 (1) of the UCC states:

> *"Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."*

When the buyer has accepted non-conforming goods and given notice properly, the buyer has the right to damages which cover loss resulting in the ordinary course of events from the breach of the seller.[137] In other words, the buyer has the duties to fulfill in order to entitle to the claim damages, i.e. to notify the seller. The entitled damages under this Article 2-714 is the loss suffered from the non-conformity. It includes the loss resulting from the seller's breach of contract. In this sense, the loss due to the buyer fault may make

[134] Macromex Srl. v. Globex International, Inc., United States 16 April 2008 Federal District Court [New York] http://cisgw3.law.pace.edu/cases/080416u1.html (last accessed on 2 Jan 2017).
[135] Article 77 of the CISG.
[136] Aluminium Hydroxide case, Germany 21 August 1997 Appellate Court Köln, http://cisgw3.law.pace.edu/cases/970821g1.html (last accessed on 2 Jan 2017).
[137] Article 2-714 of the UCC.

the seller excluded from his liability.

The "non-conformity" includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non-conformity, the buyer is permitted to recover for his loss "in any manner which is reasonable."[138]

ii. Incidental and Consequential Damages

Subject to foreseeability and mitigation rules, the buyer also entitled to recover incidental damages and consequential damages. [139]

Incidental damages is the expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breaches.[140] It is intended to provide reimbursement for the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked, or in connection with effecting cover where the breach of the contract lies in non-conformity or non-delivery of the goods. The incidental damages listed are not intended to be exhaustive but are merely illustrative of the typical kinds of incidental damage.[141]

---

[138] Para 2 of the Official Comment on Article 2-714 of the UCC.
[139] Article 2-715. (1) of the UCC, Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
(2) Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.
[140] Article 2-715(1) of the UCC.
[141] Para 1 of Official Comment on Article 2-715 of the UCC.

The buyer is entitled, in an appropriate case, any consequential damages which are the result of the seller's breach. Although the old rule at common law which made the seller liable for all consequential damages of which he had "reason to know" in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise.[142]

iii. Liquated Damages and Punitive Damages

The UCC allows the parties to the contract to make an agreement on damages amount. A seller who wants to avoid consequential damages can set the cap of damages by agreement. The amount of the agreed damages must be reasonable for the loss caused by the breach. If the amount of damages in the contract is unreasonable, such liquidated damages are void as a penalty. Article 2-718 (1) states:

> *"Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."*[143]

Accordingly, liquidated damages are permitted if it is "reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss." Liquidated damages are not offset by mitigatable amounts.

Unreasonable agreed remedy in sales contract takes in various form. For instance, regardless of the loss cause by defective goods, the damages available for the buyer is the

[142] Para 2 of Official Comment on Article 2-715 of the UCC.
[143] Article 2-718 (1) of the UCC.

agreed amount of compensation in the contract. Such compensation may not sufficient or even very little amount compared to the loss.

The punitive damages in sales contract may also in the form of cancellation fees that the parties will have to pay for breach of contract. If the amount of such kind of cancellation fees is unreasonably large amount to pay by one party, the UCC does not allow the punitive damages.

iv. Principles related to Damages

Causation under the UCC sets the principle of seller's liability for the loss which the buyer suffered resulting in the ordinary course of events from the breach of the seller.

Foreseeability test can be seen in the provision for consequential damages. The buyer is entitled consequential damages for any loss which the seller had *reason to know* at the time of conclusion of the contract. The buyer is also entitled to injury to person and property if it results from any breach of warranty.[144] The situation of *reason to know* is that it is natural for the seller to know the loss that the buyer will be suffered, for instance- the seller knows the manufacturer buyer's situation that if the delivered machine is defective the manufacturer will stop the producing process and will lose the profit. It can also cause personal injury to the employees of the manufacturer and his property.

Relating to *foreseeability*, the UCC refers to the ***Hadley v Baxendale*** case, which is a leading case of foreseeability rule in contract law.[145]

In ***Prutch v. Ford Motor Co.,*** the buyer buys a tractor, plow, disc harrow, and hay baler to use in the farm. Due to the defective of the tractor and tools, when using in the

[144] Article 2-725 of the UCC.
[145] Hadley v. Baxendale [1854] EWHC Exch. J70.

farm, it affected the crops. The buyer's claim for damages was based upon the facts that the failure of the seller implements to comply with warranties and adversely affected the crops which were produced or harvested by using of those implements in the year of the sale.

Regarding the issue of foreseeability, a manufacturer seller knows the purpose of using the product and the consequences of the defect of the products. Thus, the seller reasonably can be expected to foresee that defects in those products may cause crop losses. In such circumstances, therefore, the manufacturer should not escape liability by arguing that it did not actually foresee probable consequences which it should have foreseen.[146]

However, in ***Lenox, Inc. v. Triangle Auto Alarm,*** the foreseeability of loss due to the defective system of auto alarm installed in the car does not extend to the loss of other valuable property.

In this case, the buyer who is a jewelry salesman bought the alarm system installed in his car to help protect the jewelry samples he occasionally stored in the trunk of his car. When his car and the jewelry samples were stolen, the buyer claims damages for breach of express and implied contractual warranties, respectively and for the negligent installation of the auto alarm by Triangle (the seller), the automobile and jewelry samples would not have been stolen.

Based on the facts in this case, it is not foreseeable for the seller that the buyer will store the valuable jewel in the trunk of the car. The loss of valuable jewelry was not "highly foreseeable" under the circumstances because the buyer was never disclosed to seller that its alarm was to protect valuable commercial property. Thus, the risk of theft of

[146] Prutch v. Ford Motor Co., 618 P.2d 657 (1980) (Supreme Court of Colorado, En Banc).

a set of jewelry samples was not one of the "hazards" against which defendant could reasonably be expected to protect.[147]

The buyer has the duty to mitigate the loss in order to be entitled damages. Pursuant to Article 2-715(2), the buyer is entitled to the loss which could not reasonably be prevented by cover or otherwise. In ***Accent Commercial Furniture, Inc. v P. Schneider & Assoc.,*** the defendant could only recover the consequential damages "which could not reasonably be prevented by cover or otherwise."[148] The buyer have to try to make the loss as less as he can by all means. For instance, the perishable goods are delivered to the buyer, instead of redelivering the goods to the seller, after notifying to the seller, the buyer should mitigate the loss by selling the goods at lower price.

In ***Federal Signal Corp. v. Safety Factors,*** in using the "by cover or otherwise" language, UCC 2-715(2) (a) implies that any means of reasonable mitigation will satisfy its requirements. As a broader concept, mitigation includes other measures such as repairing the goods so that they are usable in a breach of warranty situation. Reasonable but unsuccessful efforts to mitigate do not preclude an injured party from recovering. Thus, UCC 2-715 allows for other reasonable mitigation efforts such as repair. As for the evidence, here Safety Factors presented evidence that the repairs it undertook were reasonable. Buyer presented no evidence that the products were similar enough to make cover reasonable or that the repair and replacement expenses were not reasonable. As a matter of both fact and law that the buyer could have and yet did not mitigate its damages, and on that basis the Court denied any consequential damages for lost rentals and sales.[149]

---

[147] Lenox, Inc. v. Triangle Auto Alarm, 738 F. Supp. 262 (N.D. Ill. 1990), (U.S. District Court for the Northern District of Illinois).
[148] Accent Commercial Furniture, Inc. v P. Schneider & Assoc., PLLC 2013 NY Slip Op 07106 (Decided on October 31, 2013).
[149] Federal Signal Corp. v. Safety Factors, No. 60970-5. En Banc. December 15, 1994.

2.2.3. UK Law

Damages is a substitutional remedy. The breach of primary obligation gives rise to a secondary obligation to pay damages. The aim is to provide the injured party with the sum of money necessary to put him in the position in which he would have been had the contract performed. [150] Where the seller delivered the non-conforming goods, the measure of damages for breach of contract are based on the rejection or acceptance the non-conforming goods. Where the buyer accepts the non-conforming goods, the right to damages is provided for in Section 53 (1) (b), which states as follows:

> *"Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—*
>
> *(b) maintain an action against the seller for damages for the breach of warranty."*[151]

Under this provision, the buyer is entitled to claim damages for non-conforming goods. There are three conditions which the buyer can claim damages; where the breach of warranty by the seller or even the breach of condition, but the buyer chooses to treat the breach as a warranty and the buyer is not entitled to reject the non-conforming goods.[152]

Normally, there are two forms of loss that caused by the breach of contract. The primary loss suffered from the consequences of a breach of contract and the secondary loss. It is possible for the buyer to claim damages not only for nonconforming goods but also where other loss has been suffered as a result of the breach of contract. This is referred to

[150] Solène Rowan, Remedies for Breach of Contract: A comparative Analysis of Protection of Performance, Oxford University Press, 2012, p 110.
[151] Section 53(1) of the SGA.
[152] Section 53 of the SGA.

special loss damages and it is limited by the rule of remoteness or foreseeability.[153]

i. Direct Damages

Direct damages is awarded for the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.[154] The object of awarding damages to the buyer is to put him in the position he would have been in if the contract had been performed and is not to punish the seller who delivered the non-conforming goods. In this respect, *Lord Atkinson's* "compensation principles" in ***Wertheim v. Chicoutimi Pulp*** case is that "the rule for expectation compensation should be to place the plaintiff back into a position which they would have been, so far as money can do, had the contract been fulfilled /performed in the first place." The Court held that the object of contract law is to compensate the parties for their ***actual loss***. If there is no actual loss from a breach of contract, there should be no damages.[155]

According to Section 53, the loss must be the estimated loss that resulted of the breach of contract. Where nonconforming goods are delivered and accepted by the buyer, the damages refer to the difference in value what the goods ought to have been worth if they had conformed to the contract and, in fact, they are worth at the time of delivery in consequence of the breach of contract. According to Section 53(3): "In the case of breach of warranty of quality, such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty."

With this respect, M.G Bridge discusses as follows:

[153] Section 54 of the SGA.
[154] Section 53(1) of the SGA.
[155] Wertheim v. Chicoutimi Pulp [1911] AC 301.

"The contract price does not set the ceiling of recovery, in that the buyer is not to be deprived of a later market rise in the value of goods of the kind supply, If, therefore, the market has so far risen that, even in their defective state, the goods are still worth more than the contract price, damages will nevertheless be awarded according to the difference between their present value and the enhances value they would have had if they had conformed to the contract. Where the market falls, the buyer's margin of recovery will commensurately diminish and he will have to take the market loss." [156]

ii. Special Damages

According to Section 54 of the SGA, the buyer has the right to claim special damages for indirect loss where the non-conforming goods cause personal injury or property damage.

> *"Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."*

In ***Saipol SA v. Inerco Trade SA*** case, the buyer claimed for direct damages and special damages as the consequences of the non-conformity of the goods.

Inerco Trade SA (the "Seller") agreed to sell and Saipol SA (the "buyer") agreed to purchase 3,000 MT of Ukrainian crude sunflower oil. The seller shipped the Product, as part of a total cargo of about 16,600 MT of Ukrainian crude sunflower seed oil, on board the MT Selandra Swan (the "vessel") on 16 March 2008. The balance of the cargo loaded

[156] M.G. Bridge, The Sale of Goods, 3rd ed., Oxford University Press, 2014, p 702.

onto the vessel (approximately 13,600 MT) was shipped by four other sellers. Before shipment, all five consignments of cargo had been comingled and the whole cargo was loaded, comingled into the ship's tanks ("the entire cargo").

The buyer claimed damages covers: the difference in value between sound and contaminated Product, the costs incurred by the buyer in respect of storage and financing of the contaminated Product and the sums paid by the buyer to sub-purchasers to whom the contaminated Product had been sold. In the Tribunal decision, the buyer was only entitled to (i) damages representing the difference in value between the Products as it was warranted and its actual value and (ii) damages in respect of storage and financing costs of the contaminated Product. The Tribunal held that the Seller's liability was confined to the 3,000 MT it had sold to the buyer and did not extend to the entire cargo.

The two questions of law brought up to the Court of Appeal are: (1) Whether the Sale of Goods Act, 1979, limited the recoverable damages to the difference in value between sound and defective goods. (2) Whether the comingling of the respondent's 3,000 MT with the other sellers' parcels had the effect that the respondent was not liable for third party liabilities or for expenses. The Court held that

"The SGA did not limit the recoverable damages to the difference in value between sound and defective goods. It further held that the Board had erred in making its award based on S. 53(3) of the SGA, particularly in circumstances where the Buyer had advanced its case pursuant to S. 53(2) and S. 54 of the SGA. The Court stated that under S. 53(2) of the SGA, there can be, depending of course on the facts of the situation, a claim for "consequential" losses on the basis that such losses are those that will result in the usual course of things i.e. losses that fall under the first limb of ***Hadley v. Baxendale****. In such circumstances, it is not necessary to consider whether the losses claimed were within the special*

contemplation of the parties, or whether the defending party had assumed responsibility for such losses at the time of contracting (i.e. it is not necessary to consider the second limb of Hadley v Baxendale); the point simply does not arise."[157]

Comment: This case indicates that the buyer is entitled to not only the direct damages but also the special damages.

iii. Liquidated Damages and Punitive Damages

Regarding the liquidated damages, parties to a contract may legitimately agree on the amount of damages to be paid in the event of a breach and provide for this in their contract terms. It is a desire to simplify trials by avoiding difficult issue of proof. Nevertheless, the liquidated damages clause should not become a penalty clause, which cannot be enforced by the claimant.[158]

In ***Dunlop Pneumatic Tyre Co.Ltd v New Garage and Motor Co.Ltd.,*** House of Lord's made a decision which lays down a number of rules of interpretation for determining whether the clause is a penalty. One of them is "though the parties to a contract who use the words "penalty" or "liquidated damages" may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages." Regarding the sum of damages, it will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach. (b) It will be held to be a penalty if the breach

[157] *Saipol SA v. Inerco Trade SA* [2014] EWHC 2211.
http://www.bailii.org/ew/cases/EWHC/Comm/2014/2211.html.(Last accessed on 2 Jan 2017)
[158] M.G. Bridge, at pp 645-646.

consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid. (c) There is a presumption (but no more) that it is a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of the several events, some of which may occasion serious and others but trifling damage." [159]

iv. Principles related to Damages

Under the UK law, the right to claim damages is based on whether the breach of contract is condition or warranty. Delivery of non-conformity of goods of description, quality or sample is a breach of condition.[160] However, the buyer can treat the breach of condition as a breach of warranty.[161] There are three conditions which the buyer can claim damages; where the breach of warranty by the seller[162]or even the breach of condition, but the buyer chooses to treat the breach as a warranty [163]and the buyer is not entitled to reject the non-conforming goods.[164]

The loss must be the estimated loss that resulted in the breach of contract. The main principles of *remoteness* were laid down in the case of ***Hadley v. Baxendale,*** which provides that a claimant will only be able to recover

1. Losses arising naturally as the consequences of the breach of contract

2. Losses which may reasonably be supposed to have been in the knowledge of the parties at the time they made the contract as a probable result of the breach.[165]

---

[159] Dunlop Pneumatic Tyre Company Ltd v. New Garage and Motor Company Ltd; HL 1 Jul 1914.
[160] Section 13, 14 and 15 of the SGA.
[161] Section 11 of the SGA.
[162] Section 15 A (1) (b) of the SGA.
[163] Section 11 of the SGA.
[164] Section 15 A (1) (b) of the SGA.
[165] Hadley v. Baxendale [1854] EWHC Exch. J70.

The buyer is under a *duty to mitigate* his loss, which means he must take such steps as a reasonable person in his position would take to minimize the loss or damage he suffers as a result of the breach. If he fails to do so, and in consequences his loss is greater than it need have been, he cannot recover that additional loss from the seller.[166]

In the landmark case of principle of mitigation, ***British Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric Rlys Co of London Ltd,*** the defendants (British Westinghouse Electric and Manufacturing Co Ltd) supplied the plaintiffs (Underground Electric Railways Co of London Ltd) with turbines which, in breach of contract, were deficient in power. The plaintiffs accepted and used the turbines, but reserved their right to claim damages. Later they replaced the turbines with others which were far more efficient than those supplied by the defendants would have been, even if they had complied with the contract. The plaintiffs claimed to recover the cost of the substitute turbines as damages.

Giving the leading judgment, *Viscount Haldane LC*, 688-9, "the quantum of damage is a question of fact". He set out the principles for determining the measure of damages.

"The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is, thus compensation for pecuniary loss naturally flowing from the breach. However, this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming in respect of any part of

[166] C P. Thorpe & J C L Bailey, Commercial Contracts: A Practical Guide to Deals, Contracts, Agreements and Promises, Wood Head Publishing, 1996, p p182-183.

the damage which is due to his neglect to take such steps. [167]

2.3. Termination

2.3.1. CISG

The third remedy for non-conformity is avoidance in CISG. The buyer has the right to avoid a contract provided three conditions are fulfilled: (a) the seller must have committed a fundamental breach of contract, or (b) the additional period for performance set by the buyer in the case of non-delivery must have expired.[168] Fundamental breach is one of the most practically important concepts in contract law. The question is what is meant by the fundamental breach. Generally, when one of the parties to the contract does not perform the core obligation of the contract, it causes the fundamental breach of contract.[169]

In CISG, the fundamental breach is defined in Article 25, if "*it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract".*[170]

In sales contract, not every case of non-conformity matches the condition within the legal definition of fundamental breach. For instance, the minor defect of goods does not cause fundamental breach although the goods are non-conformity and even the buyer can face the economic loss. When the fundamental breach occurred, the wronged party has the right to terminate the contract along with the right to claim damages for any loss caused

[167] British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd, [1912] AC 673.
[168] Article 49(1) of the CISG.
[169] Article 25 of the CISG.
[170] Article 25 of the CISG.

by the breach. Under UCC and UK law, the main remedy for breach of contract is "damages", which are, in general, compensatory rather than punitive. If the non-conformity does not constitute the fundamental breach of contract, the buyer cannot terminate the contract. The question is, therefore, *what condition constitute the fundamental breach of contract by the seller?*

Under the CISG rule, the delivery of non-conforming goods is the most difficult area within which to apply the fundamental breach doctrine. Of course, it is not possible to attempt to give a complete picture here. There are four criteria that can be taken into account when deciding on the fundamental character of the non-conforming delivery.

The *first criterion* is self-evident and generally accepted. The parties may define in their contract which of its terms shall be fundamental in the sense that their breach will lead to a right of avoidance. The leading decision is ***the Cobalt-sulphate case***, the seller had sold various quantities of cobalt sulphate to the buyer, a German company. It was agreed that the goods should be of British origin. The buyer tried to avoid the contract on several grounds, one of which was that the cobalt sulphate originated in South Africa. This, so it was argued, caused the buyer serious difficulties, as he "primarily" exported to India and South East Asia where an embargo on South African products was in place. The buyer did not succeed with this line of argument. According to the Federal Supreme Court, the buyer had neither been able to name potential buyers or adduce evidence of earlier sales in those countries, nor had he even alleged that it would have been impossible or unreasonable to make another use of the goods in Germany, or to export them to another country. The actual decision of the case is therefore based on procedural reasons, namely, the lack

of proof by the buyer.[171]

The *second criterion* is the seriousness of the breach. How far away from the agreed standard are the goods which have been delivered? How serious are the consequences for the buyer? What are the costs of repair? The fact that the seriousness of the breach should be taken into account is probably beyond dispute. How much weight should be attached to it is an altogether different question. To put it differently: does a serious non-conformity in itself justify avoidance? The answer probably is no.

The *third criterion* is the seller's right to cure the defect. Unless the buyer has a legitimate interest in immediate avoidance of the contract, the seller has a right to cure a defect.[172] Consequently, even a serious breach, as a rule, will not be fundamental breach if the seller offers to cure it in terms of Article 48.

The *fourth* and most disputed criterion is the reasonable-use test. The question is whether the buyer can make some other reasonable use of the non-conforming goods. The buyer loses the right to terminate the contract if it is possible and reasonable to resell the goods in the ordinary course of business, albeit for a lower price.[173]

There are judgments which regard the breach as fundamental without discussing the reasonable-use criterion. The most prominent one is the case of ***Delchi v. Rotorex***.[174] The parties had contracted for the sale of air conditioner compressors. Those delivered by the seller were less efficient than the sample model; they had a lower cooling capacity and

---

[171] Cobalt Sulphate case, Germany Supreme Court on 3 April 1996, http://cisgw3.law.pace.edu/cases/960403g1.html (last accessed on 2 Jan 2017).
[172] Article 48 of the CISG.
[173] Peter Huber, *Typically German? Two Contentious German Contributions to the CISG,* Belgrade Law Review, Year LIX (2011) no. 3 pp. 150-161. http://www.cisg.law.pace.edu/cisg/biblio/huber3.html#ii (last accessed on 2 Jan 2017).
[174] United States Federal District Court (New York) on 9 September 1994 (Delchi Carrier v. Rotorex), http://cisgw3.law.pace.edu/cases/940909u1.html (last accessed on 2 Jan 2017).

consumed more energy than the contractual specifications indicated. The U.S. Court of Appeals for the Second Circuit held that there was a fundamental breach by the seller because "the cooling power and energy consumption of an air conditioner compressor are important determinants of the product's value". The Court did not take into account whether the buyer could have reasonably expected to resell the defective goods or make any other use of them and claim damages or price reduction.[175]

Such cases do not necessarily imply that the reasonable-use criterion ought not to be applied at all. Their compatibility with this criterion may be established by showing that, on their respective facts, there simply were no other reasonable uses to which the defective goods could have been put, and thus there was no need for the courts to have addressed this issue. In the end, however, we cannot yet be certain whether the reasonable-use criterion will find general acceptance or not. There is no automatic avoidance. The buyer, even in a case of fundamental breach, he must declare that the contract is void. According to Article 26, a declaration of avoidance is effective "only if made by notice to the other party, but dispatch is sufficient. The declaration is unilateral, does not permit conditions and cannot be revoked. The party entitled to declare the contract avoided must, therefore, always inform the other party that it exercises its right of avoidance.[176]

Notice of avoidance must be communicated to the other party by appropriate means of communication. Dispatch of the notice by ordinary is not essential since it is the other party who committed a fundamental breach and who has to bear the risk of any incorrect or failing transmission of the declaration of avoidance.[177] The notice requires no specific form. It can be made in writing or even orally. It is, however, disputed whether the

[175] *Ibid.*
[176] Article 26 of the CISG.
[177] Article 39 of the CISG.

CISG allows also for an implicit declaration of avoidance and whether mere conduct can constitute such implicit declaration. Thus far, cases of that kind appear to be rare and there is no case law on the question. Nonetheless, where the conduct of the party shows clearly the intention to terminate the contract and where the conduct is communicated to the party in breach, this should suffice due to the general principle of freedom of form enshrined in Article 11.[178] However, in the case of any ambiguity, no valid declaration of avoidance can be inferred from conduct. If, for instance, a notice expresses that the goods are "immediately and totally" at the seller's disposal, that the repayment of the price is requested and that any further delivery is refused, it is regarded as a sufficiently clear declaration of avoidance.

Whether breach of contract is serious or minor is the practical issue. Where one party terminates the contract on the basis of a breach by the other, but the other party bring the case to court, and if the court ultimately determines that it was not a serious breach, here, the termination itself is a breach of contract. Therefore, the right of termination is both attraction and danger of the remedy.

2.3.2. UCC

The buyer, who rejects the non-conformity of goods or who revokes his acceptance of the goods, has the right to cancel the contract.[179] **Cancellation** occurs when either party puts an end to the contract for breach by the other and its effect is the same as

[178] Article 11 of the CISG.
[179] Article 2-711 of the UCC.
(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Article 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid.

that of termination except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.[180] Cancellation relates to the right to reject the non-conformity of goods and the seller's right to cure.[181] When the delivered goods are found in-conformity to the contract, the buyer may notify the seller of the defective of the goods. At this stage, the buyer may reject the non-conforming goods. However, this rejection will not give rise the right to cancel the contract. If the seller cures the non-conformity by redelivering the conforming goods, then the buyer cannot exercise the right of cancellation the contract.

Termination occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. The right to terminate the contract for non-conformity of goods occurs when the seller unable to cure the defect of the goods. On termination, all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.[182]

2.3.3. UK Law

Under the UK law, termination of the contract is applied for breach of condition. Non-conformity of implied terms of description, satisfactory quality and sample under section 13, 14 and 15 are a breach of condition.

All consequences of the breach of the condition are deemed to be sufficiently serious to justify termination. The buyer cannot terminate the contract if the non-conformity is a minor defect and slight breach. Slight breach is treated as a breach of warranty in the business sales contract. Slight breach is the breach when the consequences of breach

[180] Article 2-106(4) of the UCC.
[181] Article 2-508 of the UCC.
[182] Article 2-106(3) of the UCC.

do not go to the root of the contract or detriment the purpose of the contract. If the buyer accepts the goods, there is no right of termination because termination remedy required the goods can be returned to the seller.

2.4. Others Remedies

2.4.1. Price Reduction in CISG

The key provision for this remedy of price reduction is Article 50, which reads:

> *"If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price."*[183]

By Article 50, the buyer can reduce the price at the time either before or after payment of the price. It is difficult to calculate the same proportion of the value of the nonconforming goods in case of defective in quality. The alternative remedy of price reduction is the seller's right to cure.[184] The seller has the right to redeliver the conforming goods even after the date of delivery if it is not being inconvenient for the buyer. If the seller said he will redeliver the right goods, the buyer cannot exercise the right of price reduction.[185]

[183] Article 50 of the CISG.
[184] Article 37 of the CISG.
[185] Article 48 of the CISG.

2.4.2. UCC

i. Rejection and Revocation of Acceptance in UCC

The buyer has the self-help remedies when the seller delivered the non-conforming goods. The buyer has the right to reject the goods if he had knowledge of the non-conformity by examination before the acceptance of the goods. In addition, the buyer has the right to revoke the acceptance of the goods, if the non-conformity of the goods could not be discovered at the time of acceptance but discovered after the acceptance of the goods.

According to the Law, the buyer's right to cancel the contract subject to the rejection and revocation rule. The terms used in UCC 2-711 is "rightfully rejects or justifiably revokes acceptance". Therefore, for the purpose of effective rejection, the buyer must satisfy the requirement of the procedure of rejection. There are two requirements for effective rejection; first is rejection must be within a reasonable time; the second is the time limit fixed in the contract that the buyer must inspect and report of the non-conformity. The buyer can reject the goods only if the non-conformity substantially impairs the value of the contract. In addition, the buyer cannot reject the good if the seller redelivers the conforming goods according to the seller's right to cure a defective tender.[186]

ii. Refund Policy in consumer Sales Contract

Every States of the US has its own Refund Policy Law for retailers. When the refund policy contradicts the UCC, the UCC prevails. The consumers are entitled to the remedies for non-conformity of goods set forth in the UCC. Article 2-714 allowed the consumers to recover the purchase price of an item that breaches the implied warranty. The

[186] Article 2-508 of the UCC.

seller has the liability for the implied warranty of merchantability, unless excluded or modified, a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

In ***Baker v. Burlington Coat Factory Warehouse***, a consumer sued a merchant to recover the purchase price of a fake fur coat that she returned two days after she purchased it because the item was shedding. The merchant refused to give the consumer a refund because the store had a "store credit only" refund policy. The consumer did not want a store credit. The Court found that the merchant's signs and the front and back of its sales receipt reasonably informed consumers of its "store credit only" refund policy but held that the policy was unenforceable because the item was defective and breached the implied warranty of merchantability. The Court stated "[a]s between the implicit cash refund policy contained in UCC 2-314 and 2-714 and the no cash refund policy explicitly authorized in General Business Law § 218-a (2), the UCC provisions are paramount and preempt any contrary provisions in General Business Law."[187]

2.4.3. Remedies in Consumer Sales Contract under the UK Law

Remedies for consumer buyer under the new Consumer Rights Act, 2015 are:
a short term **Right to Reject** within 30 days, the **Right to Repair** or **Replacement** and if this isn't satisfactory then the **Right to a Price Reduction** or **a final Right to Reject** (and claim a refund).

All the available remedies for the consumer are the aforementioned remedies, there is no provision in the Consumer Rights Act prevents the consumer from seeking other

[187] Baker v. Burlington Coat Factory Warehouse, 175 Misc. 2d 951 (N.Y. City Ct. 1998).

remedies such as specific performance and damages. It should be noted that the available remedies for the consumer are not only under the Consumer Rights Act but also the Sale of Goods Act.[188]

i. A short Term Right to Reject

The consumer remedies of short-term rejection are very common in practice for many years and finally it reaches the time to include in the law. The consumer has a right to reject the non-conforming goods wholly or partially. When the goods delivered are mixed with conforming and non-conforming goods, the consumer may partially reject the non-conforming goods but cannot reject the goods that do conform.[189]There are some rules that the consumer has to follow: the rejection must do within 30 days and only if the goods can be returned. The 30 day begins the day after the delivered the goods but if the nature of goods is perishable the time limit is shorter. [190]

The final right to reject is exercised after one repair one replacement, the good do not conform to the contract or if the consumer cannot require the right to repair or replacement [191] or the seller cannot repair or replace the conforming goods within a reasonable time and without significant inconvenience to the consumer. [192]Where the goods are rejected, the seller must refund the purchased price without undue delay and the consumer has a duty to make goods available to the collection by the trader.[193]

Where the goods have rejected in the first six months there is no deduction but

[188] Denis Barry, Edward Jenkins QC, Daniel Lloyd, Ben Douglas-Jones, Charlene Sumnall, The Consumer Rights Act 2015, Oxford University Press, 2016, p 38.
[189] Section 21(1) of the Consumer Rights Act, 2015.
[190] Section 20 and 22 of the Consumer Rights Act, 2015.
[191] Section 23 of the Consumer Rights Act, 2015.
[192] Section 24 (5) of the Consumer Rights Act, 2015.
[193] Section 20 (8) of the Consumer Rights Act, 2015.

after the first six months then the trader can reduce any refund by a "deduction for use"; during the first six months any deduction for use is limited to motor vehicles or other goods description specified by order made by the Secretary of State by statutory instrument. [194]

ii. Right to Repair or Replacement

The consumer may ask the trader to repair or replace the non-conforming goods and the cost must be incurred by the trader. The replacement goods need to be identical that is of the same make and model. When the consumer exercises the right to repair or replacement then he will not entitle to the right to short-term rejection. If the repair and replacement take the unreasonable delay, the consumer can seek other remedies.

iii. Price Reduction

The right to a price reduction is exercised when the goods are impossible to be repaired or replaced within a reasonable time or if the consumer accepts the nonconforming goods.[195] The question is what is the appropriate amount of reduction the price? It could be the difference in value between the amounts of what the consumer paid for and the value of what they actually received. It depends on the circumstances and the remaining functionality of the goods.[196]

[194] Section 24 (11) of the Consumer Rights Act, 2015.
[195] Section 24 of the Consumer Rights Act, 2015.
[196] Denis Barry, Edward Jenkins QC, Daniel Lloyd, Ben Douglas-Jones, Charlene Sumnall, The Consumer Rights Act 2015, Oxford University Press, 2016, p 261.

Summary

Unless the exclusion or limitation clause is valid and enforceable, the seller liability and buyer remedies for non-conformity of goods will be accordance with the respective law. Under the Law, the available remedies for the buyer are specific performance, damages, rejection and reduction of the price even termination of the contract depends on the seriousness of the breach.

Albeit the Laws stated that the seller is liable for non-conformity of the goods and the buyer is entitled the reasonable remedy, it is difficult in recovering the remedy. The burden of proof is the most obstacle for claims in latent defect of the goods. If the latent defect did not appear during the time limitation to give notice of defective of the goods, the buyer can lose the right to claim. If the buyer cannot prove that the goods are non-conformity, then the buyer is not entitled to the remedy.

Relating to the buyer's right to remedy, the UK law and the UCC prefer the monetary damages whereas the CISG prefers the specific performance which encourages the extent of the contract. In UK Law and UCC, the specific performance is granted for the case when the damages are insufficient for the aggrieved party. Under the three legal systems, to recover the loss, even the buyer can prove that the goods are non-conformity, the buyer still has the duty to mitigate the loss and the loss must be within the foreseeability of the seller at the time of making a contract.

Not every non-conformity of goods gives the buyer right to terminate or avoid the contract. Under the UK law, only the breach of the condition can terminate the contract, a slight defect of the goods does not amount to a breach of condition and the buyer will not have the right to terminate the contract. Under the CISG, a fundamental breach of the contract make the buyer avoid the contract, the question is whether the non-conformity of

goods amount to fundamental breach under Article 25. According to the case studies, not every non-conformity case is a fundamental breach.

To sum up, if the non-conformity of goods seriously defects, it constitutes the fundamental breach, the buyer is entitled to reject the non-conforming goods then the buyer can avoid the contract and claim for damages. If the seller has the right to cure during a reasonable time and it does not cause inconvenience to the buyer, the buyer can alternatively reject the goods and ask for redelivery of the conforming goods.

If the conforming goods are slightly defected and it does not constitute a fundamental breach of contract, the remedy can be a reduction of the price or damages. Slightly defect goods are non-fundamental breach so that it is not the sufficient ground for the buyer to reject the goods and avoid the contract.

CHAPTER III

Time Limitation under the CISG, UCC and UK Law

Introduction

Time limitation is paramount important for the parties to the contract because it define the seller's liability and the buyer's right to remedy. The seller is liable for non-conformity of goods within a certain limit of time. Not every non-conformity case can be brought before the court. Before claiming at the court, the buyer must give timely notice of the nature of the non-conformity of the goods to the seller. Time limitation can bar the buyer's right to claim for non-conformity of goods in two ways: Time limit for notice of the non-conformity and time limit for action or statute of limitation.

It is common in Sale Law that requires the buyer to give notice of non-conformity of goods to the seller within a reasonable time. Under the UK Law, reasonable time is a question of fact and it is necessary to determine case by case.[197] The UCC provided for in Article 2-603 that the buyer must give notice to the seller within a reasonable time otherwise he will be barred from any remedy.[198] Under the CISG, the notification rule has three tiers. According to the CISG Article 39(1), the buyer has the duty to notify the seller within a reasonable time after discovering the defect of the goods. If the buyer failed to do so, he will not be able to rely on the right on non-conformity of goods. According to Article 39(2), the maximum of time of notification is two years from the date on which the goods were

[197] Section 59 of the SGA
Where a reference is made in this Act to a reasonable time the question what is a reasonable time is a question of fact.
[198] UCC 2-607(3) Where a tender has been accepted
(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

actually handed over to the buyer. According to Article 40, the two-year time limitation will not effect, if the seller knows or could not have be unaware of the defect of the goods. This is the case when buyer discover the defect of goods after two years of delivery and the seller know or could have known about the defective of the goods before delivery to the buyer.

After giving notice to the seller, whether the buyer can sue the seller for non-conformity of goods is subject to the statute of limitation of a particular domestic law. Under the UK Law, the statute of limitation for instituting the suit for contract is six years from the accrual of cause of action.[199] In US, the statute of limitation is four years and it can be reduced to one year by agreement of the parties. However, the parties cannot reduced time limitation less than one year.[200] The CISG does not contain the provision for statute of limitation. This issue of limitation was intended to be addressed by the 1974 Convention on the Limitation Period in the International Sale of Goods (Limitation Convention).[201] According to Article 8 of the Limitation Convention, the statute of limitation is four years.[202]

3.1. CISG

The CISG contains time limit for notice but it does not govern time limit for action. Although the issue is intended to be solved by the Limitation Convention, all members of the CISG has not been ratified yet. In the absence of ratification of the Limitation Convention, the national law rules for statute of limitation apply. The issue may occur when

[199] Section 5 of the Limitation Act, 1980.
[200] UCC 2-725.
[201] http://www.cisg.law.pace.edu/cisg/text/limitation-text.html (last accessed on 2 Jan 2017).
[202] Article 8 of the Limitation Convention states: "The limitation period shall be four years."

the statute of limitation of domestic applicable law is shorter than the time limitation of notification; when the statute of limitation is longer than the time of limitation of notification; when the contractual guarantee is shorter or longer than the time limitation of notification.

According to *Honnold,* a buyer who fails to give time notice will have lost "the right to rely" on the provisions of CISG relating to non-conformity of the goods or third-party claims even though the statute of limitation has not expired. Conversely, a buyer who has promptly notified the seller may be barred from instituting judicial or arbitral proceedings after expiration of the four-year period provided by the 1974 Limitation Convention.[203]

Relating to the limitation period of notification of the fact of non-conformity of goods, Article 39 (2) of the CISG states as follow:

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

According to Article 39(1), the buyer has the duty to complain the non-conformity of the goods by giving notice within a reasonable time. The term "reasonable time" can vary depending on the nature of the goods. "Notice within 7 days" can be a reasonable

[203] John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed. (1999), p 286. http://cisgw3.law.pace.edu/cisg/biblio/ho39.html#261.1 (last accessed on 2 Jan 2017).

time for perishable goods, but it will not be a reasonable time for machine. Untimely notice causes the buyer lost the right for non-conformity.[204] However, reasonable time must be within two years, [205] unless the seller know or could not have been unaware the defect of the goods.[206]

According to paragraph 2 of Article 39, the parties can agree to extend or shorten the two-year period of article 39 CISG or to exclude its application. It should be noted that two year period of limitation applies when it does not contrary to the time frame agreed in the contract.[207] The time limit of contractual agreement take precedence over the two-year period of limitation under the CISG's provision. Therefore, the two-year time limit ordinarily applicable by virtue of the default rule in Article 39(2) will not apply if the parties' contract *expressly* and *validly* lay down a different notice rule in their contract, e.g., a contract agreement which requires the buyer give notice within a shorter period of time.[208] A seller could, for instance, guarantee that he will substitute defective parts if the buyer gives notice within 14 days after having taken over the goods. A seller could also extend his guarantee for more than two years. In the event that a guarantee was granted, the buyer will have the duty to examine the goods immediately and to give notice, without delay, of a non-conformity at its discovery. Apparent defects may not be notified at the end of a guarantee period. In ***Machine* case**, *the parties had agreed to a maximum guarantee period*

[204] Germany 29 July 1998 District Court Erfurt (Shoe soles case)
http://cisgw3.law.pace.edu/cases/980729g1.html (last accessed on 2 Jan 2017);
Germany 12 December 1995 District Court Marburg (Agricultural machine case)
http://cisgw3.law.pace.edu/cases/951212g1.html (last accessed on 2 Jan 2017).
[205] Article 39(2) of the CISG.
[206] Article 40 of the CISG.
[207] Article 39(2) of the CISG.
[208] Joseph Lookofsky ,The 1980 United Nations Convention on Contracts for the International Sale of Goods, in J. Herbots editor / R. Blanpain general editor, *International Encyclopedia of Laws - Contracts*, Suppl. 29 (December 2000) 1-192., p.108.
http://cisgw3.law.pace.edu/cisg/biblio/loo39.html#195 (last accessed on 2 Jan 2017).

of 18 months, therefore, the prescription period for a buyer who has given timely notice was not governed by article 39(2), and was a matter beyond the scope of the CISG to be subject to domestic law.[209]

The clear borderline between time limitation of notification under Article 39 and statute of limitation to commence action is pointed by various decisions. The two-year time limit laid down in Article 39 was "a time limit for a complaint of lack of conformity and not a time limit for action".[210] In the ***Coke case***, an Arbitral Penal determined that *"article 39(2) dealt with notice of lack of conformity and the time limit contained therein was not to be understood as a statute of limitation. The arbitration clause, noted the arbitral tribunal, strictly regarded the time in which any claim, whether or not concerning a dispute for lack of conformity, could be filed as a claim in arbitration. In addition, the arbitral tribunal noted that the arbitration clause had no relationship with the "contractual period of guarantee" contained in article 39(2) CISG."*[211]

3.2. UCC

Under the UCC, the buyer has the duty to give notice within a reasonable time of non-conformity of goods. The duty of notification relates to the acceptance of the goods and the seller's right to cure. Article 2-607(3) of the UCC states "*the buyer must, within a reasonable time after he discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy*" It expressly states that the buyer has the duty to

[209] Machine case, ICC Arbitration Case No. 11333 of 2002, http://cisgw3.law.pace.edu/cases/021333i1.html (last accessed on 2 Jan 2017).
[210] Société Novodec / Société Sigmakalon v. Soctiétés Mobacc et Sam 7, France 3 February 2009 Supreme Court, http://cisgw3.law.pace.edu/cases/090203f1.html (last accessed on 2 Jan 2017).
[211] Coke case, ICC Arbitration Case No. 7565 of 1994, http://cisgw3.law.pace.edu/cases/947565i1.html (last accessed on 2 Jan 2017).

give notice to the seller, otherwise, he will lose the right to claim any remedy for non-conformity of goods. There is no exact time limitation for notification. The term "reasonable time" is considered as a question of fact and it is needed to decide on individual case.

Regarding the statute of limitation, the law provided for in Article 2-725. [212] According to Article 2-725(1), the buyer may commence the claim within four years from accrual of cause of action. The starting date of cause of action is at the date of delivery whether the buyer knows the existence of defective of the goods.[213] It aims to cover the case latent defect of the goods. The seller can reduce the statute of limitation to one year, but it is not allowed to extend more than four years. [214]

3.3. UK Law

According to Section 35(4) of the SGA, the buyer is assumed to accept the goods if after the lapse of reasonable time he retained the goods and he did not intimate the seller relating to the rejection of the goods. Therefore, after the examination of the goods, if the non-conformity of goods was discovered, the buyer has the duty to let the seller know

---

[212] Article **2-725. Statute of Limitations in Contracts for Sale.**
(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.
[213] Article 2-725(2) of the UCC.
[214] Article 2-725(1) of the UCC.

about the fact of non-conformity. The term "reasonable time" for notification of non-conformity of goods is a question of fact.[215]

Regarding the statute of limitation, Section 5 of the Limitation Act [216]states that, "An action founded on simple contract shall not be brought time limit for after the expiration of six years from the date on which the cause actions of action accrued."

The buyer may commence the claim for damages for breach of contract within six years. But if the non-conformity causes personal injury or death, the time limitation is shortening to three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured or the date of death. [217]

3.4. Incorporation of Time Limitation Clause

Since the parties can draw their contract as they wish, if the parties want to reduce or extend the time limitation set in Article 39, they can include the time limitation clause. There is no provision of methods of incorporation of limitation clause. Therefore, the inclusion of time limitation clause must comply with the rule of formation of contract. It should state expressly the duration of the limitation period – how long is it, and when does the time period start to run? If it was not properly incorporated in the contract, time for giving notice will be in accordance with the default rule of Article 39. There is no special requirement to include time limitation clause under the UCC and UK Law.

For the statute of limitation clause, it should state clearly that claims can not be brought after the expiry of the agreed limitation period.

---

[215] Section 59 of the CISG.
[216] http://www.legislation.gov.uk/ukpga/1980/58/pdfs/ukpga_19800058_en.pdf (last accessed on 2 Jan 2017).
[217] Section 11(4) and (5) of the Limitation Act.

3.5. Reasonableness of Time Limitation Clause

When the parties agreed their own rule of time limitation for notification and time for action, it must be reasonable and fair. The reasonableness of the clause is depending on the nature of goods, the starting date and the length of the time. The law allows the parties that they can agree to reduce or they can increase (in some jurisdiction) time limitation. However, the court can determine whether time limitation clause agreed in contract is reasonable or not. In many cases, the short time limitation is concerned as justifiable for perishable goods and consumer sales.

Summary

Although the non-conformity of goods has discovered, there are still the practical issues to commence the claim to the court. The condition must fit within the two kinds of time limitations mentioned above. The notification must be within a reasonable time and a claim must be brought before the court within the statute of limitation. Claimant after the statute of limitation means the claim is unjustified.

The length of time limitation differed among the three systems. The CISG has three tiers of time limitation, reasonable time, maximum of two years to give notification and reasonable time for the exception case of seller's knowledge of non-conformity.

The computing of the length based on the date of cause of action occurred. The cause of action occurs at the time of discovery or the time which he ought to have discovered of the non-conformity. Under the UCC, the cause of action occurs at the time of delivery, whereas under the UK Law, the cause of action occurs at the time of acceptance.

CHAPTER IV
Right to Exclude and Limit Liability

Introduction

The exclusion or limitation clause, also called exemption clause and disclaimer clause. It is named in the Unfair Contract terms Act as "exclusion or restriction of liability",[218] "the exemption clause" in CISG and "disclaimer clause" under the UCC. Nowadays, the exclusion or limitation clause is included in every sales contract. In business sales contract, the exclusion clause created accordance with the consent of the parties. Whilst, in the consumer sales contract, especially in the standard contract, it is completely the intention of the seller who has greater bargaining power.

Regarding the inclusion of the clause, according to the freedom of contract rule, the parties to the contract can agree on the condition to allocate the risk between them. However, in present days, the freedom of contract rule cannot be applied in every situation. The ideology of protectionism in the early of the twentieth century brought the new rule to protect the weaker party of the contract. The statute of sale law provides the implied terms of goods quality which the sellers have to be liable. The contract requires being fair and reasonable.

Contracts containing limitation or exclusion of liability clause present a difficult problem if the seller unable to deliver the non-conforming goods. Such kind of contract makes the buyer unable to expect the remedy under the law, as long as the seller has no liability for non-conforming goods. If there is no liability, there is no remedy. The contract that is lacking the fairness and reasonableness would be invalidated.

[218] Section 13 of the Unfair Contract Terms Act, 1977.

There are many different types of exclusion or limitation clause. It may take various forms such as the exclusion of express or implied warranty, limitation of consequential damages and so on. The exclusion or limitation clause can be categorized into three groups: exclusion of the liability of implied terms, limitation of remedies, and time limitation. These three types of the clause can be seen, in some case, including in one contract. The three types of clauses can be differentiated from their functions.[219]

Exclusion clause intended to set a condition to liberate from a liability for a potential by removing the causes of the breach of contract. It is to create the situation that the seller does not breach the contract. It excludes the implied terms under the law by contractual terms.

Limitation clause sets a limit on the amount that can be claimed for a breach of contract, irrespective of the actual loss. It attempts to choose and set the remedy that the seller is available. It substitutes the remedies under the law by choosing the most convenience remedy for the seller.

Time limitation clause aimed to shorten or extend the time limitation provided in the law. It may state that, for instance, an action for a claim must be instituted within six months although the law allowed within two years.

In this chapter, it is to explore the types of exclusion and limitation clauses which are common in practice. There are many ways to exclude the liability for non-conformity of goods. It will express types of exclusion or limitation of liability by the seller and discuss

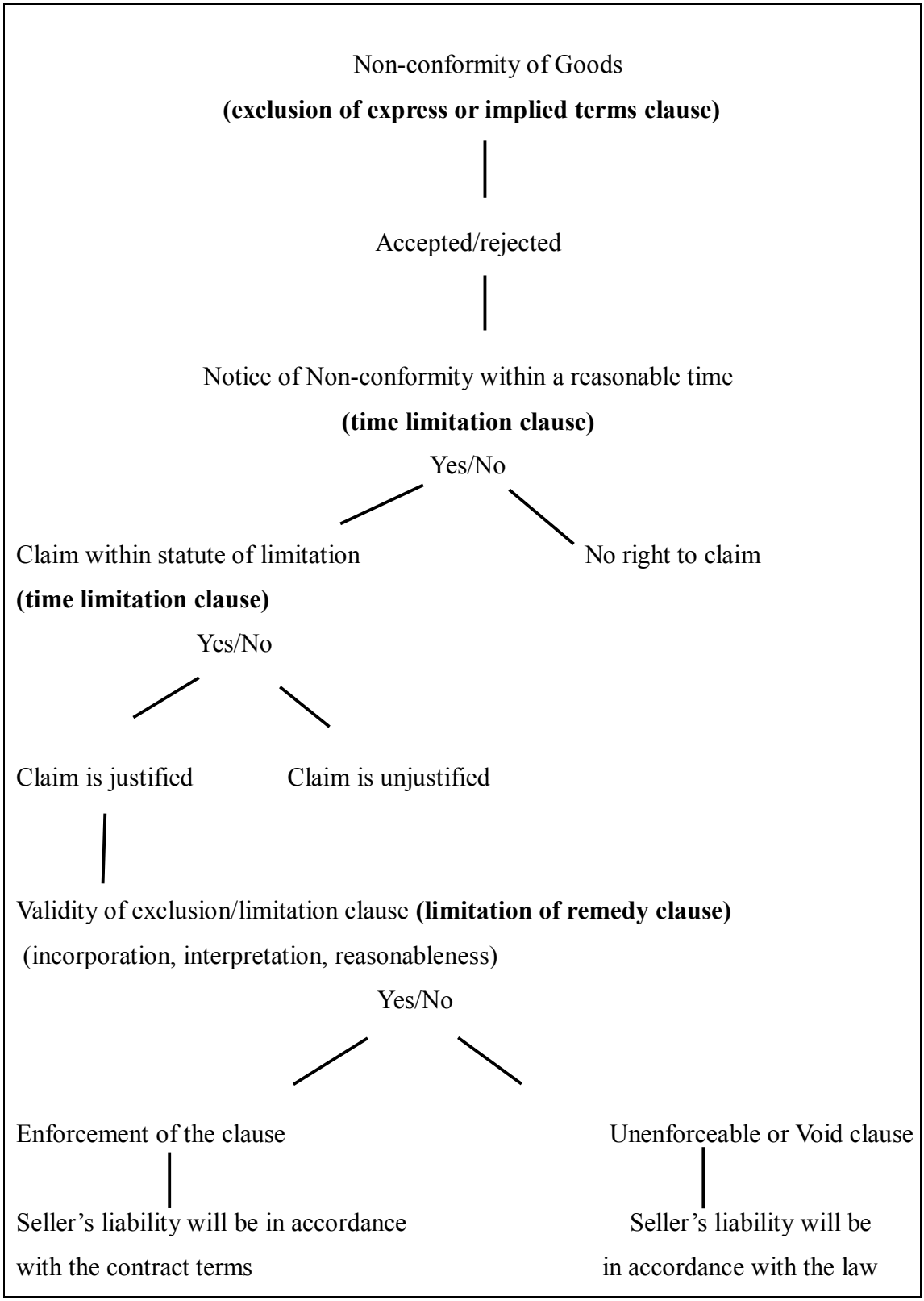
[219] Air Transworld Limited v. Bombardier Inc., [2012] EWHC 243.

how it differs from the business sales contract (including international sales) and the consumer sales contract. In addition, on what kind of liability that the seller is able to exclude or limit will also be discussed.

4.1. Purpose of Exclusion or limitation clause

According to the early common law doctrine of *caveat emptor*, the risk of goods is placed at the buyer. As the development of the doctrine of *caveat vendito*r, the seller has liability for the goods sold under the implied warranty. By means, the risk of loss shifts to the seller. The exclusion clause is a result of the attempt to repose the risk that derives from the implied warranty. The purpose of the exclusion and limitation clause is to allocate the risk between the seller and the buyer. Practically, the seller includes the clause intended to exclude or limit the availability which will arise as a result of the breach of contract. The purpose can reach by the inclusion the clause which exclude the seller's liability for implied terms, or limit the extent of the remedies, provided for in the statute. It may provide that under all the circumstances, the buyer has to bear the risk of loss. How the exclusion or limitation clause play important role in determining the seller's liability and buyer's remedies has shown in the following figure.

Functions of Exclusion Clause, Limitation Clause and Time Limitation Clause



4.2. Right to Exclude or Limit Liability

4.2.1. CISG

There are many ways that the seller can reduce the risks,[220] among them the exclusion or limitation clause is the cost-efficient mechanism for allocating contractual risk for the seller. The limitation and exclusion of liability agreed to by the parties to a contract for the international sale of goods is a matter governed by the CISG but not settled by the CISG. The parties' agreement on the limitation or exclusion of their own liability falls under the scope of the Convention for two reasons. First, it is a matter connected with the rights and obligations of the buyer and seller arising from the contract, as envisaged by Article 4, first sentence of the CISG. Second, it deals with the scope of the seller's liability or buyer's remedies for breach of contract under the CISG.[221]

As the CISG recognizes the freedom of contract rule,[222] the seller may exclude or limit the liability for non-conformity of goods. For example, an express term in the seller's standard form contract whereby the seller accepts no responsibility whatsoever that the goods are complied with the implied terms obligation set forth in Article 35(2) (b). The parties may derogate from or vary the effect of any Convention provisions.[223]

The CISG also governs the exclusion or limitation of remedies clause pursuant to Article 6 of the CISG. These remedies include not only damages, but also other remedies.

---

[220] Advisory Opinion No 17.
The seller can mitigate its damages risks in a number of ways: (i) by training the buyer how to operate the machines so as to prevent hazardous situations; (ii) by transferring all risks to the buyer (by providing for an exclusion clause); (iii) by sharing the risks with the buyer (by providing for a limitation clause); or (iv) by purchasing an insurance policy in the marketplace.
[221] Para 1.11 of Opinion No.17 of the Advisory Council of the CISG.
[222] Article 6 of the CISG
The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.
[223] *Ibid.*

Buyer's remedies, such as specific performance, [224] delivery of substitute goods, [225] repair of lack of conformity of the goods, [226]price reduction, [227] and the remedy of avoidance [228] may be limited or even excluded by agreement of the parties.

4.2.2. UCC

Under Article 1-103, the UCC has to be liberally construed and applied and recognized the rule of freedom of contract.[229] Freedom of contract in this context means the ability of the contracting parties not merely to enter a mutually satisfactory agreement but to change the relationships set out in the law.[230] The effect of the UCC's provisions may be varied by agreement. Article 1-302 clearly expressed –

(a)*Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement.*

Under the UCC, the seller can exclude or limit both express and implied warranties within certain limits. In other words, exclusion or limitation of warranties should be

[224] Article 46(1) of the CISG.
[225] Article 46(2) of the CISG.
[226] Article 46(3) of the CISG.
[227] Article 50 of the CISG.
[228] Article 49 of the CISG.
[229] Article 1-103 provides that- (a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions;
Thomas M. Quinn, Uniform Commercial Code Commentary and Law Digest, Warren, Gorham &Lamont, Inc., 1978, p 2-498-499.
[230] Thomas M. Quinn, Uniform Commercial Code Commentary and Law Digest, Warren, Gorham &Lamont, Inc., 1978, p 1-3.

interpreted reasonably and enforced. By doing so it can avoid the unreasonableness which can invalidate the exclusion or limitation clause by the court.[231]

The seller's right and the methods of disclaimers of warranties are provided for in Article 2-316 [232] and modification or limitation of remedies are provided for in Article 2-719 of the UCC.[233] Although it is common in the sales contract that includes the time limitation clause, there is no provision that indicates the method for time limitation clause. Unlike the UK Sale Law, the UCC allows the seller to exclude the liability for the title. The seller can exclude express and implied terms and can modify the remedies granted under the UCC. However, the seller cannot exclude liability for tort. The warranty also seeks to limit the remedy for a breach to the replacement of defective components and to eliminate any other remedies. It states:

> **In no case shall the company be liable for any special incidental or consequential damage (including without limitation loss of profits, loss of revenue, cost of capital, cost of substitute equipment, downtime, claims of third parties and injury to person or property) based upon breach of warranty, breach of contract, negligence, strict liability in tort, or any other legal theory.**

4.2.3. UK Law

The right to include the exclusion or limitation clause is allowed in Section 55 of

[231] Article 2-316 of the UCC.
[232] *Ibid.*
[233] Article 2-719 of the UCC.

the SGA[234] and Section 6(3) of the UCTA that the seller's liability can be excluded or restricted if the terms satisfy the requirement of reasonableness.[235]

The seller liability under the law can be excluded or limited by consent of the parties in the form of expressed agreement or course of dealing between the parties or trade usages that is binding both parties. However, according to Article 55, the terms shall comply with the reasonableness requirements under the UCTA.

Under the UK Law, the right of seller to include the exclusion or limitation clause in business sales and consumer sales are different.[236] Liability or remedy for non-conformity of goods can be excluded or limited by the agreement of the parties in the business sales contract.[237] Subject to the section 6(3) of the Unfair Contract Terms Act, 1977, if it is reasonable, the liability and remedy for non-conformity under the Sale of Goods Act, 1979 can be excluded or limited.

In ***Persimmon Homes*** *case*, Mr. ***Justice Stuart-Smith*** referred to *"an increasing recognition that parties to commercial contracts are and should be left free to apportion and allocate risks and obligations as they see fit, particularly where insurance may be available"*. [238]

---

[234] Section 55(1) of the SGA
Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the **U**nfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.
[235] Section 6(3) of the UCTA.
As against person dealing otherwise than as a consumer, the liability specified in subsection 2 above can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.
[236] It will discuss in the part of incorporation and reasonableness next chapter.
[237] Section 55 of the Sale of Goods Act, 1979. The reasonable question will be discussed in Chapter 7.
[238] Chart brook Ltd v Persimmon Homes Ltd & Ors [2009] UKHL 38 (1 July 2009) http://www.bailii.org/uk/cases/UKHL/2009/38.html (last accessed on 2 Jan 2017).

4.4.2. Consumer Sales Contract

Seller's liability cannot be excluded or limited in consumer sales contract. The purpose of Consumer Rights Act is to protect the consumer as an inferior party. However, the UCC states limitation of consequential damages for personal injuries in the consumer sales is *prima facie* unconscionable.[239]

Consumer sales contracts and businesses sales contracts, which use standard terms, are subject to more stringent rules than negotiated contract. In consumer sales contract, regardless of with or without standard terms, liability for negligence cannot be excluded in the case of death or personal injury. In negotiated contracts between businesses, liability for negligence may not be excluded unless the clause cannot be construed otherwise - usually negligence is expressly mentioned in the exclusion clause.

The CISG only governs the international business contract for the sale of goods and the consumer sales excluded from the CISG.[240]

4.3. Types of Exclusion or Limitation clause

4.3.1. Exclusion Clause

Exclusion of warranty or implied terms attempts to exclude the liability of the seller for non-conformity of goods' quality under the law. It intends to create the condition that the seller has no liability for goods' quality of the implied terms. For example, the seller accepts no liability for non-conformity of satisfactory quality or sample. Example clause –

---

[239] Article 2-719 of the UCC.
[240] Article 2 of the CISG.

1. The Vendor shall not be under any liability to the Purchaser for any defects in the goods or for any damage, loss, death or injury (other than death or personal injury caused by the negligence of the Vendor) resulting from such defects or from any work done in connection therewith.

2. The foregoing warranty is in lieu of all other warranties, express or implied, including but not limited to the implied warranties of merchantability and fitness for a particular purpose.[241]

4.3.2. Limitation clause

Limitation of Liability for non-conformity can take the form by an expression that the seller liability is limited to the contract price of the goods or cap amount of damages. Its purpose is to limit the extent of seller liability. Example-

1. Our obligation under this Warranty shall be limited to repairing a defective part, or at our option, refunding the purchase price or replacing such part or parts as shall be necessary to remedy any malfunction resulting from defects in material or workmanship as covered by this Warranty.[242]

2. The Seller is not responsible for any damage which is insured by Purchaser or for any special, indirect, incidental or consequential damages including but not limited to loss of profit, loss of power, loss of use, loss of revenue, the cost of capital or costs due to interruption of power supply.[243]

Limitation of remedies clause is which also called ***agreed remedy*** clause exempts liability under the law and substitutes with the chosen remedy. For example, the buyer is

[241] http://www.premieraluminum.com/pdf/limited_warranty.pdf, (last accessed on 2 Jan 2017).
[242] http://www.talamexinflatables.com/warranty-conditions/, (last accessed on 2 Jan 2017).
[243] http://www.uprightparts.com/id15.html, (last accessed on 2 Jan 2017).

not allowed to terminate the contract or the right to damages or the right to reject the non-conformity. An alternative remedy provided as a remedy is repair or replacement of substitute goods.

4.3.3. Time Limitation

The seller can set the time bar to limit the buyer right to claim for non-conformity of goods. The seller has no liability for non-conformity if the buyer did not give notice within the time limit and if the buyer gave notice after the time limit, the buyer loses the right to claim for any remedy. For example- the seller will not accept liability for any defect of the quality of the goods unless the buyer notices the seller within seven days beginning with the date of delivery of the goods. Time limitation clause is the restricted time for the buyer can claim for non-conformity, although the law set the period for statute of limitation. It may state that the buyer can claim for non-conformity within one year after delivery. Example-

(1)Faulty goods will be exchanged if returned or notified within 7 days from the date of invoice and returned in original, clean and full packaging.[244]

(2)All claims shall be absolutely barred and all remedies excluded unless legal proceedings are brought within one year from the date on which the goods have been delivered or should have been delivered.[245]

(3) The Buyer agrees that any claim or lawsuit relating to the purchased goods must be filed no more than six (6) months after the delivery date. The Buyer hereby waives any statute of limitations to the contrary.

[244] https://designer-carpet-remnants.co.uk/terms, (last accessed on 2 Jan 2017).
[245] http://www.alternativeflooring.com/downloads/Product%20Complaint%20Form.pdf (last accessed on 2 Jan 2017).

Summary

As mentioned above, in all three systems, the seller has the right to exclude or limit the liability based on the freedom of contract rule. However, there is exception in the UK law; the seller has no right to exclude liability in consumer sales but in business sales contract. Under the UCC, the seller cannot exclude tort liability.

There are various types of exclusion or limitation clause and different approach to reach their purpose. They can be categorized into three groups, exclusion of liability, limitation of liability or agreed remedy clause and time limitation clause. To summarize, the aim of all the approaches is to make the seller has no liability for non-conformity of goods or breach of contract, if possible, or to limit the liability for non-conformity of goods. However, it should be noted that, the right to include the exclusion or limitation clause varied in business sales contract and consumer sales contract.

CHAPTER V

Incorporation of Exclusion or Limitation Clause

Introduction

As discussed in the part of introduction, the seller has liability to deliver the conforming goods and if the seller failed to fulfill the duty, the buyer is entitled to the remedies according to the law's provision. However, if the sales contract includes the limitation or exclusion of liability clause, the buyer's right to entitled the remedy is barred by limitation clause.

The exclusion clause is said to be valid if it is expressed in the contract. In the UCC and UK law, the laws allowed the exclusion clause made by oral agreement and by customs and trade usage. The exclusion clause made by written expression in the contract even cause the uncertainty of meaning. Therefore, for the exclusion clause made by oral and custom, and trade usage causes more uncertainty.

As the validity of exclusion clause is the most important fact to decide the right and remedies of the seller and buyer, the criteria for deciding on validity issue are the incorporation, interpretation and reasonableness. In this chapter, it will study the methods of incorporation of exclusion or limitation clause under the CISG, UCC and UK Law. It will analyze how the incorporation has an impact on the validity of exclusion clause and to compare the issue under the three legal systems.

5.1. CISG

5.1.1. CISG Governs the Exclusion and Limitation Clause

According to Article 4, the CISG governs only the formation of the contract and obligation of the parties arisen from the contract and the CISG.[246] Before the Advisory Council issued the Opinion No.17, there is no clear understanding about the procedural and substantive validity of the contract. There was the concept that the CISG does not govern the validity issue so that the issue was governed by the domestic applicable law.[247]

Therefore, the criteria (incorporation, interpretation and reasonableness test or unconscionability) to test the validity of exclusion totally fall under the domestic law. Yet, in the international sales contract, the parties are unlikely to draw their contract in accordance with the requirement of domestic law and the nature of their contract reflects the international business transaction. If the domestic law required the specific rule of incorporation which is not necessary under the CISG, such kind of contract will always invalid.

The CISG has no provision relating to the exclusion or limitation of liability clause. To promote the common interpretation of the validity of exclusion and limitation clause, the Advisory Council issued Opinion No.17 on 16 October 2015. According to Comment 1 of the Opinion No. 17, the CISG governs the incorporation of the exclusion and limitation clause. The parties' agreement on the limitation or exclusion of their own liability falls under the scope of the Convention for two reasons. First, it is a matter related to the rights and obligations of the buyer and seller arising from the contract, as reflected by Article 4, first sentence CISG. Second, it relates to the scope of the buyer or seller's remedies for breach of contract under the Convention. Therefore, whether the exclusion or

[246] Article 4 of the CISG.
[247] *Ibid.*

limitation clause is incorporated in the contract shall subject to the formation rule under the CISG.[248]

In ***B.V.B.A. Vergo Kwekerijen v. Defendant***, the Supreme Court decided on the question whether the buyer consented to the application of the seller's General Terms and Conditions, including the disputed exoneration clause, which printed on the back of the receipt that indicated the seller's liability could not exceed the purchase price. The question must be settled by reference to the rules of the Convention, pursuant to Article 7(2) of CISG and not by reference to any system of law that would be applicable under rules of private international law.[249]

5.1.2. Freedom from Form Requirement

Article 11 of the CISG states that "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."[250] Thus, the principle under Article 11 CISG must not give way to domestic form requirements regarding the validity of limitation clauses. Courts and arbitral tribunals have consistently reaffirmed the principle of freedom from form requirements established in Article 11 of the CISG and its prevailing character over domestic form requirements.[251] Suppose, the applicable domestic law is the US, the UCC requires the contract meets the procedural unconscionability (the rule of incorporation under Article 2-316 of the UCC) and substantive unconscionability (Article 2-719 of

[248] Comment 1 of the Opinion No. 17.
[249] B.V.B.A. Vergo Kwekerijen v. Defendant, Netherlands 28 January 2005 Supreme Courthttp://cisgw3.law.pace.edu/cases/050128n1.html (last accessed on 2Jan 2017).
[250] Article 11 of the CISG.
[251] Schwenzer, Commentary on Art. 79, paras. 57-58, and Art. 80, para. 2; Atamer, Kroll, Mistelis and Viscasillas on CISG Art. 79, para. 89, 93; and Honnold on CISG, Art. 79, para. 424. See also the reported decisions at the CISG Digest 2012 p. 393, para. 23.

the UCC). When the validity of international sales contract need to be tested under the US Law, the substantive unconscionability will be tested under the UCC and procedural unconscionability will not require being tested under Article 2-316 of the UCC. In such kind of case, the exclusion clause subject to the formation rules under the CISG provision.

5.1.3. Exclusion or limitation Clause required to be incorporated

Before deciding the validity of the exclusion or limitation clause under the domestic law, the CISG requires it is incorporated in the contract. If the clause was not incorporated accordance with the rules of formation, it is not the terms of the contract. As long as it is not included in the contract, it is not necessary to decide the issue of the validity of the clause. *Lookofsky* mentioned the practical problem of the incorporation as-

> *"One practically important subset of the incorporation problem relates to the fact that disclaimer clauses are likely to be hidden amidst the 'boilerplate' language in a seller's standard form, and courts will not always read surprising and/or unreasonably burdensome fine-print clauses as part of the deal."* [252]

5.1.4. Incorporation of Standard Terms

There is no provision in the CISG for a standard contract. However, the using of the standard contract become a common feature of the mass productive economy in domestic and international sales contract. Since the standard contract are prepared in advanced by the seller for using repeatedly. The issue related to the standard contract often arise as whether the terms which were not in the specific bargaining included in the contract? In

[252] Joseph Lookofsky, in J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000) 1-192. http://www.cisg.law.pace.edu/cisg/biblio/loo35.html#173-1 (last accessed on 2 Jan 2017).

other words, whether the limitation of liability clause did indeed become a part of the contract under the rules employed by the CISG?

For this purpose, the Advisory Council's Opinion No.13 gives guidelines of incorporation of standard contract. Most commentators and courts agree that the incorporation of standard terms must therefore comply with the provisions relating to the formation of the contract. Domestic provisions and rules regulating standard terms may only be applied to standard terms if they deal with questions of validity.[253]

To summarize the Black Letter rule of the Advisory Opinion, incorporation of standard terms requires being a clear information with respect to the fact that the contract shall be subject to a specified standard terms. The ways to make known to the buyer can be different and the buyer impliedly or expressly consents on the matter. The other requirements are the standard terms shall be written clearly that a reasonable person can understand and being written in the language understandable by the buyer.

In the ***Tantalum case***,[254] seller argued that buyer's standard terms printed in German at the backside, have not been validly incorporated in the English written contract between the parties. Whether standard terms have been validly incorporated in the contract was decided by analyzing how "a reasonable person of the same kind as the other party" would have understood. The incorporation of standard term depends on whether the intent to apply the standard conditions to the contract is known or ought to have known to the other party. It requires an unambiguous declaration of the provider's intent. A reference to

[253] Comment A of the Advisory Council's Opinion No. 13. See also the Guidelines of Advisory Opinion No. 13.
[254]Tantalum case, Austria 31 August 2005 Supreme Court, http://cisgw3.law.pace.edu/cases/050831a3.html (last accessed on 2 Jan 2017).

standard terms given the actual proposal must be specified and clear enough so that a reasonable person "standing in the shoes of the other party" would understand it.[255]

5.2. UCC

To exclude or limit warranties or remedies, the UCC provided the incorporation methods how to disclaim the warranties liability and remedies. The specific methods to disclaim express warranty, implied warranty and the methods of limitation or modification of remedies differ. The seller must follow the methods of the UCC in drawing the disclaimer clause. The disclaimer clause must be specific and conspicuous.[256] The principal purpose of the conspicuousness requirement is to avoid fine print waiver of rights by the buyer.[257]

5.2.1. Disclaimer of Express Warranty

Incorporation of disclaimer of express warranty can be made by written or oral followed by a course of performance, course of dealing and usage of trade. Disclaimer clause of express warranty must not inconsistent to the express warranty that creates the seller liability for goods. In other words, the seller cannot exclude the warranty that he clearly stated in the contract. If a factfinder determines that a seller's statement created an express warranty words purportedly disclaiming the warranty will be inoperative, for the disclaiming language is inherently inconsistent.[258]

---

[255] *Ibid.*
[256] Article 2-202 of the UCC.
[257] Greenspun v. American Adhesives, Inc., 320 F. Supp. 442 (E.D.Pa.1970).
[258] James J. White & Robert S. Summer, Principles of Sales Law, Thomson Reuters, 2009, p 664.

The disclaimer clause which excludes the liability other than in the express warranty clause is effective.[259]Again, as the warranty can make by words or conduct, if the disclaimer clause refuses to give the guarantee that made by oral that the goods will be merchantable, the effectiveness of the clause depends on whether the warranty made orally can proof by the ***parol evidence*** rule. If the express warranty that made by oral is excluded then the disclaimer clause is effective.[260]

An express warranty must be expressly disclaimed. A general statement that there are "no warranties, express or implied" is usually ineffective. In ***South Carolina Electric & Gas Co. v. Combustion Engineering, Inc.,*** effective disclaimer of implied warranties was shown by the manufacturer of a product in a customer's suit for recovery of damages occurred in a fire; because evidence showed that in plain language, the disclaimer excludes all warranties other than the express one-year warranty and the warranty of title.[261]

5.2.2. Disclaimer of Implied Warranty

There are two procedural requirements to exclude implied warranty: exclusion must be in a record and conspicuousness. Despite there is no requirement for disclaimer of merchantability to be written, if it is written, disclaimer of implied terms either for merchantability or fitness for particular purpose must be written conspicuously.[262] In business

[259] US Fibires, Inc. v. Procter & Schwartz, Inc., 509 F.2d 1043, 16 UCC 1(6th Cir.1975).
[260] Article 2-202 of the UCC, Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
[261] South Carolina Electric & Gas Co. v. Combustion Engineering, Inc., 283 S.C. 182 (1984) (Court of Appeals of South Carolina).
[262] Article 2-316(2) of the UCC.

sales, a disclaimer for merchantability must include the word "merchantability", then the buyer can easy to notice that the seller excludes the liability for merchantability. To disclaim the implied warranty of merchantability in a consumer contract, language must state *"The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract"*.

Language to exclude all implied warranties of fitness in a consumer contract must state "*The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract.*" Whilst, the disclaimer for fitness for a particular purpose in business sales does not require to mention the word "fitness for particular purpose". There is an example for disclaimer of fitness for a particular purpose in the statute, which states, "there are no warranties which extend beyond the description on the face hereof".[263]

In ***South Carolina Electric & Gas Co. v. Combustion Engineering, Inc.,*** Manufacturer's product disclaimer, as a matter of law, did not exclude the implied warranties of workmanship and merchantability. The disclaimer nowhere mentions the word "merchantability" to exclude an implied warranty of merchantability; further, the written language of the disclaimer was not "conspicuous" as was required to exclude an implied warranty of fitness for a particular purpose as well as an implied warranty of merchantability; and the item containing the disclaimer was misleading in that it was suggestive of a grant of warranty rather than a disclaimer because the heading of the item, printed in underlined capital letters, simply read "Warranty."[264]

[263] Article 2-316(2) of the UCC.
[264] South Carolina Electric & Gas Co. v. Combustion Engineering, Inc., 283 S.C. 182 (1984) (Court of Appeals of South Carolina).

"Conspicuous" refers to a term "so written that a reasonable person against whom it is to operate ought to have noticed it."[265] According to this definition, the conspicuous of the terms can be determined by the different font size, and color, the use of italicized or capitalized, underlined, bold of the letter which differs from the surrounding text.[266] Whether a term is conspicuous or not is to be decided by the court. Where the disclaimers met the requirements of conspicuousness and the mentioning the word "merchantability", there is no warranty to breach for the seller, thus there can be no remedy.[267]

In ***Hartman v. Jensen's, Inc.,*** a seller of a mobile home was liable to buyers for breach of an implied warranty of merchantability where he placed an alleged disclaimer of implied warranty under the bold heading of "Terms of Warranty;" such placing of a disclaimer created an ambiguity and was likely to fail to alert the consumer that an exclusion of the warranty was intended. Disclaimers or limitations of express and implied warranties are also generally enforceable under the UCC, if they are clear and conspicuous and consciously bargained for.[268]

In ***Moscatiello v. Pittsburgh Contr. Equip,*** the disclaimer clause excluded seller's liability *for any incidental or consequential damages occasioned by the sale, possession, operation, maintenance or use of the goods or for any failure of the goods to operate under any claim of breach of warranty or contract, negligence, strict liability or otherwise*. The parties did not negotiate about the disclaimer clause before making the contract. The disclaimer clause was set forth in the form of finest print even though the letters were capi-

[265] Article 1-201 of the UCC.
[266] *Ibid.*
[267] Ford Motor Co. v. Multon, 511 S.W.2d 690(Tenn.1974).
[268] Hartman v. Jensen's, Inc., 277 S.C. 501 (1982).

talized but are buried in the middle of the contract within the margins of the price breakdown of the goods. In addition, the language on the front of the contract referring to terms and conditions on the reverse side of the contract was inconspicuous as well as misleading and it did not meet the UCC's requirement. The Court decided that "warranty disclaimer did not adequately put on notice that substantial rights of the buyer were being relinquished."[269]

A warranty disclaimer hidden in the fine print of a three-page sales contract will not be enforced because the UCC also requires that a disclaimer is conspicuous.[270] The specific reference forward in the present section to the following section on exclusion or modification of warranties is to call attention to the possibility of eliminating the warranty in any given case. However, it must be noted that under the following section the warranty of fitness for a particular purpose must be excluded or modified by a conspicuous writing.[271]

There is an exception for conspicuous, using the word "as it" "with all fault" in the disclaimer clause, or expressing that there is no liability for implied warranty. In the practical business transaction, the seller can exclude the implied warranties through custom, usage and agreement. Article 2-316 (3) (a) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of

[269] Moscatiello v. Pittsburgh Contr. Equip.407 Pa. Superior Ct. 363 (1991) 595 A.2d 1190.
[270] *Ibid.*
[271] Comment 6 to Article 2-315 of the UCC.

trade.[272]

The seller can disclaim the implied warranty, if the buyer inspects the goods prior to the sale, and if the defect can discover at the time of inspection. [273] If the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty.[274]

Under Article 2-316(3) (c), the implied warranties may be disclaimed by course of dealing,[275] course of performance[276] or usage of trade.[277] If the previous course of performance or course of dealing between the parties, the limitation clause is part of contract even without negotiation between them. Conversely, if the course of performance or course of dealing between the parties is well recognized, then the course of dealing or course of performance prevails.

5.2.3. Limitation or Modification of Default Remedies

According to Article 2-719, the seller may agree to remedies or control damages as they see fit by adding or substituting those provided in the UCC. The seller may limit

---

[272] Article 2-316(3) (a) of the UCC.
[273] See at Buyer knowledge of non-conformity, supra at p 50.
[274] Article 2-316(3) (b) of the UCC.
[275] Article 2-103(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
[276] Article 2-103 (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.
[277] (c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

the remedies to return of the goods and repayment of the price, or to repair and replacement of non-conforming goods or parts. The purpose is to permit the parties in drawing their commercial agreements even to the extent of altering the UCC Rule[278] within the limit of fairness.[279]If the limited or modified remedy which used to bar the use of remedies under the UCC fails of its essential purpose, the remedies for the buyer will be in accordance with the remedies available under the UCC.[280]

However, the commentators point out that the contract remedy is not absolute. "A misconception is that because the sales contract provides for a set of remedies, those remedies preclude recourse to the standard Article 2 remedies. Such is simply not the case, both sets are available. In every sales contract, there is not one, but two places to look for one's remedies; the contract's itself and the provision of Article 2." [281]

The seller may control the damages by limiting damages. It states in Article 2-719 as "…. may limit or alter the measure of damages recoverable under the Article".[282] Or the seller may exclude the consequential damages unless it is unconscionable, except the exclusion of consequential damages for personal injury in the case of consumer sales.[283]

There are two conditions that the UCC limits the seller's right to disclaim his liability. First, the exclusive or limited remedy which fails its essential purpose is unenforceable and the remedy will be accordance with the Law Provision;[284] and second, the

[278] Article 2-719(1) of the UCC.
[279] Article 2-302 of the UCC.
[280] Article 2-719(2) of the UCC.
[281] UCC Commentary and Law Digest, pp 2-482-483.
[282] Article 2-719(1) of the UCC.
[283] Article 2-718(3) of the UCC.
[284] Article 2-719(2) of the UCC.

UCC explicitly stated that the limitation of consequential damages for injury to the person in the case of consumer sales is *prima facie* unconscionable.[285]

Relating to the exclusive or limited remedy, the circumstances must meet the remedy fails of its essential purpose. It can confuse with the essential purpose of the contract. The remedy fails of essential purpose will be in the situation of when the remedy cannot perform or delay to perform. [286] The circumstances that the remedy fails its essential purpose occur when under a limited "repair or replacement" remedy, due to the seller's unable or unwilling to repair the defective goods or replace with the sound goods within a reasonable time, so that it fails to cure the defect. Thus, the limited remedy fails of its essential purpose. [287] When the limited remedy fails of its essential purpose, the buyer may disregard the terms of the contract and pursue the remedies available under the law.[288]

In ***Posttape Assoc. v. Eastman Kodak Co.***, a partnership engaged in the production of documentary films brought an action against a film manufacturer, claiming that defects in film furnished by the manufacturer caused production delays and lost profits. The Court found that the seller's exclusive remedy of replacement of the film did not fail of its essential purpose because the risks associated with the film are latent in nature.[289] The existence of unknown or undeterminable risks justifies using a limitation and provides a reason for a defendant to offer an exclusive remedy. In such cases, a limited remedy operates exactly as intended and does not fail of its essential purpose. [290]

[285] Article 2-719(3) of the UCC. See also James J. White & S. Summer at pp 268-269.
[286] James J. White & Robert S. Summer, Principles of Sales Law, Thomson Reuters, 2009, p 700.
[287] James J. White & Robert S. Summer, at p 701.
[288] Article 2-719(2) of the UCC.
[289] Posttape Assoc. v. Eastman Kodak Co. 450 F.Supp. 407 at 411 (E.D.Pa.1978).
[290] Posttape Assoc. v. Eastman Kodak Co., 537 F.2d 751 (3d Cir.1976).

In ***Hornberger v. General Motors Corp.*,** the General Motor's exclusive remedy to limit the remedy to the performance of repairs and needed adjustments does not fail of its essential purpose. The Court reasoning was "car manufacturers limit damages because of the uncertainties inherent in the business. Therefore, a car manufacturer's decision to limit damages merely allocates risks among the parties, and the exclusive remedy does not fail of its essential purpose." [291]

It is unfair to leave the aggrieved party without any remedy and let the breaching party take the advantages of the right of modification granted by the Law. Comment 1 of Article 2-719 explains that -

> "It is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract."[292]

In ***Earl Brace & Sons v. Ciba-Geigy Corp***., a remedy fails of its essential purpose where it deprives either party of the substantial value of the bargain.[293] In examining why a limited remedy failed of its essential purpose, courts consider it significant if the seller acted unreasonably or in bad faith.[294]

Regarding "a minimum adequate remedy" suggesting in Comment 1, it was decided in the case of ***Riley v. Ford Motor Co.,*** the exclusive remedy of repair and replacement of defective part was not satisfied the requirement of a minimum adequate remedy because the seller cannot satisfactorily repair the defect and the buyer has to incur the extra

[291] Hornberger v. General Motors Corp., 929 F. Supp. 884 (E.D. Pa. 1996).
[292] Comment 1 of Article 2-719 of the UCC.
[293] Earl Brace & Sons v. Ciba-Geigy Corp., 708 F. Supp. 708, 710 (W.D.Pa.1989)
[294] Pierce v. Catalina Yachts, Inc., 2 P.3d 618 (2000) 41 UCC 2d 737 (Alaska 2000).

cost of repair the defective part of the car. The court held that the buyer is entitled to the exceeding cost of repair.[295]

With the limitation of consequential damages for personal injuries in the consumer sales, the statutes express that it is *prima facie* unconscionable. There are two points to be noted, the buyer must be a consumer and the consequential damages must claim for personal injury and not for business loss.[296] Therefore, according to the scope of Article 2-719(3), the consequential damages for the business loss of the consumer and the personal injury of the business buyer can be limited. In ***Blevins v. New Holland***, the question before the court is whether a limitation of remedy to bar a breach of warranty claim for personal injury to the buyer's employee is unconscionable within the meaning of the Uniform Commercial Code. [297]The court reasoning was "since the hay baler was purchased and used in a commercial enterprise and thus is not consumer goods[298], the exclusion is not prima facie unconscionable.[299] When the loss at issue is commercial, a limitation of remedy clause in a sale contract is not *prima facie* unconscionable.[300]

5.3. UK Law

According to the Unfair Contract Terms Act, the criteria of enforceability and validity in the business sales contract and consumer sales contract are different. In consumer sales contract, the clause is unreasonable if the clause excludes or restricts the liability

[295] Riley v. Ford Motor Co., 442 F .2d 670,8CC 1175 (5th Cir.1971).
[296] Article 2-719(3) of the UCC.
[297] Blevins v. New Holland 97 F.Supp.2d 747 (2000).
[298] Consumer goods are goods "used or bought for use primarily for personal, family or household purposes". See at Va. Code Ann. § 8.2-103(3) (Michie 1991).
[299] Blevins v. New Holland 97 F.Supp.2d 747 (2000).
[300] Jim Dan, Inc. v. OM Scott & Sons Co., 785 F. Supp. 1196 (W.D. Pa.1992).

which the law expressly prohibited under Section 31 of the Consumer Rights Act.[301] However, in the business sales contract, the clause is reasonable if the parties have reasonably known when making the contract[302] and the clause is clarity.[303]Incorporation is concerned with whether limitation clause has been included in a contract and it is a question of fact.[304]

Incorporation is the rule set to invalidate the exclusion or limitation clause which is not complied with the law requirements. The law provides the methods to follow how to exclude or restrict liability for implied terms. Section 55 of the SGA provides for the incorporation in three ways: incorporation by express agreement, incorporation by the course of dealing between the parties, or by such usage as binds both parties to the contract. According to the UCTA, the exclusion or limitation clause can be included by reference to a contract term.[305]The validity of exclusion clause is, firstly, decided on the rule of incorporation. In this part, it will discuss the causes of an unenforceable clause in different ways of incorporation.

5.3.1. Signed Contract

A limitation clause is of no effect unless it is incorporated as a term of the contract. It must be incorporated when the contract is made. In incorporation by express agreement, it includes a clause written on a document that all the parties have signed. Any attempt to incorporate it after the contract is made will be unsuccessful. The document which contained an exclusion of liability for fitness and ordinary purpose had not been supplied to

[301] Section 31 of the Consumer Rights Act, 2015.
[302] Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] EWCA Civ 6.
[303] Section 2(1) of the UCTA.
[304] Michael G. Bridge, at p 474.
[305] Section 6 (3) of the UCTA.

the buyer before signing the contract. Such kind of exclusion clause is unenforceable.[306]

It is difficult for a buyer to prove that the clause was not agreed upon if the buyer has signed the contract. In ***L'Estrange v Graucob,*** the plaintiff bought a cigarette machine for her cafe from the defendant and signed a sales agreement, in very small print, without reading it. The agreement provided that "any express or implied condition, statement or warranty... is hereby excluded". The machine failed to work properly. In an action for breach of warranty the defendants were held to be protected by the clause. *Scrutton LJ* said:

> *"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."*[307]

Yet, it is possible to include the limitation or exclusion clause in the unsigned contract, if the buyer was made known before making the contract. However, the problem is it is difficult to prove limitation clause in case of oral agreement between the buyer and the seller, unsigned contractual document.

5.3.2. By Course of Dealing

In incorporation by the previous course of dealings, it is practically used words. It means that, this incorporation involves a course of dealings between the parties were depends on the facts incorporated by a contract. If the parties, in the past, have regularly made a contract with each other upon the same terms. Before inclusion of the exclusion clause by the course of dealing, the three requirements must be satisfied: the sufficient

[306] Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd [2010] EWHC 965.
[307] L'Estrange v Graucob, [1934] 2 KB 394.

numerous transaction, the consistency of course of dealing and no deviation from the established course of dealing. A clause can also be incorporated by trade usage among all the buyers and seller in the environment in question.

5.3.3. By Notice

In incorporation by notice, it includes an exclusion clause if the person relying on a contract took a rational measure to draw notice in order to attract other parties' attention. A term will only become incorporated in the contract if notice of a term has been given and that notice is reasonably sufficient in all the circumstances of the cases.[308] "Sufficient" required a party seeking to enforce the term or condition showing that it had been fairly and reasonably brought to the other party's attention.[309]

5.3.4. Standard Contract

If the contract is the standard terms, it is required to explain how the other party can be bound by those terms even if he is unaware of their content. It must ensure that those terms are incorporated into a contractual offer, then, if the offer is accepted, the contract itself incorporates those terms.[310] The problems of the standard contract term are more related to the reasonableness issues- whether the bargaining position of the parties was equal at the time of making the contract; whose standard terms is applied, buyer or seller? Relating to the common issue of standard terms, *Lord Reid* said,

---

[308] Parker v. South Eastern Railways, 2 CPD 416[1877].
[309] Interfoto Picture Library Ltd v. Stilleto Visual Programme Ltd, 1ALL ER 348[1988].
[310] C P Thorpe& J C L Bailey, Commercial Contracts: a practical guide to deals, contracts, agreements and promises, Woodhead Publishing Limited, Cambridge, 1996, p 116-117.

"In an ordinary way the customer has no time to read them, and if he did read them he probably would not understand them. And if he did understand and object to any of them, he would probably be told he could take it or leave it. And if he then went to another supplier the result would be the same".[311]

Summary

Relating the incorporation of exclusion and limitation clause, there are differences and similarities among the three systems.

In all three systems, the exclusion or limitation clause require to express in contract. However, the methods differ. In the CISG, the incorporation of exclusion or limitation clause must be accordance with the formation of contract and the standard terms should comply with the guidelines of Advisory Opinion No. 13.

The UCC provides the methods how to incorporate the exclusion of liability clause and how to modify the remedy clause. The inclusion of the clause that does not comply with the methods mentioned in Article 2-316 and 2-719 of the UCC will be procedural unconscionability.

In the UK Law, although the SGA mentions the ways that the seller can exclude liability such as by consent, trade usage, and in standard, there is no specific word to exclude liability as same as in the UCC. The UK law precisely prohibit the seller right to exclude the liability in consumer sales contract.

[311] Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967]1 AC 361, [1966] 2 All ER 61.

CHAPTER VI

Interpretation of Exclusion or Limitation Clause

Introduction

The second criteria for deciding the validity of exclusion clause is interpretation. The purpose of interpretation is to establish the intention of the parties agreed to the contract. It is one of the principal tasks of the court is to interpret the intention of the parties to the contract. There can be the case, the context of the contract was written ambiguity, and the court has to define the rights and obligations of the parties.

In this chapter, it will discuss different methods of interpretation in three systems. Under Article 7 of the CISG, the contract shall be interpreted with good faith and general principles which the CISG based on. In the UCC, the contract shall interpret in the *parol evidence* rule and in the UK Law, it shall interpret with the *contra proferentem* rule.

6.1. CISG

The CISG does have the principle of good faith which govern the interpretation of clauses providing for the limitation and exclusion of liability of the obligor for failure to perform a contract for the international sale of goods.[312] The contract is required to be interpreted accordance with the rule under Article 7, to maintain its international character and to promote uniformity. Article 7 suggests to interpret the convention and questions governed by the CISG accordance with good faith, general principles which the CISG based on and conflict of laws rule as follows:

[312] Comment 1 of the Advisory Council's Opinion No. 17.

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which is not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[313]

The exclusion and limitation clause fall under the "*questions concerning matters governed by this Convention which is not expressly settled in it"* mentioned in para 2 of Article 7.[314] In interpreting the intention of the parties to the contract, the CISG requires all circumstances and extrinsic evidence for these interpretations to be taken into account.[315] Merger clauses, international usages are as applicable,[316] although on account of implied agreements.[317] The issue of interpretation governed by Article 8(2) which stipulates that "where a party is not aware of the intent that the other party had with a specific statement", that statement must be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.[318] In the interpretation of the intention of the party, or the understanding of a reasonable person would have had, due consideration is to be given to all relevant circumstances of the cases, including negotiation and practices established between the parties.[319]

[313] Article 7 of the CISG.
[314] Article 4 and 7 of the CISG.
[315] Article 8 of the CISG.
[316] Wood case, Austria 21 March 2000 Supreme Court, http://cisgw3.law.pace.edu/cases/000321a3.html (last accessed on 2 Jan 2017).
[317] Article 9 of the CISG.
[318] CISG Advisory Council' Opinion No. 13.
[319] CISG Advisory Council's Opinion No.3.

In ***Tantalum case,*** criteria for cases in which the addressee might be expected to have knowledge and understanding of standard terms written in a foreign language are: length, intensity and economic importance of the business relationship between the parties, as well as the spreading and use of language within their society. During the business relationship with the seller, the buyer on several occasions referred in English to his German written standard terms printed on the backside of his documents. As the party entered into a deal about 7 million Euro, an economic importance in the sense mentioned above can be concluded.[320]

6.2. UCC

Even the contracts are expressly agreed to by the parties, those terms need to be interpreted and the court must ascertain the terms and meaning of the parties to the contract.[321] According to the UCC, the court would look to the relevant course of performance, course of dealing and usage of trade to determine the meaning of the words of agreement.[322]

The *parol evidence* rule is a legal rule that applies to written contracts. *Parol evidence* is evidence pertaining to the agreement that is not included in a written contract. Courts generally do not allow this extra evidence, because the written contract is considered to be the best description of the parties' intentions.

[320] Tantalum case, Austria 31 August 2005 Supreme Court, http://cisgw3.law.pace.edu/cases/050831a3.html (last accessed on 2 Jan 2017)
[321] Henry D. Gabriel, at pp 38-49.
[322] *Ibid.*

According to Article 2-202, the *parol evidence* rule does not apply in the interpretation of every term containing in the contract. There are two situations that the *parol evidence* rule applies: *terms with respect to which the confirmatory memoranda of the parties agree or terms which are otherwise set forth in a writing intended by the parties as a final expression of their agreement.* [323]If one of the two situations existed, it applies and those terms included in the contract may not be contradicted by evidence of any prior agreement or a contemporaneous oral agreement.[324]The *parol evidence* rule applies in both of the contracts which fully integrated or partially integrated contract. If the court decides the writing is complete and exclusive, even evidence of consistent additional terms may not be admitted. [325] Moreover, if the court decides the writing is not complete and exclusive, then it may admit evidence of consistent additional terms.[326]

In ***Wind Wire, LLC v. Finney,*** the Indiana Court of Appeal summarized Indiana law on integration clauses and the *parol evidence* rule as follows:

"An integration clause of a contract is to be considered as any other contract provision to determine the intention of the parties and to determine if that which they intended to contract is fully expressed in the four corners of the writing. Generally, where parties have reduced an agreement to writing and have stated in an integration clause that the written document embodies the complete agreement between the parties; the *parol evidence* rule

---

[323] Article 202 0f the UCC (*Parol* or extrinsic evidence)
Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
[324] *Ibid.*
[325] James J. White & S. Summer, at 140.
[326] *Ibid.*

prohibits courts from considering extrinsic evidence for the purpose of varying or adding to the terms of the written contract. An exception to the *parol evidence* rule applies, however, in the case of fraud in the inducement, where a party was 'induced' through fraudulent representations to enter a contract." [327]

In ***Agri-Tech v. Brewster Heights Packing,*** the buyer entered a contract with the seller for the purchase of apple packing machinery. The district court entered judgment in favor of the seller on its breach of contract claim. On appeal, the court affirmed. The buyer contended that both it and the seller intended at the time of their contract to be bound by their written agreement and to prior oral discussions. The buyer contended that the largest portion of its damages stemmed from the loss of an orally bargained-for system. The court held that a clause in the parties' contract prohibited the inclusion of any understandings or representations not expressly included in the contract. It appeared that the buyer intended to use the *parol evidence* not to explain or to supplement the contract, but rather to contradict the limitation of warranties contained in the contract. The court concluded that the buyer's counterclaims of fraud and violation of the Washington Consumer Protection Act failed because they did not give rise to the independent tort of fraud and there was insufficient evidence to demonstrate an effect on other consumers or a real and substantial potential for repetition of unfair conduct. [328]

However, there is an exception to use *parol evidence* rule. In ***Hull-Dobbs, Inc. v. Mallicoat,*** the court stated that: "The *parol evidence* rule does not apply where the *parol evidence* in no way contradicts or alters the terms of the written contract but the representation or statements are made as an inducement to the contract and form the basic and

[327] Wind Wire, LLC v. Finney, 977 N.E.2d 401 (Ind. Ct. App. 2012) (Indiana Court of Appeals)
[328] Agri-Tech v. Brewster Heights Packing, 24 U.C.C. Rep. Serv. 2d (Callaghan) 440(United States Court of Appeals for the Fourth Circuit).

consideration for it."[329]

6.3. UK Law

A limitation clause is usually inserted for the sole benefit of one of the parties, in a contract of sale, the seller. A limitation clause which purported to exclude liability for implied terms does not exclude liability for the express term and a clause certifying the quality of goods does not extend to packaging requirements. In ***Baldry v Marshall,*** the written contract excluded the liability for any "guarantee or warranty, statutory or otherwise". The requirement that the car is suitable for touring was a condition. Since the clause did not exclude liability for breach of a condition, the plaintiff was not bound by it.[330] Exclusion or limitation of liability clause which excluded liability for loss of profits did not cover the deliberate personal repudiatory breach of contract.[331]

However, in ***Air Transworld Ltd v BombardierInc,*** the Court held that an exclusion clause was effective to disapply sections 13 and 14 of the Sale of Goods Act 1979, despite making no express reference to "conditions".[332]

A limitation clause is construed ***contra proferentem***, i.e. narrowly against the interest of the person relying upon it. If a clause is ambiguous the Court will adopt the meaning which is less favorable to the party (usually the seller) wishing to rely upon the clause. The doctrine is often applied to situations involving standard contracts or where the parties are of unequal bargaining power but are applicable to other cases.

[329] Hull-Dobbs,Inc. v. Mallicoat, 57 Tenn.App.at 100,415 S.W.2d 344, 3 UCC at 1032-34(1966).
[330] Baldry v Marshall [1925] 1 KB 260.
[331] Internet Broadcasting Corporation Ltd (t/a NET TV) v MAR LLC (t/a MARHedge) (2009).
[332] Air Transworld Ltd v Bombardier Inc. [2012] EWHC 243 (Comm).

Summary

The interpretation of exclusion or limitation clause plays an important role as determining the validity and enforceability of the clause. There are different interpretation techniques among three systems. The CISG follows principles of ***good faith*** in international trade (Article 7), interpretation of the intention of the parties must be interpreted according to the understanding that a ***reasonable person of the same kind as the other party would have had in the same circumstances*** (Article 8).

The UCC strike out the previous oral evidence which contrary to the written clause by ***parol evidence*** rule. Whilst, the UK Law applies the ***contra proferentem*** rule, which narrowly against the interest of a person relying upon the exclusion or limitation clause.

CHAPTER VII

Reasonableness of Exclusion or Limitation Clause

Introduction

The validity of exclusion or limitation clause plays the essential role in deciding what liability the seller has and what remedy the buyer is entitled to the breach of contract. The third criteria to test the validity and enforceability of exclusion or limitation clause is "reasonableness". It is the judiciary control over the unfair and unreasonable clause. The court invalidates the exclusion or limitation clause only if the clause failed the reasonableness test.

In this chapter, the different methods of reasonableness test applied by the court under three systems will be discussed. Under the CISG, the court applied the available domestic law to test the reasonableness of the exclusion or limitation clause. Under the UCC, the court determines the reasonableness of the clause by two steps, procedural unconscionability and substantive unconscionability. According to the UK Law, the reasonableness of the clause must be tested by the Unfair Contract Terms Act for business sales contract. For consumer sales contract, the reasonableness test is governed by the Consumer Rights Act.

7.1. CISG

Exclusion and limitation clause fall under the scope of the CISG and the issue of incorporation and interpretation need to be decided by the rules under the CISG. However, the issue of reasonableness has to subject both the rules under the CISG and the rules under

the applicable domestic law. It is required to draw the lines between the rules of the CISG and the domestic law.

According to Article 4, the substantive validity of exclusion or limitation clause fall outside the scope of the CISG. Domestic Law approach varies from international instruments in controlling the validity of exclusion and limitation clauses. The domestic law restricts the parties' freedom to exclude liability or to modify or limit the remedy.[333] Whilst, the CISG does not prohibit the parties' freedom to exclude or limit their liability under contracts within its scope. [334]

Even an exclusion or limitation clause passes the incorporation and interpretation test discussed above, the validity issue still remains. The third requirement is reasonableness test or substantive validity. Commentator's comments on what is "reasonableness and substantive validity" under the CISG. According to *Honnold,* "*What is 'reasonable' can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade. This approach is analogous to and is supported by Article 9, which provides that contractual obligations include "practices established by the parties and usages . . . in the particular trade*".[335]Professor *Flechtner* has pointed out, *"there is a consensus among commentators that the law governing fraud, duress and certain other matters -- including the capacity to contract and agent's authority, illegal contracts, and unconscionability -- are matters of validity".*[336]

---

[333] See Article 2-316, 2-719 of the UCC; Section 11 of the UCTA.
[334] Article 6 of the CISG.
[335] John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention, 3d ed., Kluwer Law International (1999) p 101.
http://cisgw3.law.pace.edu/cisg/biblio/honnold.html (last accessed on 2 Jan 2017)
[336] Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price Under Article 50,* 14 J.L. & Com. 153, 166 (1995)
http://www.cisg.law.pace.edu/cisg/biblio/flechtner.html (last accessed on 2 Jan 2017)

In the past, there was a view that "a reasonableness test of international sales contract is under the domestic law". Article 4 allows domestic rules permitting courts to exercise control over unfair, unreasonable, or unconscionable contracts constitute rules of validity and thus apply to contracts for the international sale of goods.[337] Thus, the question "whether the parties have validly . . . derogated from any of the CISG's provisions falls outside the Convention and has to be solved by reference to a particular domestic law." According to this view, both the procedural and substantive validity of the exclusion or limitation clause fall under the scope of the available domestic law.

In ***Vacuum cleaners case,*** it concerns the validity of contract terms controlled by domestic law; the term in seller's general conditions limiting damages did not validly incorporate into a contract under the applicable domestic law, as a result, the standard terms was unenforceable.[338]

Currently, the view of domestic law governs both substantive and procedural validity issue changed. Provisions of the Convention may displace rules of domestic law, *Honnold* argues that, *"Domestic rules on validity -- such as requirements of good faith, conscionability, or rules controlling contract clauses restricting responsibility for defective goods -- may become inapplicable in certain cases".* [339] According to the latter's view, the rules of the domestic applicable law to control the exclusion or limitation clause should not contrast with the principles of which the CISG based. There are some cases decided according to this view.

---

[337] Article 4 of the CISG.
[338] Vacuum Cleaners case, Germany 2 September 1998 Appellate Court Celle, http://cisgw3.law.pace.edu/cases/980902g1.html (last accessed on 2 Jan 2017).
[339] John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention, 3d ed., Kluwer Law International (1999), p 16. http://www.cisg.law.pace.edu/cisg/biblio/honnold.html (last accessed on 2 Jan 2017).

In ***Conveyor band case***, "the CISG does not contain provisions for the test of substantive validity of standard terms. The test according to the law applicable according to conflict of laws rules applies, here: German law. However, the standard of appropriateness needs to be adjusted to unified law and internationally accepted usages. A set-off bans included in standard terms allowed under the German Law and Austria Law, the laws of the states of the parties. This demonstrates that set-off ban is in line with international standards. Moreover, it does not conflict with the principle of good faith underlying the CISG. For these reasons, the court decided that "a set-off ban is valid."[340]

7.2. UCC

7.2.1. Article 2-302

Article 2-302 of the UCC is the provision which allows the court to invalidate the exclusion or limitation clause on a certain circumstance. The court follows the doctrine of *unconsciousability* to determine the validity and enforceability of the exclusion or limitation clause. According to the doctrine of *unconscionability*, the court may invalidate whole contracts, or particular provisions in contracts if they find fundamentally unfair. Article 2-302 states as follows:

(1)If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[341]

[340] Conveyor band case, Austria 23 March 2005 Oberlandesgericht [Appellate Court] Linz http://cisgw3.law.pace.edu/cases/050323a3.html (last accessed on 2 Jan 2017).
[341] Article 2-302(1) of the UCC.

The court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.[342]

Regarding the test of unconscionability, in the case of ***Stanley A. Klopp, Inc. v. John Deere Co., 510 F***, two factors have to be taken into consideration. Lacking of a meaningful choice upon the acceptance of the exclusion clause in question and the exclusion or limitation clause in question must unreasonably favor the other party to the contract. Unconscionability may be expressed as the lack of meaningful choice together with a contract term which is so one-sided as to be oppressive. Thus, although the buyer had no choice at the time of making the contract, if the term was fair and reasonable, it is still enforceable.[343]

In determining whether an exclusion is unconscionable, courts examine all related circumstances existing at the time of signing the contract to ascertain whether "there was a reason to conclude the contract and the competency of the parties to make agreement upon the allocation of risk." Unconscionability is more often found by the court when a consumer is involved, when there is an inequality in bargaining power, and when the lim-

[342] Comment 2 and 3 to Article 2-302 of the UCC.
[343] Stanley A. Klopp, Inc. v. John Deere Co., 510 F. Supp. 807, 810 (E.D.Pa.1981)

itation clause is on a standard form; *vice- versa*, the exclusion or limitation clause are unlikely to be found as unconscionability when "such a limitation is included by freely negotiation between the parties, which will most likely occur in a commercial transaction".[344]

Although the exclusion clause or limitation clause was included in the contract by written which is inconspicuous, if the term extremely takes one side and causes disadvantages of the other side, the court will not enforce the clause. In ***Moscatiello v. Pittsburgh Contractors Equip. Co.***, the limitations of remedies clause which prohibited recovery of incidental and consequential damages, was unconscionable and unenforceable due to unfairness even thought it was concluded by genuine assent of the parties. In this case, the incorporation of limitation clause of standard contract was drawn as the seller desired. Inconspicuousness and express agreement of the contract will not sufficient to decide that the limitation remedy clause is unconscionable and valid.[345]

The same principles are also applied in many other cases. In ***Hall v. Treasure Bay Virgin Corp., the requirement of*** for fair contract are procedurally and substantively unconscionable. "Procedural unconscionability relates to the process by which an agreement is reached and the form of an agreement." Terms of a contract are substantively unconscionable when they so unreasonably favor one party that the other party does not truly agreed.[346]

Similarly, in ***Williams v. Walker-Thomas Furniture Co.,*** bargaining power of the party was one of the factors to be considered in deciding the unconsciousability. In many

[344] Pierce v. Catalina Yachts, Inc., 2 P.3d 618 (2000) (Supreme Court of Alaska).
[345] Moscatiello v. Pittsburgh Contractors Equip. Co., 407 Pa.Super. 363, 595 A.2d 1190 (1991), alloc. dn., 529 Pa. 650, 602 A.2d 860 (1992).
[346] Hall v. Treasure Bay Virgin Corp., 2009 U.S. Dist. LEXIS 18117, (United States District Court for the District of the Virgin Islands, Division of St. Croix).

cases, the superior bargaining power can quash the right of meaningful choice of the inferior bargaining power. The common practice of making contract is also relevant to this consideration. Normally, when the contract terms incorporated in accordance with the procedural unconscionable, the contract terms are not to be questioned by the court. However, when a party of inferior bargaining power, who has little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective reflection of his consent, was ever given to all the terms. In such a case the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[347]

In order to aid the court in deciding on the matter of unconscionable of the exclusion or limitation clause, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial transaction, purpose and effect.[348]

In ***Haugen v. Ford Motor Co.,*** the requirement of Article 2-302(2) that the court required an affording opportunity for the buyer to present evidence to aid the court in making a determination. In this case, Plaintiff buyer challenged the judgment of the District Court of Williams County (North Dakota) that granted summary judgment in favor of defendant manufacturer dismissing the buyer's damage claim based on a liability exclusion for damage from fire. The buyer filed a complaint against the manufacturer when the car he bought burst into flames while he drove it. The manufacturer was awarded summary judgment dismissing the buyer's claim based on a liability exclusion for damage from fire included in the limitation of liability. The court reversed finding that if the Uniform Commercial Code (UCC) was applicable to the sale, the trial court improperly determined that

[347] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (C.A. D.C. 1965) (United States Court of Appeals for the District of Columbia Circuit).
[348] Article 2-302(2) of the UCC.

the disclaimer was not unconscionable without affording the parties the opportunity to present evidence as to its commercial setting, purpose, and effect as required to aid courts in making the determination. The required adversary hearing would have precluded summary judgment. If the manufacturer was not a "seller" subject to the Uniform Commercial Code the issue of whether the buyer agreed to the limitation of liability by the manufacturer was a matter of defense that could not have been decided on a motion for summary judgment, as there was no proof of the relationship between the buyer and the manufacturer except that the buyer was handed a booklet containing the limitation of liability at the time of purchase. Therefore, the order granting summary judgment in favor of the manufacturer and dismissing the buyer's damage claim based on a liability exclusion for damage from the fire was reversed.[349]

7.2.2. Unconscionability and Standard Contract

The unconscionability of the contract is a crucial point to decide the validity of the contract. There is no definition of the term "unconscionable" and the UCC leave the determination task to the court.[350] Professors ***White and Summers*** have stated unconscionability "is not a concept, but a determination to be made in light of a variety of factors not unifiable into a formula."[351] The purpose of unconscionable under Article 2-302 stated in the official comment is "prevention of oppression and unfair surprise". The procedural unconscionability may take place in two forms: unfair surprise resulting the misleading the

[349] Haugen v. Ford Motor Co., 219 N.W.2d 462, (Supreme Court of North Dakota).
[350] Neil M. Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, MICH. ST. L. REV. 211 (2013), p 224.
[351] James J. White & Robert S. Summers, Principles of Sales Law, Concise Hornbook Series, Tomson Reuters, 2009, p 258.

bargaining process and oppression resulting from unequal bargaining power.[352]Thus, the substantive unconscionable requires the substantive terms be unreasonably favorable to one party or unduly burdensome to the other.

Procedural unconscionability occurs when the seller's exclusion or limitation clause did not meet the requirements of methods construction the contract under the statute. Whereas, the substantive unconscionability involves the terms of the clause fail to meet the requirement of fairness. The court's approach to invalidate the exclusion clause is based on the circumstances of each case. For negotiated business contract, the current approach of the court analysis on a case-by-case basis does make sense. As the nature of making of negotiated contract and standard contract differ, it is not suitable to apply the same approach in the standard contract, because it would raise the litigation cost enormously.

Until the present time, the attempt of the Court and many scholars fail in creating a new approach to the consistency rule for unconscionability. The court still struggles on the issue of "when and how to decide the exclusion clause of the standard contract is invalid". The requirements of the validity of contract set in the Statute and the nature of standard contract never match each other. The Law requires the freedom of contract to make a contract, whilst the buyer of the standard has no right to negotiate or alter the contract terms. It always in the situation of "take it" or "leave it" position. This can be called the procedural unconscionability. The types of contracts or terms most often subjected to the test of unconscionability include excessive price terms, termination-at-will clauses, add-on security clauses, limitations on damages for breach, and limitations on periods for filing

[352] Harry.G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 Hastings L.J. 459 (1995), p 474.

claims. The contract terms that is unconscionable under the law provided is only the personal injury causes the consumer. This overlaps the tort liability. Even without this statutory control on this matter, the buyer or the third party can claim for tort liability. Therefore, for invalidation of exclusion or limitation clause, it should set the criteria that are reasonable and satisfactory to the seller and the buyer of the standard contract.

As the unconscionability should exist at the time that the contract was made for the doctrine to be applied, the court has to decide a controversial condition whether the unconscionable existed or not? Instead, it should be the criteria including the specific terms that will be unconscionable.

According to Article 2-302, the court generally has no power to draw or alter the contract terms of the parties so that it has taken the position that unconscionability can be used only as a defense against enforcement and not as a basis for affirmative recovery because unconscionability is "a shield and not a sword". [353] However, according to Article 2-719, if the remedies clause is unconscionable, the remedies shall be accordance with the Law. The provision of these two articles contradicts each other. In practice, the courts alter the contract terms in the consumer cases. Of course, the courts have the power to enforce the conscionable clause and to invalidate the unconscionable clause, however, the question is "what are the proper judicial power to reform the contract?"

Due to the protectionism, the courts are more receptive to the consumer or non-merchant claims of unconscionability than to claims by merchants. Despite the fact, the consumers who bought the goods for the price under 500 dollars, will not happy to sue instead they will complain to the seller. Therefore, the litigation is not a reasonable means

[353] James J. White & S. Summer, at p 275.

to solve the issue of unconscionable for all consumers who engaged in the standard contract. The unconscionable of standard contract terms should subject to the distinguished set of rules which vary from the current rules under the UCC.[354]

The judicial power to invalidate the clause combined the two methods of incorporation and unconscionability. Section 2-316 only states minimum criteria for the enforceability of an implied warranty disclaimer, and that disclaimer satisfying these criteria still must be conscionable under section 2-302. By its express terms, section 2-302 applies to "any clause of the contract."[355]Therefore, in many cases of unconscionability, the courts applied both procedural and substantive unconscionability to invalidate the exclusion clause of the standard contract.[356]

7.2.3. Why the current theories do not fit in the standard contract?

The scholars of contract and economic debate the issue of enforceability and validity based on their own theory. According to the consent-based theory, whether the contract is valid should be based on the consent and bargaining power of the parties. An example case is ***Williams v. Walker-Thomas Furniture Co.*** In this case, whether or not to invalidate the contract, *J. Skelly Wright* focused on the objective consent of the buyer who has little knowledge, by stating as follow:

---

[354] See "the refund policy for consumer sales under the UCC" in Chapter V.
[355] Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 Chi.-Kent. L. Rev. 199 (1985), pp 220.
[356] WXON-TV, Inc. v. A.C. Nielsen Co., 740 F. Supp. 1261, 1264(E.D. Mich. 1990) (construing Michigan law to require substantive and procedural unconscionability); Master Lease Corp. v. Manhattan Limousine, Ltd., 580 N.Y.S.2d 952 (App.Div. 1992) (construing New York law to require substantive and procedural unconscionability); Rite Color Chem. Co. v. Velvet Textile Co., 411 S.E.2d 645, 648-49 (N.C. Ct. App.1992) (holding that both substantive and procedural unconscionability are required); Collins v. Click Camera & Video, Inc., **621** N.E.2d 1294, 1302 (Ohio Ct. App. 1993) (holding that a "quantum" of both substantive and procedural unconscionability is required under Ohio law).

"When a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."[357]

The two problems for a consent-based theory are; first, clearly, the person signing such a contract did not assent to terms that went unread, subjectively and consciously; second, no one offering such terms can reasonably have thought that the other party subjectively assented and therefore, according to the modern objective theory, there was no *objective* assent either. That is, no one who hands a form contract to another to sign, knowing that it will largely go unread, can conclude that the other party has consciously assented to each of the terms therein.[358] Since the parties may vary the UCC provision by the agreement, the question is in a standard contract, did the consumer buyer consent the terms of the contract? The consumer usually did not read the standard contract and sign it; even they read and understand the terms, if they have no other choice in the market to enter the contract.

There are numbers of problems arisen from this theory, if the enforceability and validity of the contract terms have to base on the case-by-case analysis, it will not suit the consumers who mostly engaged in the standard contract. It will not cover all the consumers of the same signing the same type of contract.

As the standard contract was formed by one party, who set the condition of the contract and the other party who has no right to alter or negotiate the conditions of the contract, if the enforceability and validity of the exclusion clause are decided based on the

[357] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).
[358] Randy E. Barnett, *Consenting to Form Contracts*, 71 Fordham L. Rev. 627 (2002) p 632. http://ir.lawnet.fordham.edu/flr/vol71/iss3/2 (last accessed on 2 Jan 2017).

consent-based theory, all standard contracts will be unconscionable. It should be noted that although the court may assume that the consent of the buyer was not given objectively and the disclaimer clause is favor on the seller side. However, the seller can argue that, as the standard contract intended to apply in the mass market, the exclusion clause can also be said as a custom and usage of commercial transaction. When the custom and usage are widely used in the standard contract, the terms of exclusion clause are acceptable.

In contrast, according to the economist theory, the fairness of the terms of the contract is controlled by the competition among the competitors. Since the terms of the standard contract is part of the goods or service over which businesses in the market compete, either competition to offer the best goods at the lowest price, or the desire for monopoly profits, would drive sellers to make their terms efficient.[359]

The scholars and the courts failed to develop the theory for invalidation of the exclusion clause of the standard contract. For this issue, of course, there can be various solutions for solving the issue of invalidation of the exclusion clause in the standard contract. However, it is trying to propose an alternative approach to solving the current problem. Instead of analysis on the case-by-case study, it is necessary to set the criteria to decide the enforceability and validity of the exclusion clause in the case of standard contract. The theory should fulfill the basic requirements of the contract to maintain the fairness of the parties and to satisfy the modern commercial pattern.

[359] Andrew Tutt, *On the Invalidation of Terms in Contracts of Adhesion*, Yale Journal on Regulation, vol. 30 (2013).

7.3. UK Law

7.3.1. Reasonableness of Business Sales Contract

The fairness of contract terms has to be tested by the reasonableness test under Schedule 2 of the Unfair Contract Terms Act. However, this provision cannot prevent the court or tribunal in deciding the exclusion clause as it is not a term of the contract.[360] The basic approach required is a gathering and weighing of the relevant factors in each case.

When the guidelines under the Schedule 2 is required to consider the court is not confined to those factors listed in the Schedule , since they are not to be treated as exhaustive of the matter to be considered when determining if a term is reasonable.[361] It is possible an identical clause to be reasonable in on a case and unreasonable to the other cases.

In ***Green v. Cade Bros. Farms*****,** Mr. Justice Griffiths held "it was fair and reasonable for seed potato merchants to rely on a limitation clause which limited their liability to the contract price of the potatoes."[362]

However, in ***George Mitchell v Finney Lock Seeds*****,** it would not be fair or reasonable to allow the seller to rely on the clause to limit their liability, as the buyer would not have been aware of the fault and had no opportunity at all of knowing or discovering that the seed was the wrong seed. Whereas, the sellers could and should have known the fact. However, as to the seed merchants it is possible for seedsmen to test seeds before putting them on to the market.[363]

The factors for deciding whether the exclusion or limitation clause is fair and reasonable are as follows:

---

[360] Section 11(2) of the Unfair Contract Terms Act, 1977.
[361] Richard Lawson, Exclusion Clause and Unfair Contract Terms, 5th ed., Sweet & Maxwell, 1998.
[362] Green v. Cade Bros. Farms (1978) 1 Lloyd's Law Reports 602.
[363] George Mitchell v Finney Lock Seeds [1983] QB 284.

i. Bargaining power;

ii. The existence of an inducement to the buyer to accept the exclusion clause;

iii. The ability to acquire the goods elsewhere and

iv. Whether the buyer should have known of the term.[364]

i. Bargaining Power

Inequality of bargaining power is one of the factors in the assessment of whether the exclusion or limitation clause is reasonable or not. If the court found that the inclusion of a particular clause which excluded liability for breach of contract is making between parties whose position are inequality of bargaining position, even that clause properly included accordance to incorporation regulation, it indicates it is unreasonableness.[365]

The court will not interfere where the parties have experiences in business and equal bargaining power, it is reasonable to allocate the risks unless one party has taken unfair advantage of the other or the term is so unreasonable that it is ambiguity.[366]How can the court judge if the situation of inequality bargaining power existed at the time of making a contract? Analysis on the issue of inequality of bargaining has focused on individual cases.

In ***St Albans City and District Council v ICL***, the court found in favor of St Albans, holding that a clause limiting ICL's liability to £100,000 was unreasonable. As the contract was a standard contract of the seller who has stronger bargaining position and lack of negotiation at the time of making a contract. Due to the financial restraints and they are

[364] Schedule 2 of the UCTA.
[365] Section 11(2) of the UCTA.
[366] Watford Electronics Ltd v Sanderson CFL Ltd, [2001] EWCA Civ. 317.

not from the business field, the buyer cannot buy without the terms. In addition, the insurance does not cover the potential loss of the buyer [367]

Using standard terms may indicate that the drafter is always in a better bargaining position than the other is, but this is not always true. Considering the strength of the parties' bargaining position may involve questions such as:

(a) whether the transaction was unusual for either or both of them

(b) whether the complaining party was offered a choice over a particular term

(c) whether that party had a reasonable opportunity to seek a more favourable term

(d) whether that party had a realistic opportunity to enter into a similar contract with other persons but without that term

(e) whether the party's requirements could have been met in other ways(f) whether it was reasonable, given the party's abilities, for him or her, to have taken advantage of any choice offered under (b) or available under (e).[368]

ii. Inducement

The second indicator for reasonableness is whether the buyer received an inducement to agree to the term, or in accepting, it had an opportunity of entering into a similar contract with other persons, but without having a similar term. This issue is the question of fact and it is necessary to take consideration of all circumstances relating to the issues.

[367] St Albans City and District Council v ICL [1996] EWCA Civ. 1296.
[368] In relation to the fair and reasonable test under the proposed unified legislation, the Law Commissions have provided some guidance on considering bargaining power states in Note 45 to their draft Bill.

iii. Ability to acquire the Goods elsewhere

The third indicator of reasonableness test is whether the injured party could have gone elsewhere or whether there was an alternative source of supply of whatever was being contracted for and whether the alternative source used the same terms. The case law on the Unfair Contract Terms Act 1977 has indicated that the availability of alternatives may be significant in relation to the question of whether the *proferens* had offered the other party a higher priced contract involving less risk than the contract made which, through the exemption clause, placed the significant risk on that other party.

In ***R W Green Ltd v Cade Bros Farm,*** there was a choice of level of risk available to purchasers of seed potatoes. There was an alternative available in the form of a different, and safer, type of seed. The availability of more expensive seed potatoes which would be more likely to be healthy indicated that the exemption clause was reasonable in a contract for the purchase of cheaper seed potatoes.[369]

iv. Buyer's Knowledge

The fourth indicator of reasonableness test is the buyer's knowledge of the terms of the exclusion or limitation clause. Such knowledge could indicate that the clause is fair and reasonable. The question of buyer's knowledge of the incorporation of a clause, which limits or excludes seller's liability, may in some circumstances occur without a buyer either knowing of the existence of the clause or contemplating the extent of certain terms. According to the Unfair Contracts Terms Act, there are two levels of knowledge which may

[369] R W Green Ltd v Cade Bros Farm, [1978] 1Lloyd's Rep. 602.

be relevant to the reasonableness of a clause "which were known or ought to have been, known to or in the contemplation of the parties." [370]

In order to assess fair and reasonableness of the clause, it is necessary to consider the circumstances of "what the buyer know and what he should have known." "What the buyer knows" covers the circumstances of not only knowing the existence of the clause but also to understand the extent of the terms of the clause. This can happen if the seller makes known to the buyer by effective measures such as clear and transparent words were written and explains the extent of the terms. The other means is if the buyer uses his own standard terms contract, the situation may provide an indicator of knowledge. [371] The lack of appropriate measures to make the buyer aware of a clause may indicate its unreasonableness.

"The buyer should have known" may depend on the situation of individual cases. Trade practice and a long course of dealing between the parties may, nevertheless, indicate the reasonableness. Similarly, a wide distribution and ready availability of the *proferens'* standard terms may indicate reasonableness. Also relevant is the legibility and intelligibility of a clause. If the terms would have been understandable by any intelligent businessman that may be a factor indicating reasonableness.

In considering knowledge of whether a term is fair and reasonable, it is necessary to consider the following factors:

(a) any previous course of dealing between the parties

(b) whether the party knew of a particular term

(c) whether the party understood its meaning and implications

[370] Section 11 of the UCTA.
[371] Watford Electronics v Sanderson [2001] EWCA Civ. 317.

(d)what a person other than the party, but in a similar position, would usually expect in the case of a similar transaction

(e) the complexity of the transaction

(f) the information given to the party about the transaction before or when the contract was made

(g) whether the contract was transparent

(h) how the contract was explained to the party

(i) whether the party had a reasonable opportunity to absorb any information given

(j) whether the party took professional advice or it was reasonable to expect the party to have done so, and

(k) whether the party had a realistic opportunity to cancel the contract without charge.[372]

7.3.2. Reasonableness of Consumer Sales Contract

As mentioned in the introduction part, the criteria of enforceability and validity in the business sales contract and consumer sales contract are different. In consumer sales contract, the clause is unreasonable if the clause excludes or restricts the liability which the law expressly prohibited under Section 31 of the Consumer Rights Act.[373] However, in the business sales contract, the clause is reasonable if the parties have reasonably known when making the contract[374] and the clause is clarity.[375]

[372] The notes to the Law Commission's draft Unfair Contract Terms Bill identify factors which may be relevant in considering 'knowledge and understanding' in relation to whether a term is fair and reasonable. They indicate the need to consider both of the levels of 'knowledge' referred to above. Note 44 lists the factors.
[373] Section 31 of the Consumer Rights Act, 2015.
[374] Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] EWCA Civ. 6.
[375] Section 2(1) of the UCTA.

As described above, liability for non-conformity of goods in consumer sales is not allowed to exclude.[376] Section 31 of the Consumer Rights Act clearly listed the liability and remedies that the trader cannot exclude when contracting with the consumer. The statutory right of the consumer consisted goods quality must be matched as description, satisfactory quality, fit for particular purpose, sample and model, etc.

Liability that cannot be excluded or restricted are as follows:

(1) A term of a contract to supply goods is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under any of these provisions—

(a) section 9 (goods to be of satisfactory quality);

(b)section 10 (goods to be fit for particular purpose);

(c)section 11 (goods to be as described);

(d)section 12 (other pre-contract information included in contract);

(e) section 13 (goods to match a sample);

(f)section 14 (goods to match a model seen or examined);

(g)section 15 (installation as part of conformity of the goods with the contract);

(h)section 16 (goods not conforming to contract if digital content does not conform);

(i)section 17 (trader to have right to supply the goods etc.);

(j)section 28 (delivery of goods);

(k)section 29 (passing of risk).”[377]

For consumer sales contract, as the law expressly stated the criteria which liabilities are prohibited to include in the consumer sales contract, it is not necessary to check under the rule of reasonableness test. The law also makes the list of remedies available for

[376] Section 31 of the Consumer Rights Act, 2015.
[377] *Ibid.*

the consumer, it can be said that the trader has no longer to have the right to exclude or restrict the liability for non-conformity goods in consumer sales contract.

7.4. Reasonableness of Standard Contract

Section 3 of the Unfair Contract Terms Act provides the reasonableness of the contract between the parties by using the written standard contract. It states as follows:

"(1) This section applies as between contracting parties where one of them deals on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach;[378] *or*

(b)claim to be entitled—

(i)to render a contractual performance substantially different from that which was *reasonably expected of him, or*

(ii)in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.[379]

[378] Liability for breach in Section 3 refers to liability under Section 6 of this Act, which states: Liability for breach of the obligations arising from—
1(a) Section 13, 14 or 15 of the 1979 Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);
(b) Section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire purchase), cannot be excluded or restricted by reference to a contract term except in so far as the term satisfies the requirement of reasonableness.

[379] This section does not apply to a term in a consumer contract (but see the provision made about such contracts in Section 62 of the Consumer Rights Act 2015).

According to Section 13(1), the scope of Section 3 extends to the prevention of restriction or exclusion under Section 13.[380] There are two folds to determine the scope of Section 3, first, it is essential to know when one party "deals on the other party's written standard terms of business"; second whether the standard contract is reasonable under Section 3 because being standard contract will not bring the contract automatically unreasonable.[381]

To decide whether a contract is a standard contract of the other party, there are some factors to analyze. Even a contract made for a specific party, if it is "take it or leave it" position, it is the standard contract.[382]The contracts which have been written and produced in advance as a suitable set of terms, for using in the future and no attempt to negotiate regards to the conditions are standard contracts.[383] If the parties negotiated the exclusion clause, it is likely to pass the reasonableness test. The exclusion clause which the parties did not negotiate is a written standard term of business.[384] The exclusion clause without negotiations between parties is clearly as a written standard contract of the other party. If the standard contracts are produced by a trade association and used by its member,

---

[380] Section 13 of the Unfair Contract Terms Act.
(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents—
(a) making the liability or its enforcement subject to restrictive or onerous conditions;
(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
(c) excluding or restricting rules of evidence or procedure; and (to that extent) sections 2, 6 and 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.
[381] Section 3 of the Unfair Contract Terms Act.
[382] Richard Lawson, Exclusion Clauses and Unfair Contract Terms, 5th ed., Sweet & Maxwell, 1998, P 117.
[383] The Salvage Association v. CAP Financial Services Ltd., [1995] FSR 654.
[384] Richard Lawson, Exclusion Clauses and Unfair Contract Terms, 5th ed., Sweet & Maxwell, 1998, p 120.

whether it is a standard contract of business is depend on whether the terms is adopted by one side or not.[385]

There are the guidelines for resolving the issue of whether the contract is standard contract, states as follows:

(1) The degree to which the standard terms are considered by the other party of the process of agreeing on the terms of the contract.

(2) The degree to which the standard terms are imposed on the other party by the party putting them toward.

(3) The relative bargaining power of the parties.

(4) The degree to which the parties putting forward the standard terms is prepared to entertain negotiation with regard to the terms of the contract generally and the standard terms in particular.

(5) The extent and nature of any agreed alterations to the standard terms made as a result of the negotiations between the parties.

(6) The extent and duration of the negotiation.[386]

Summary

The reasonableness test of the exclusion or limitation clause under the CISG has to follow the incorporation methods accordance with the CISG's formation rule. Pursuant to Article 4, the reasonableness test has to follow the available domestic law. As discussed above, there are differences between the UCC and UK Law. The UCC set the specific

[385] St Albans City and District Council v International Computers Ltd, [1995] FSR 686 per Scott Baker J at 706;
[386] The Salvage Association v. CAP Financial Services Ltd., FSR 654, 1995.

methods for procedural unconscionability, but the court decided the substantive unconscionability based on the facts of individual case. In contrast, the UK Law does provide a specific criterion for reasonableness in the Unfair Contract Terms Act and Consumer Rights Act.

Chapter VIII

Consequences of Invalidity of Exclusion or Limitation Clause

Introduction

As discussed above, the seller has the right to exclude or limit his liability for non-conformity of goods to some extent. In case of the limitation clause is invalidated by the court, the buyer may seek for remedies available under the respective law discussed in chapter II. The invalidity of time limitation clause enable the buyer to claim for any remedy provided for in the law. In this chapter, for the understanding of the consequences of invalidity of exclusion or limitation clause, it intended to study the relevant cases.

8.1. Consequences of Invalidity of Exclusion and Limitation Clause in CISG

The validity of the exclusion or limitation clause cannot be determined by reference to the CISG itself and it is required to apply the governing law on the contract according to the conflict of laws rule. However, when the exclusion clause is decided as invalid clause, the remedy available for the buyer will be decided in accordance with the CISG's provision.

In ***Film coating machine*** case, the validity of limitation clause was decided by the German Law, (applicable domestic law) and the remedy for the buyer was decided by the CISG. The Court held:

> *"The relationship between the CISG and national law was governed by Article 4 and Article 7 of the CISG. Therefore, conditions foreseen under national law could only be applied if the issue was not addressed by the CISG. As the CISG provides an exhaustive set of provisions on remedies for breach of contract in Article 45 of the CISG,*

no recourse could be had to German national law. The final calculation of damages and their possible limitation to the foreseeable loss under Art. 74 [sentence two] was kept for the final decision." [387]

Similarly, many cases decided on validity of contract terms controlled by domestic law and the available remedies for the buyer was decided in accordance with the CISG.[388]

In contrast, timely notification of defect of the goods was decided by Article 39 of the CISG in the ***Cooling system*** *case.* The general terms of delivery and payment of the contract contained a choice of German law and special rules on the notice of lack of conformity. The general terms are as follows:

Notice of Defects

The seller is liable for defects only under the following circumstances:

(a) The buyer must inspect the delivered goods for amount, conformity, and any expressly warranted condition immediately upon arrival. Written notice is to be given for obvious defects within eight days after receipt of the goods.

(b) Upon justified complaints the seller has the choice to either cure the defective goods or make a substitute delivery. The goods complained of are to be returned carriage paid.

---

[387] Film coating machine case, Germany 15 September 1997 District Court Heilbronn http://cisgw3.law.pace.edu/cases/970915g1.html (last accessed on 2 Jan 2017).

[388] Vacuum cleaners case, Germany 2 September 1998 Appellate Court Celle, http://cisgw3.law.pace.edu/cases/980902g1.html (last accessed on 2 Jan 2017);
Norfolk Southern Railway Company v. Power Source Supply, Inc., United States 25 July 2008 Federal District Court [Pennsylvania] http://cisgw3.law.pace.edu/cases/080725u1.html (last accessed on 2 Jan 2017).
Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc., United States 13 April 2006 Federal District Court [State of Washington] http://cisgw3.law.pace.edu/cases/060413u1.html (last accessed on 2 Jan 2017).

Warranty

The warranty period is twelve months from delivery from our factory. Liability for damages arising from improper assembly or setting into operation, as well as defective or negligent handling by the buyer or a third party, is excluded. Consequential damages are excluded.

Place of Performance, Venue, Choice of Law

Place of performance and exclusive venue for deliveries and payments, as well as any and all disputes arising between the parties, is the principle place of business of the seller. The relations between the parties to the contract are governed exclusively by the laws in force in the Federal Republic of Germany.

Due to the late delivery, employees of the buyer could only undertake a visual inspection, whereby visual and qualitative defects, namely, corrosion damage and processing defects, were ascertained. The seller was immediately notified.

Despite these defects, due to deadline pressure the buyer was forced to install the table cooler immediately (from 29 May to 1 June 1996). The design defects of the cooler were discovered after installing and at the first test run. The Buyer notified the seller in writing on 3 June 1996 and subsequences of the later defect.

Concerning legal findings, the Court of first instance and the Court of second instance had the opinion that seller's standard terms became part of the contract.

The Supreme Court held that, while the period for the examination of the goods under Article 38 of the CISG may vary with the circumstances, one week should be a

standard term for this operation. In case of goods difficult to examine, experts may be consulted, but there is no obligation to carry out exceedingly costly examinations. Further, the court stated that the period for the notice of non-conformity of the goods under Article 39 of the CISG starts as soon as the period for examination has elapsed and amounts normally to one week, and that the notice of non-conformity should therefore reach the seller within two weeks from the delivery of the goods.[389]

8.2. Consequences of Invalidity of Exclusion and Limitation Clause in UCC

According Article 2-316 of the UCC, the exclusion of warranty clause which fails to comply with the methods of incorporation and if it is unconscionable pursuant to Article 2-302 of the UCC, such clause is unenforceable. According to Article 2-719(2), the limitation clause which fails its essential purpose enable the buyer entitled to the general remedies of the UCC, including consequential damages, notwithstanding that consequential damages also may have been specifically excluded under the contract.

Tokyo Ohka Kogyo Am., Inc. v. Huntsman Propylene Oxide LLC [390]

In this case, the seller excludes all kinds of damages and the available remedy for breach of contract is the purchase price. The Limitation Clause was not discussed or specifically and expressly bargained-for at the time the Credit Application was signed by the buyer. The generic Limitation Clause was also not brought to the attention of the buyer. The limitation clause is written as follows:

---

[389] Cooling system case, Austria 14 January 2002 Supreme Courthttp://cisgw3.law.pace.edu/cases/020114a3.html (last accessed on 2 Jan 2017).

[390] 35 F. Supp. 3d 1316 (D. Or. 2014) ; See also Barnext Offshore, Ltd. v. Ferretti Group USA, Inc., 2012 U.S. Dist. LEXIS 61710; Viking Yacht Co. v. Composites One LLC, 63 U.C.C. Rep. Serv. 2d (Callaghan) 999; BOC Group, Inc. v. Chevron Chemical Co., LLC, 359 N.J. Super. 135; Mercedes-Benz of North America, Inc. v. Dickenson, 720 S.W.2d 844.

Limitation of liability

"Seller's maximum liability for any breach of this Agreement, or any other claim related to the Product, shall be limited to the purchase price of the Product or portion thereof (as such price is set forth on the first page of Seller's invoice) to which such breach or claim pertains. In no event shall seller be liable for any consequential, incidental, special or punitive damages, including but not limited to any damages for lost profits or business opportunities or damage to reputation."[391]

The buyer makes several arguments as to why the seller's Limitation Clause is unenforceable in this case:

(a) it fails of its essential purpose and is unenforceable under UCC Section 2-719(2);

(b) it is unconscionable and unenforceable under UCC Section 2-719(3);

(c) it is inconspicuous;

(d) it is an invalid contractual provision because it was not bargained for, there was no meeting of the minds, and it is ambiguous; and

(e) it does not apply to the 2011 Procurement Specification, which is the specific contract that was allegedly breached.

The Court found the following factors which can decide the limitation clause is unenforceable:

- The buyer and seller did not allocate to the buyer the risk of an unknown, latent defect caused by seller's breach of its obligation timely to notify the buyer of a change in manufacturing,
- Refund-only remedies fail of their essential purpose when there are latent defects

[391] Original limitation clause was written in bold and capital letter.

that were only discovered after the defective product was either integrated into something else or was otherwise put to use in a way that rendered it non-returnable, thus resulting in significantly greater damages than the original purchase price.

- If the remedy limitation fails of its essential purpose then the buyer may receive any remedy available under the UCC, including consequential damages, notwithstanding that consequential damage also may have been specifically excluded under the contract.
- The Limitation Clause is unenforceable under evaluation of procedural unconscionability
- The Limitation Clause, under the specific circumstances of this case, operates in a substantively unconscionable manner.

According, the court decided that the limitation to a remedy of only the purchase price of the product is unenforceable and the buyer may receive any remedy available under the UCC, including consequential damages, notwithstanding those consequential damages also may have been specifically excluded under the contract.[392]

8.3. Consequences of Invalidity of Exclusion and Limitation Clause in UK Law

Under the UK Law, if the exclusion of implied terms was not fair and unreasonable, in the consumer sales contract, such exclusion clause shall be void and in the business sales contract, will have no effect on the parties.[393] The remaining part of the contract will not

[392] Tokyo Ohka Kogyo Am., Inc. v. Huntsman Propylene Oxide LLC 35 F.Supp.3d 1316 (2014) (United State District Court, D. Oregon).
[393] Section 20(2) (b) of the UCTA.

be affected by the invalid clause and the contract remains enforceable.[394] Under the Consumer Rights Act, the consumer has more protection than the buyer dealing in the course of business. The law stipulates that the implied terms cannot be excluded in consumer sales contracts under Section 31of the Consumer Rights Act and Section 6(2) (a) of the Unfair Contract Terms Act. Whereas, in the business sales contract, even though the limitation clause is unreasonable and unfair, it is mere unenforceable and the contract term does not become void automatically. The Unfair Contract Terms Act does not give the clearest guidance about its effect on a clause that fails to meet the standard lays down by the Act and in particular does not declare offending term to avoid.[395]

Summary

The Consequences of invalidity of exclusion and limitation clause is *prima facie* unenforceable in all three systems. The impact on contract vary in business and consumer sales contract in UK Law. Under the UCC, the unenforceable clause is assumed void and never existed in the contract. The buyer's remedies will be in accordance with the UCC's provision. Under the CISG, although the validity issue is controlled by the domestic applicable law, the buyer's remedies have to be in accordance with the CISG.

[394] Richard Lawson, Exclusion Clause and Unfair Contract Terms, 5th ed., Sweet & Maxwell, 1998, p156.

[395] M.G Bridge, at p 496.

Conclusion

1. Overview of the Three Legal Systems

This is the conclusion part of the thesis which will express the author's own view for improving Myanmar Sale Law especially in the part of "exclusion and limitation of seller's liability for non-conformity of goods". The main purpose to reform the law is to promote the buyer's right both in business and consumer sales contract. Since present Myanmar Sale Law is pure Common Law, the study of the development of Sale Law in UK and US is very beneficial for the Law reform in Myanmar. For that reason, at the last part of the following discussion, a conclusion will be made for the proposed reform. The discussion is made by comparative means on the issues of scope of seller's liability, buyer's remedies and the enforceability and validity of exclusion and limitation clause under the CISG, UCC and UK law. Firstly, the three systems discussed in the previous chapters will be summarized and compared.

The scope of seller liability for non-conformity under the three legal systems discussed above is the overview of the liability of the seller according to the law when the goods delivered are differed from the agreed terms of the contract. If there is no other agreement, the goods must be in accordance with the description, or sample or model, and possess the satisfactory quality (merchantable quality in the UCC). The seller's liability extent to the latent defect of the goods after acceptance. The seller has product liability for consumer and third parties.

Unless there is exclusion or limitation clause, if the seller has liability, the remedies available for the buyer are specific performance, damages, rejection and reduction of the price even termination of the contract depends on the seriousness of the breach. Albeit the Laws state that the seller is liable for non-conformity of the goods and the buyer is

entitled the reasonable remedy, it is difficult to recover the remedy. The burden of proof is the most obstacle for claims in latent defect of the goods. If the latent defect did not appear during the time limitation to give notice of defective of the goods, the buyer may lose the right to claim. If the buyer cannot prove that the goods are non-conformity, the buyer is not entitled to the remedy.

Relating to the buyer's right to remedy, the UK law and the UCC prefer the monetary damages whereas the CISG prefers the specific performance which encourages the extent of the contract. In UK Law and UCC, the specific performance is granted for the case when the damages are insufficient for the aggrieved party. Under the three legal systems, to recover the loss, even the buyer can prove that the goods are non-conformity, the buyer still has the duty to mitigate the loss and the loss must be within the foreseeability of the seller at the time of making a contract.

Not every non-conformity of goods gives the buyer right to terminate or avoid the contract. Under the UK law, only the breach of the condition can terminate the contract. A slight defect of the goods does not amount to a breach of condition and the buyer will not have the right to terminate the contract. Under the UCC, the right to terminate the contract occurs when the seller unable to cure the defect of the goods. Under the CISG, a fundamental breach of the contract permits the buyer avoid the contract. The question is whether the non-conformity of goods amount to fundamental breach under Article 25. According to the case studies, not every non-conformity case is a fundamental breach. The seller's liabilities and the buyer's remedies under the CISG, the UCC and UK Law are shown in the following table.

Table of Seller's Liabilities and Buyer's Remedies under the CISG, UCC and UK Law

	Express Terms	Implied Terms	Remedies
CISG	● Description ● Quality ● Quantity ● Packaging which specified in the contract	● Fitness for ordinary purpose, ● Fitness for particular purpose ● Quality as a sample or model ● packaged or contained as usual manner	● Specific Performance ● Damages ● Avoidance ● Price Reduction
UCC	● Quality ● Description ● Sample ● Promise that the seller has made in the contract.	● Merchantability ● Fitness for a particular purpose	● Specific Performance ● Damages ● Avoidance ● Rejection, revocation of acceptance ● Refund of the paid price
SGA	● No clear provision regarding the express terms	● Description ● Satisfactory quality ● Fitness for purpose ● Sample , Model	● Specific Performance ● Damages ● Avoidance
CRAs		● Description ● Satisfactory quality ● Fitness for purpose ● Sample, Model ● Installation as part of Conformity of the goods ● Digital content must conform ● Pre-contract information	● Short term right to reject ● Right to repair or replacement ● Price reduction &final right to reject ● Right to recover the amount of the price

2. Validity of Exclusion or Limitation Clause in Comparative Perspective

The validity and enforceability of exclusion or limitation clause under the three system are discussed comparatively.

A. CISG

The validity issue of exclusion or limitation of liability from the scope of the uniform sales law reflects a compromise enabling the Contracting States to continue to enforce traditional limitations on party autonomy. Many courts and tribunals have decided the validity issue of exclusion or limitation clause through the combination of the principles employed in the CISG and domestic law. Substantive validity falls under the scope of the domestic laws, so that the risk of uncertainty still remains. The CISG cannot bring the unification of this area yet. In this sense, determining the validity issues should preserve the balancing between the international character of the Convention and the reasonableness requirements of the individual domestic law.

The court should take the approach which would comply with the reasonableness of international sale of goods when deciding the substantive validity of the exclusion or limitation clause. For the formation of contract possesses the character of international sale of goods. However, further study is necessary to ascertain the feasibility of unifying the standards that govern the validity of exclusion or limitation clauses.

B. UCC

The current approach of the UCC's provisions on the one hand allows the seller the right to disclaim the express or implied warranty and to modify the remedies. The UCC itself on the other hand sets to control the seller's right to disclaim his liability and to modify the remedy and it refers the court to judge the unconscionableness of the clause. It relates to the contractual freedom and contractual justice.[396] The enforceability and validity

[396] Florian Rödl, *Contractual Freedom, Contractual Justice and Contract Law (Theory),* Law and Contemporary Problems. Vol. 76:57 No.2 (2013), p 59.

of exclusion or limitation clause under the UCC are subject to the complex rules. The exclusion clause which complied with the requirement stated in Article 2-316 is procedural conscionable. According to Article 2-316, the disclaimer clause and the warranty must not be inconsistent, the terms must be conspicuous. Unless the disclaimer clause is not contrary to the methods provided in Article 2-316, such clause is valid and enforceable. There is an issue to question – will the exclusion clause, which made according to the methods stipulated in Article 2-316 to exclude all warranties, be valid and enforceable? Based on the case study, the court will not enforce the exclusion or limitation clause if it extremely favors the one side of the parties.

Since the UCC grants the sellers to create their own remedies as they pleased, it is undoubted that the sellers will include the least remedy available for the buyers for the defect of the goods in the contract and the sellers may exclude all remedies in some cases. If the seller modified the remedy according to the method under Article 2-719, the available remedies for the buyer are the contract remedies. The two factors that may cause the buyer to entitle to the remedy are: (1) the meaning of the word "unconscionability" embodied in Article 2-719 (3) is very broad and (2) unconscionable of any term of the contract must exist at the time of making a contract.[397] For the business sales contract, the parties may have equal bargaining power when making their contract. The exclusion clause, which allocates the risk, will also be in accordance with the desire of the parties. The unequal bargaining power between the parties is frequent in the case of consumer sales contract. When the courts apply the same rule to invalidate the exclusion clause in the consumer sales contract or the standard contract, many problems have arisen due to the different

[397] Article 2-302 of the UCC.

nature of the contract. The most important issue is the lack in theory in deciding the unconscionability of the exclusion clause in the standard contract.[398] The lack exists because the existing rule of unconscionability under Article 2-302 and 2-719 do not fit to apply in the standard contract.

C. UK Law

In deciding whether the terms are reasonable or not, the criteria set in the law may not be sufficient for the fairness of the parties. The nature of the goods, all circumstances inclusion of the contract and all other terms of the contract should be taken into consideration. It is fair to say that any question of reasonableness relating to exclusion clauses always depend on the individual circumstances of the case.

For the issue of fairness of exclusion clause, the UK law developed a new approach to control over by law and to empower the court to invalidate the unreasonable exclusion clause. Whilst, the law limits the seller's right to exclude all liabilities and leave the buyer without remedy. The court decides the issue of whether the exclusion or limitation clause is fair or reasonable, for the aggrieved party, through the rules of incorporation, interpretation and reasonableness test.

According to the rule of incorporation, the exclusion or limitation clause must be properly expressed in the contract. The clause must state the liability or the remedy that the seller intended to exclude or to limit. The problem frequently arises when the contract includes the clause of limitation of remedy to repair or replace or the clause that bars the buyer's consequential loss. The remedy available to the buyer by the agreed remedy clause

[398] Friedrich Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of Contract,* Faculty Scholarship Series. Paper 2731(1943), p 633.

may not cover the loss of the buyer suffered. In the current approach of enforcement of exclusion or limitation clause, the court rarely changes the term of the contract between the parties of the business sales contract. The buyer cannot rely on the remedy which was not included in the contract.

When the case brought before the court, then the court has to decide to what extent of the exclusion or limitation clause covered and whether the words are clearly understandable or ambiguity. The court follows the *contra proferentem,* which construes against the drafter. In one case, it was held that the exclusion of warranty did not exclude the condition. However, in another case, although there was no express term of condition, the court held that it covered condition. The interpretation rule under the UK Law depends on the individual case despite that the clearness is required. Therefore, it leads to the uncertainty for the aggrieved parties.

The court invalidates the exclusion or limitation clause only if the clause failed the reasonableness test. The current approach under the UK Law tackles the issue that reasonableness differs based on kinds of contract, business sales and consumer sales contract. The business sales subject to the reasonableness test under the Unfair Contract Terms Act, 1977 and the consumer sales has to be in accordance with the provision of the Consumer Rights Act, 2015.

The validity issue of exclusion or limitation clause of seller's liability is subject to the reasonableness rules under Section 6 of the Unfair Contract Terms Act, 1977. For the purpose of fairness, the criteria of unfair contract term cannot meet all circumstances of the buyer's loss. The current approach does not meet the buyer's expectation of the performance of contract purpose. The result of the court's decision on the validity of ex-

clusion or limitation clause varies. The different approaches that courts have used to resolve the issue, and then proposed analysis by which the courts may better effect the uniform interpretation of Section 6 of the Unfair Contract Terms Act.

For consumer sales contract, Section 31 of the Consumer Rights Act, 2015 states the list of liabilities which cannot be excluded and it covers all kinds of liability for non-conformity in goods quality. However, there is no provision for limited remedy. For the buyer is in the inferior bargaining position and it is common that the seller uses the standard contract for the consumer sales. The seller can manage to include the remedy clause for breach of contract that enables him not to compensate or lessen compensation. In consumer sales, it may be less to see the exclusion of liability for non-conformity but it may be more to see the exclusion or limitation of remedy and time limitation to claim damages. The buyer may lose his right to claim if he finds out the defect of the goods after the time limit.

3. A Brief Sketch of Myanmar Sale Law

Myanmar sale law was enacted in 1930 as the Burma Sale of Goods Act[399] during the British colonial era and it has never been amended until the present day. Myanmar Sale of Goods Act 1930 includes the idea of implied terms. Most contractual claims in respect of defective goods are based on a breach of one of the terms implied by statute. Thus, it is very similar to the Sale of Goods Act of the UK.

[399] Burma Code Vol. X, p 236-253.

A. Seller's Liability

The seller is liable for the express and implied terms of the contract. The implied terms as to description is a condition. Implied terms as to quality or fitness for any particular purpose can be condition or warranty. There are equivalent terms implied into contracts by the Myanmar Sale of Goods Act 1930. As regards the goods, by the Sale of Goods Act, 1930 terms are implied as to title (Section 14), correspondence with description (Section 15), quality or fitness (Section 16), and in respect of sales by sample (Section 17).

For example:

(1) By Section 16(1) of the Sale of Goods Act, 1930, "where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgement and the goods are of a description which ***is in the course of seller's business*** to supply (whether he is in the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose."

By Section 14(3) of SGA, where the seller sells goods ***in the course of a business*** and the buyer makes known any particular purpose for which the goods are being bought, "There is an implied term that the goods supplied under the contract are reasonably fit for that purpose" (except where the buyer does not rely on the seller's skill or judgment).

(2) By Section 16(2) of the Sale of Goods Act, 1930, "Where goods are brought by description from a seller who deals in goods of that description (whether he is in the manufacturer or producer or not), there is an implied condition that the goods shall be of ***merchantable quality***."

By Section 14(2) of the SGA, "Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of ***satisfactory***

quality".

The differences between the two laws are, unlike the UK Law, regards the seller liability for non-conformity of goods, Myanmar law has no provision nor other law relating to the implied terms for the consumer sales contract.

B. Buyer's Remedies

Like the UK sale law, the remedies for breach of contract depend on the breach of condition or warranty. [400] Buyer may treat the breach of condition as a breach of warranty. Section 13 of the Sale of Goods Act, 1930 states, "Where a contract of sale is subject to any condition to the fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not a ground for relating the contract as repudiated."

The remedies for breach of warranty are a reduction in the price or damages. The buyer is not entitled to reject the non-conforming goods in breach of warranty. The buyer can seek for damages even after diminution or extinction of the price.

Remedies for breach of condition gives rise to the right to treat the contract as repudiated. However, the sale law does not provide for the remedy for breach of condition. The Contract Act, 1972[401] is applied for such case.

C. Time Limitation

Time limitation for giving notice of non-conformity within a reasonable time is a question of fact. This provision is exactly same as in SGA of the UK. Section 63 of Sale

[400] Section 12 of the Myanmar Sale of Goods Act, 1930.
[401] Burma Code Vol. IX, p 3-55.

of Goods Act, 1930 states: *"Where in this Act any reference is made to a reasonable time, the question what is reasonable time is a question of fact."*

The Limitation Act[402] of Myanmar was enacted in 1909. The action for breach of contact can be instituted within three years after the accrual of the cause of action.[403] The statute of limitation for the suit of compensation of breach of contract which is registered is six years, whilst for non-registered contract is three years. In addition, it is expressly stated that relating to the suit of breach of contract entered into in a foreign country, if the suit is instituted in Myanmar Court, no foreign rule of limitation shall be applied.[404]

Statute of limitation varies from one country to another. According to the UCC, time limitation is four years, six years under the UK law and 3years in Myanmar Law. Under the UK law and Myanmar Law, there is no provision for the right to reduce or extend the timescales. However, the parties can reduce to one year of limitation period under the UCC, but cannot extend more than four years.

D. Exclusion or Limitation Clause

Myanmar Sale law is still clinging to the ***"caveat emptor"*** (Let the buyer beware) rule. There is no law which restrict the seller right to exclude or limit his liability in consumer sales contract. The Sale Law allows the seller right of exclusion clause but does not have the provision relating to the validity of the clause.

According to Section 62 of the Sale of Goods Act, 1930, "Where any right or

[402] Burma Code Vol. XII, p 385-413. The Law amending the Limitation Act was issued in 2014. However, the amendment was only the replacement of the name of the current court. No other part of the act was changed.
[403] No.113, 114, 115 and116 of the Schedule I of the Limitation Act, 1909.
[404] Section 11 of the Myanmar Limitation Act, 1909.

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

The seller may exclude or limit the liability for non-conformity of goods by consent or course of dealing or trade usage. Thus, there is no provision for the protection of consumer buyer.

The most obvious example of this kind of abuse is the insertion of clauses which exclude or limit the seller's liability for breach of contract (or other liability) into standard contracts between a business and a consumer. A consumer would not usually read the small print of the contract, but in any event does not have the bargaining power or the opportunity to renegotiate the contract.

Compared to the UK Sale Law, a major theme of Consumer Rights Act, 2015 has been the necessity to control the abuse of a stronger bargaining position. Section 31 of the Consumer Rights Act states the list of liabilities which cannot be excluded and it covers all kinds of liability for non-conformity in goods quality.

Concerning business sales contract, the UK Sale Law has reacted to this problem to test the terms by incorporation, interpretation and reasonableness rule under the Unfair Contract Terms Act.

E. Why Myanmar needs to amend the Sale Law?

There are a number of reasons why Myanmar should amend the existing sale law. First, Myanmar Sale Law can no longer protect the buyer rights on nonconformity of goods in present situation. The reason is that Common Law concept of ***caveat emptor*** is still applied in every kind of contract. In present day, in legislation of other jurisdictions, the

manufacturer or the seller have liability for wrong goods or substandard goods which can be harmful to the public health or the environment. In Myanmar, if the buyer bought such goods, the law cannot protect the buyer because all liabilities are on himself due to the ***caveat emptor*** rule. The consumer does not have right to claim for non-conformity of goods under Myanmar Sale Law and more importantly, the Consumer Protection law has no provision for consumers regarding the non-conformity of goods.

Second, the buyer in Myanmar are increasing in buying and selling goods which were not seen in the 1930s when the Myanmar Sale Law was enacted. The nature of the goods today is quite different from the past and the development of buyer's rights are included in the UK Sale Law by many amendments. It also passed the Consumer Rights Act in 2015. It can be argued that, it is incomparable between the developed country like UK and least developed country like Myanmar. Although the development of law is interrelated to the development of the society, according to the fairness rule, there should be no difference in the buyer's rights because of the gap of economically, socially, and politically. The buyer or the consumer should be entitled to the fair remedies for non-conformity of goods.

Third, Myanmar opens a new chapter of trade in the history but the existing sale law is not in line with the current international trade atmosphere. Myanmar's main trading partner countries are China and India and other neighboring states and ASEAN countries. Among them, China, Singapore and Vietnam are the CISG members.

The 1930 Myanmar Sale Law is quite out of date to meet the international trade. For these reasons, Myanmar should amend the existing sale law to contribute the fairness among the seller, the buyer including the consumer and the third party.

F. When Myanmar should amend the Sale Law?

It is obvious that the development of Myanmar Sale Law is far behind and it should be amended. The question is "***when is the right time to amend it".*** Before answering the question, it is the current business transaction in Myanmar that should be presented.

In Myanmar, even when the consumers complain about the goods quality, they rarely have other different choice of the one good. They will be treated by the same way wherever they buy. There is no refund, no replacement and no right to return the non-conforming goods.

For business entity doing business of international trading, they may conclude the sales contract, of importing the goods into Myanmar or exporting the local goods to abroad. However, the international sale law is unfamiliar.

Although Myanmar new government is trying to boost Myanmar's economy by uplifting the trade sectors, it overlooks the deficiency of existing Sale Law and there is no sign of amendment of the Sale Law to be in line with globalization. Thus, the public awareness of buyer's right and seller's liability for non-conformity of goods is urgently necessary to be educated and spread out quickly.

It is the right time for Myanmar to amend the Sale Law now because it is the time when everyone's attention is on Myanmar, including business entity and people of Myanmar. It is the perfect time to amend the existing Sale Law during transitional period of democratization. How it should be amended is on the decision of the legislature and economic policy of the new government. The proposal for Law reform is presented below.

4. Proposal for reform of Myanmar Sale Law

There are three parts to propose the law reform in Myanmar in the area of exclusion and limitation of seller liability for nonconformity of goods in different contract such as business sales contract, consumer sales contract and international sales contract.

First, for business sales contract, Myanmar Law has the provision which allows the seller to include the exclusion or limitation clause. Therefore, the restriction on seller liability should be added for the purpose of maintaining the fairness.

Second, for consumer sales contract, the ***caveat emptor*** rule is out of date and it is no longer suited in the current situation. Instead, the ***caveat venditor*** (Let the seller beware) rule should be introduced. The consumer remedies are necessary to be made known. Furthermore, the rule which restrict the seller to exclude the liability of implied terms should be added to the existing Sale Law.

Third, for international sales contract, Myanmar should learn more to understand the current principles of international trade and take into consideration to enter into the CISG.

Summary

To summarize, in Chapter I, the scope of seller liability for non-conformity of goods under the CISG, UCC and UK Law was discussed. Chapter II t analyzed the buyer remedies available under the Law and Chapter III discussed the time limitation, which is very important in deciding the seller's liability and the buyer's right relating to non-conformity of goods. The seller's right to exclude or limit his liability of implied terms and types of exclusion and limitation clause were described in Chapter IV. Methods of incorporation of exclusion or limitation clause was emphasized in chapter V. The interpretation

methods of three systems was discussed in Chapter VI and reasonableness test was analyzed in chapter VII. In Chapter VIII, the consequences of the invalidity of the exclusion or limitation clause was expressed. In the final part, I described what Myanmar could learn from the UCC and UK law and pointed out which principles which should be added to Myanmar Law or revised.

There are some essential elements of legal regulations of seller liability for non-conformity of goods in Myanmar Law which are mostly same as the UK Sale Law. Nevertheless, there are also some differences between Myanmar Law and modern Sale law of UK, UCC and international principles. Moreover, some deficiencies in Myanmar Law were found. For instance, the principle of ***caveat emptor*** in Myanmar Sale of Goods Act is out of date and it would no longer be appropriate in the consumer sales contract. The Act has no provision which limits or restricts the seller's right of exclusion or limitation clause like Article 2-316 and 2-719 of the UCC, Section 6 of the UCTA and Section 31 of the Consumer Rights Act of UK.

Such differences and defects are not desirable in making international commercial contracts. Thus, Myanmar Law is required to be made adequate and be up to date in the future for domestic and international contractual relations due to the changing nature of things in global community. Myanmar has an obligation to develop its laws of commercial contracts. As the purpose of the CISG is to reduce problem caused by the divergence of states law, it should promote and accept uniform rules in international commercial contractual relations. The CISG is the greatest success for unification of substantive commercial contract law.

By the examination of this paper, I was able to draw a conclusion that Myanmar Sale of Goods Act and the Contract Act are not different from the international principles

of commercial contracts. However, some more principles, in my view, should be added for future conduct of contracts. I have suggested that the principles of the concept of ***caveat venditor*** (the new concept of seller liability), the restriction on seller's right to exclude or limit liability in consumer sales contract based on the fairness principle should be added to Myanmar Law or revised. The rest of elements are very similar in Myanmar Law.

At present, it is the time for Myanmar to recognize the globalization of world economy and its advantages. So, the present laws are requested to learn to adjust for the purpose of expending wider relations with other members of the international society in the political, economic and social affairs. To be able to do so, analysis of international regulations and analysis of the development of UK Law and the UCC of the United States are important. I hope that in this paper, I was able to identify some important points that may contribute to the improvement and modernization of present Myanmar Sale of Goods Act.

BIBLIOGRAPHY

Books

1. C P. Thorpe & J C L Bailey, Commercial Contracts: A Practical Guide to Deals, Contracts, Agreements and Promises, Wood Head Publishing, 1996.

2. David Qughton & Martin Davis, Source Book on Contract Law, 2nd ed., Cavendish Publishing, London, 2000.

3. Denis Barry, Edward Jenkins QC, Daniel Lloyd, Ben Douglas-Jones, Charlene Sumnall, The Consumer Rights Act 2015, Oxford University Press, 2016.

4. Harry D. Gabriel, The ABCs of the UCC, Article 2: Sales, 3rd ed., ABA Publishing, 2011.

5. James J. White & Robert S. Summers, Principles of Sales Law, Concise Hornbook Series, Tomson Reuters, 2009.

6. Michael G. Bridge, The Sale of Goods, 3rd ed., Oxford University Press, 2014.

7. Richard Lawson, Exclusion Clauses and Unfair Contract Terms, 5th ed., Sweet & Maxwell, 1998.

8. John O. Honnold, Cases and materials on the law of sales and sales financing, Brooklyn Foundation Press, 1954.

9. John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention, 3d ed., Kluwer Law International (1999).

10. Ronald A. Anderson, Anderson on the Uniform Commercial Code. 3rd ed., 1994 revision, Clark Boardman Callaghan, 1994.

11. Thomas M. Quinn, Uniform Commercial Code Commentary and Law Digest, Warren, Gorham & Lamont, 1978.

12. John O. Honnold, Uniform law for international sales under the 1980 United Nations convention. 3rd ed., Kluwer Law International, 1999.

13. Cris P. Thorpe and John C.L. Bailey, Commercial contracts: a practical guide to deals, contracts, agreements and promises, Woodhead, 1996.

Articles

1. Andrew Tutt, *On the Invalidation of Terms incontracts of Adhetion*,Yale Journal on Rregulation, vol 30(2013).

2. Djakhongir Saidov, *The Law of Damages in International Sales: The CISG and other International Instruments*, Hart Publishing (2008), pp 120-121.

3. Friedrich Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of Contract,* Faculty Scholarship Series. Paper 2731(1943).

4. Florian Rödl, *Contractual Freedom, Contractual Justice and Contract Law (Theory),* Law and Contemporary Problems. Vol. 76: 57 No.2 (2013).

5. Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 Hastings L.J. 459 (1995).

6. Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, Validity"and Reduction of Price Under Article 50,* 14 J.L. & Com. 153, 166 (1995).

7. Jeffrey S. Sutton, *Measuring Damages under the United Nations Convention on the International Sale of Goods*, 50 Ohio S. L.J. (1989) 737-752.

8. Joseph Lookofsky, in J. Herbots editor / R. Blanpain general editor, *International Encyclopaedia of Laws - Contracts*, Suppl. 29 (December 2000) 1-192.

9. Michael A. Schmitt & Michael Pasterczyk, *Specific Performance under the Uniform Commercial Code-Will Liberalism Prevail?* 26 DePaul L.Rev.54 (1976).

10. Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 Chi.-Kent. L. Rev. 199 (1985).

11. Pascal Hachem, ACIArb, *Agreed Sums in CISG Contracts*, Belgrade Law Review, Year LIX (2011).

12. Peter Huber, Typically German? Two Contentious German Contributions to the CISG, Belgrade Law Review, Year LIX (2011/3).

13. Randy E. Barnett, *Consenting to Form Contracts*, 71 Fordham L. Rev. 627 (2002).

14. M Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory,* MICH. ST. L. REV. 211 (2013).

15. Teija Poikela, *Conformity of Goods in the 1980 United Nations Convention of Contracts for the International Sale of Goods,* Nordic Journal of Commercial Law (2003/1).

16. The CISG Digest, 2012.

International Treaty

1. The United Nations Convention on Contract for International Sale of Goods, 1980.

2. Convention on the Limitation Period in the International Sale of Goods, 1974.

3. CISG Advisory Council Opinion No. 2

4. CISG Advisory Council Opinion No. 6

5. CISG Advisory Council Opinion No. 12

6. CISG Advisory Council Opinion No. 13

7. CISG Advisory Council Opinion No. 17.

Legislations

1. The Uniform Commercial Code of the United States

2. The Sale of Goods Act, 1979 of the UK

3. Unfair Contract Terms Act, 1977 of the UK

4. Consumer Rights Act, 2015 of the UK

5. Myanmar Sale of Goods Act, 1930.

6. Myanmar Contract Act, 1872.

7. Myanmar Limitation Act, 1908.

Cases

CISG

1. Agricultural Products case, China 18 September 1996 CIETAC Arbitration proceeding.

2. Agricultural Machine case, Germany 12 December 1995 District Court Marburg.

3. Aluminium Hydroxide case, Germany 21 August 1997 Appellate Court Köln.

4. B.V.B.A. Vergo Kwekerijen v. Defendant, Netherlands 28 January 2005 Supreme Court.

5. Cable Drums case, Switzerland 7 July 2004 Supreme Court.

6. Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd, Australia 20 April 2011 Federal Court.

7. Cobalt Sulphate case, Germany Supreme Court on 3 April 1996.

8. Caito Roger v. Société française de factoring, France 13 September 1995 Appellate Court Grenoble.

9. Coke case, Germany 2 March 1994 Appellate Court München; ICC Arbitration Case No. 7565 of 1994.

10. Conveyor band case, Austria 23 March 2005 Oberlandesgericht. [Appellate Court] Linz.

11. Cooling system case, Austria 14 January 2002 Supreme Court.

12. Film coating machine case, Germany 15 September 1997 District Court Heilbronn.

13. Granulated Plastic case, Germany 8 February 1995 Appellate Court München [7 U 3758/94].

14. Hars & Hagebaeuer BV v. Amuyen SA, Netherlands 20 January 2000 District Court Rotterdam.

15. Hydraulic Press case, China 23 December 2002 CIETAC Arbitration proceeding.

16. Jeans Case, Germany 26 November 1999 Appellate Court Hamburg.

17. Machine case, ICC Arbitration Case No. 11333 of 2002.

18. Marble slabs case, Germany 27 September 1991 Appellate Court Koblenz.

19. New Zealand mussels case, Germany 8 March 1995 Supreme Court.

20. Potting Soil case, Netherlands 18 July 2006 Appellate Court Arnhem.

21. Rheinland Versicherungen v. Atlarex, Italy 12 July 2000 District Court Vigevano.

22. RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller, New Zealand 30 July 2010 High Court of New Zealand.

23. Saltwater Isolation Tank case, Switzerland 26 April 1995 Commercial Court Zürich.

24. Second hand bulldozer case, Switzerland 28 October 1997 Appellate Court Valais.

25. Shoe soles case, Germany 29 July 1998 District Court Erfurt.

26. Société Novodec / Société Sigmakalon v. Soctiétés Mobacc et. Sam

France 3 February 2009 Supreme Court.

27. Sport clothing case, Germany 5 April 1995 District Court Landshut.

28. Tantalum case, Austria 31 August 2005 Supreme Court

29. Vacuum cleaners case, Germany 2 September 1998 Appellate Court Celle.

30. Veneer cutting machine case, Germany 2 July 1993 Appellate Court Düsseldorf.

31. Used car case, Germany 21 May 1996 Appellate Court Köln.

32. Vacuum cleaners case, Germany 2 September 1998 Appellate Court Celle.

33. Wood case, Austria 21 March 2000 Supreme Court.

US

34. Accent Commercial Furniture, Inc. v P. Schneider & Assoc., PLLC 2013 NY Slip Op 07106 Decided on October 31, 2013.

35. Agri-Tech v. Brewster Heights Packing, 24 U.C.C. Rep. Serv. 2d (Callaghan) 440(United States Court of Appeals for the Fourth Circuit).

36. Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc., United States 13 April 2006 Federal District Court [State of Washington].

37. Baker v. Burlington Coat Factory Warehouse, 175 Misc. 2d 951 (N.Y. City Ct. 1998).

38. Barnext Offshore, Ltd. v. Ferretti Group USA, Inc., 2012 U.S. Dist. LEXIS 61710.

39. Blevins v. New Holland 97 F.Supp.2d 747 (2000).

40. BOC Group, Inc. v. Chevron Chemical Co., LLC, 359 N.J. Super. 135.

41. Collins v. Click Camera & Video, Inc., 621 N.E.2d 1294, 1302 (Ohio Ct. App. 1993)

42. Colorado-Ute Electric Ass'n v. Envirotech Corp, 524 F. Supp. 1152 (D. Colo. 1981) U.S. District Court for the District of Colorado.

43. Delchi Carrier v. Rotorex, United States Federal District Court (New York) on 9 September 1994

44. Earl Brace & Sons v. Ciba-Geigy Corp., 708 F. Supp. 708, 710 (W.D.Pa.1989).

45. Federal Signal Corp. v. Safety Factors, No. 60970-5. En Banc. December 15, 1994.

46. Ford Motor Co. v. Multon, 511 S.W.2d 690(Tenn.1974).

47. General Food Corporation v Valley Lea Dairies, Inc. and Lyons Creamery Cooperative Association, 771 F.2d 1093 (7th Cir.1985).

48. Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897.

49. Greenspun v. American Adhesives, Inc., 320 F. Supp. 442 (E.D.Pa.1970).

50. Hull-Dobbs,Inc. v. Mallicoat, 57 Tenn.App.at 100,415 S.W.2d 344, 3 UCC at 1032-34(1966).

51. Hall v. Treasure Bay Virgin Corp., 2009 U.S. Dist. LEXIS 18117, (United States District Court for the District of the Virgin Islands, Division of St. Croix).

52. Hartman v. Jensen's, Inc., 277 S.C. 501 (1982).

53. Haugen v. Ford Motor Co., 219 N.W.2d 462, (Supreme Court of North Dakota).

54. Hornberger v. General Motors Corp., 929 F. Supp. 884 (E.D. Pa. 1996).

55. Jim Dan, Inc. v. OM Scott & Sons Co., 785 F. Supp. 1196 (W.D. Pa.1992).

56. Jones v. Asgrow Seed Co., 749. Supp.836. (N.D. Ohio 1990).

57. Laclede Gas Co. V. Amoco Oil Co., 33 522 F.2d 33 (8th Cir. 1975) (United States Court of Appeals, Eighth Circuit).

58. Lenox, Inc. v. Triangle Auto Alarm, 738 F. Supp. 262 (N.D. Ill. 1990) (U.S. District Court for the Northern District of Illinois).

59. Macromex Srl. v. Globex International, Inc., United States 16 April 2008 Federal District Court (New York).

60. South Carolina Electric & Gas Co. v. Combustion Engineering, Inc., 283 S.C. 182 (1984) (Court of Appeals of South Carolina).

61. Master Lease Corp. v. Manhattan Limousine, Ltd., 580 N.Y.S.2d 952 (App.Div. 1992)

62. Medical Marketing v. Internazionale Medico Scientifica, United States 17 May 1999 Federal District Court [Louisiana]

63. Mercedes-Benz of North America, Inc. v. Dickenson, 720 S.W.2d 844.

64. Moscatiello v. Pittsburgh Contractors Equip. Co., 595 A.2d 1190 (Pa. Super. Ct. 1991).

65. Norfolk Southern Railway Company v. Power Source Supply, Inc., United States 25 July 2008 Federal District Court [Pennsylvania]

66. Ole Mexican Foods, Inc. v. Hanson Staple Co., 676 S.E.2d 169 (Ga. Sup. Ct. 2009.

67. Pierce v. Catalina Yachts, Inc, 2 P.3d 618 (2000) (Supreme Court of Alaska).

68. Posttape Assoc. v. Eastman Kodak Co. 450 F.Supp. 407 at 411 (E.D.Pa.1978).

69. Posttape Assoc. v. Eastman Kodak Co., 537 F.2d 751 (3rd Cir.1976).

70. Riley v. Ford Motor Co., 442 F .2d 670,8CC 1175(5th Cir.1971).

71. Rite Aid Corp. v. Levy-Gray, 894 A.2d 563, 570-71 (Md. 2006).

72. Rite Color Chem. Co. v. Velvet Textile Co., 411 S.E.2d 645, 648-49(N.C. Ct. App.1992).

73. Sparks v. Total Body Essential Nutrition, Inc., 27 So. 3d 489, 496 (Ala. 2009).

74. Stanley A. Klopp, Inc. v. John Deere Co., 510 F. Supp. 807, 810 (E.D.Pa.1981)

75. Tokyo Ohka Kogyo Am., Inc. v. Huntsman Propylene Oxide LLC, 35 F. Supp. 3d 1316 (D. Oregon 2014)

76. US Fibires, Inc. v. Procter & Schwartz, Inc., 509 F.2d 1043, 16 UCC 1(6th Cir.1975).

77. Viking Yacht Co. v. Composites One LLC, 63 U.C.C. Rep. Serv. 2d (Callaghan) 999.

78. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

79. Wind Wire, LLC v. Finney, 977 N.E.2d 401 (Ind. Ct. App. 2012) (Indiana Court of Appeals)

80. WXON-TV, Inc. v. A.C. Nielsen Co., 740 F. Supp. 1261, 1264(E.D. Mich. 1990)

UK

81. Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm).

82. Arcos v Ronaasen & Son v Arcos Ltd [1933] APP.L.R. 02/02.

83. Baldry v Marshall [1925] 1 KB 260.

84. Bartlett v. Sidney Marcus Ltd, [1965] 1 WLR 1013.

85. Beale v. Taylor, [1967] 3 All ER 253.

86. Behnke v Bede Shipping, (1927) 27 L.l.L. Rep. 24.

87. British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of Lon-don Ltd, [1912] AC 673.

88. BSS Group v Makers (UK) Ltd, [2011] EWCA Civ 809.

89. Chart brook Ltd v Persimmon Homes Ltd & Ors [2009] UKHL 38 (1 July 2009).

90. Dunlop Pneumatic Tyre Company Ltd -v- New Garage and Motor Company Ltd; HL 1 Jul 1914.

91. Grant v The Australian Knitting Mills [1935] UKPC 2, [1936] A.C. 562.

92. George Mitchell v Finney Lock Seeds [1983] QB 284.

93. Green v. Cade Bros. Farms (1978) 1 Lloyd's Law Reports 602.

94. Hadley v. Baxendale [1854] EWHC Exch. J70.

95. Internet Broadcasting Corporation Ltd (t/a NET TV) v MAR LLC (t/a MARHedge) [2009] EWHC 844 (Ch)

96. Interfoto Picture Library Ltd v. Stilleto Visual Programme Ltd, 1ALL ER 348[1988].

97. KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co KG v Petroplus Marketing AG, [2009] EWHC 1088 (Comm).

98. Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd, [2010] EWHC 965.

99. L'Estrange v Graucob, [1934] 2 KB 394.

100. Parker v. South Eastern Railways, 2 CPD 416[1877].

101. R W Green Ltd v Cade Bros Farm, [1978] 1 Lloyd's Rep. 602.

102. Ronaasen & Son v Arcos Ltd [1933] APP.L.R. 02/02.

103. R W Green Ltd v Cade Bros Farm, [1978] 1 Lloyd's Rep. 602.

104. Saipol SA v. Inerco Trade SA [2014] EWHC 2211.

105. Sky Petroleum v. VIP Petroleum, [1974] 1 All ER 954.

106. St Albans City and District Council v International Computers Ltd, [1996] EWCA Civ 1296.

107. Steels & Busks v Bleecker Bik & Co [1956] 1 Lloyd's Rep. 228.

108. Stickney v. Keeble, [1915] A.C. 386 at 419

109. Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] EWCA Civ. 6.

110. Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967]1 AC 361, [1966] 2 All ER 61.

111. The Salvage Association v. CAP Financial Services Ltd., [1995] FSR 654.

112. Watford Electronics v Sanderson [2001] EWCA Civ. 317.

113. Wertheim v. Chicoutimi Pulp [1911] AC 301.

114. William Stevenson and Anthony Stevenson v Martyn Rogers CA, [1998] EWCA Civ. 1931, [1999] QB 1028.