Legal Remedies for Non-conformity of Goods under CISG, UCC and UK Law

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要　旨

本稿の目的は、売買契約における契約違反の法的救済に関する問題を研究することにある。すべての物品販売契約において、納入された物品が契約条件と合致している必要がある。買主は、物品が契約に適合しない場合には特定の行為の履行または損害賠償御を請求することができる。本稿は三つの法制度、すなわち国際物品売買契約に関する国連条(CISG)、米国の統一商法（UCC）および連合王国売買法における非適合品に関する 二つの法的救済を分析するものである。

Keywords: legal remedy, specific performance, damages, mitigation, foreseeability

I. Introduction

II. CISG
- (a). Specific Performance
- (b). Damages

III. UCC
- (a). Specific Performance
- (b). Damages

IV. UK Law
- (a). Specific Performance
- (b). Damages

V. Conclusion

I. Introduction

Every legal system of contract law has detailed rules on rights and obligations of the parties to the contract. The seller has the duty to deliver goods which complied with the contract terms. Therefore delivering non-conforming goods is a breach of contract. When the seller breaches the contract by delivering

non-conforming goods, the buyer is entitled to a remedy. Generally, there are self-help remedies and legal remedies. On the one hand, self- help remedy means the aggrieved party does not require the Court order to exercise the rights; which are suspension of performance, termination or avoidance. Legal remedy, on the other hand, is the means with which a court of law, enforces a right, imposes a penalty, or makes another court order to impose its will. Legal remedies are damages and specific performance.

Specific performance is an order of a court which requires a party to perform a specific act according to the agreed contract terms instead of paying damages. Traditionally, Common Law can only grant money damages. Specific performance is an equitable remedy, which was granted when there was no Common Law's remedy available. Damages is defined as a monetary remedy or compensation for the loss caused by the breach of contract. It is also the Common Law court preference remedy. Damages is the primary remedy for breach of sales contract and the majority of actions for breach of contract are in fact claims for compensation. There are generally six types of damages: compensation, incidental, consequential, nominal[1], liquidated and punitive.

When the seller delivered non-conforming goods, the buyer can seek for specific performance or ask the seller to perform the contract or claim damages. In Common Law, damages is the primary remedy and specific performance is granted only if the damages is not enough for the loss, in the case of a sales contract, if the goods are unique and impossible to obtain elsewhere. Under the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the CISG), specific performance is the primary remedy rather than damages, which intends to keep the contract continued.

This research will focus on the two legal remedies which require to claim before the court; specific performance and damages. Specific performance is the remedy that raise the most controversy because of the grounds for granting the right of specific performance. Under the CISG, the right of specific performance for non-conformity of goods depends on whether non-conforming goods does amount to a fundamental breach or not. While in common law system, specific performance depends on the uniqueness of the goods and the inadequacy of damages.

The issue of sufficiency of damages will be discussed as the second issue. As the purpose of damages remedy is to compensate the buyer for the loss as the result of breach of contract. The problem is how much the buyer can recover damages? In practice, whether the amount of damages is sufficient or not depends on the measurement rule and limitation of damages. When would the buyer prefer specific performance or when would the buyer prefer the damages as a remedy for non-conforming goods? The fundamental question is studied and the answer is simply based on whether the buyer accepts or rejects the goods.

This research is intended to analyze the two legal remedies: suspension of performance and damages system under the CISG, the Uniform Commercial Code of the United States (UCC) and the UK Sale of Goods Act,1979 (the SGA). Section I is the introduction of the research. Section II will study the two legal remedies system under the CISG. Section III and IV will analyze the legal remedies under the UCC and the SGA respectively.

II. CISG

There are two parts of remedy system of the CISG. Article 45(1) (a) offers the remedies available to the buyer in the event of a breach - specific performance, avoidance, damages, and price reduction. According to Article 45(1) (b), the buyer may claim damages if the seller fails to perform any of his obligations under the contract or this convention. Legal remedies for breach of contract under the CISG are provided for in Article 45(1):

"If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in Articles 46 to 52;

(b) claim damages as provided in Articles 74 to 77."

(a) Specific Performance

(i) Redelivery of Substitute Goods or Repair

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.[2]

The right to require specific performance is subject to the condition of having no recourse to other remedies that are inconsistent with it. Inconsistency arises when the buyer avoids the contract because, in so doing, he releases the other party from his contractual obligations, and therefore can no longer demand

performance. Inconsistency is clearly at hand if the buyer avoids the contract.[3] The remedies inconsistent with specific performance are (1) avoidance of the contract under Articles 26, 49, or 81; (2) reduction of the contract price under Article 50; and (3) a claim for damages based on the market-contract price differential under article 74.[4]

Under Article 46, specific performance may arise in the form of the seller's right to substitute delivery and repair. To require performance of substitute delivery, the non-conforming goods must constitute a *fundamental breach*.[5]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.[6]In ***Model Locomotives case,*** the notice of deficiencies was at the latest sent to the seller within three weeks was a reasonable time because the examination requires 75 to 150 hours. Taking this into account, the average period of time of fourteen days for the examination and notification seems too short and must be reasonably prolonged with regard to the circumstances. As far as the period of time is concerned, the buyer did fulfill its duties and also the content of its writing from 26 August 1998 fulfills the requirements of Article 39 CISG (specific statement of the kind of the deficiency).[7] 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.[8]

The right to require repair is provided for in Article 46(3). When the breach is not fundamental, the buyer has recourse to repair. It is limited to situations where it is reasonable to repair under the circumstances. This means that 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. In ***Engraving Machine case***, the buyer bought the machine with one year warranty after the machine was installed and adjusted and the testing was accepted. Problems with the machine occurred three times during the warranty period, and the seller did not repair and restore the machine to its normal operation. It thereby, the seller breached the warranty duty stipulated in the contract. The seller shall, therefore, be liable for the repair charges which were incurred because the buyer hired engineers to repair the machine, and the loss of the expected profits, which was incurred because the seller did not send its engineers to repair the machine on time.[9]

As provided in Article 46 (2) and (3), the notice of non-conformity must be given within the time limit. The time limitation serves the interests of both parties. It is important for the buyer to receive the goods

within a certain period of time, otherwise, the receipt of the goods will have no meaning for him. If the buyer failed to give notice, the buyer will not be entitled to the remedies**.**[10]

(ii) Limitation

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."*[11]

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.[12] 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.[13] In ***Soinco v. NKAP,*** the buyer claimed for specific performance alternatively for damages. Regarding the question of granting specific performance, the Tribunal held that-

"The Arbitral Tribunal believes that this is primarily a question of the applicable law. It sees no basis for claims for specific performance under Russian law. The Vienna Convention does not provide for this. If the law applicable to the procedure (Swiss law? - again the Vienna Convention) applied, the Arbitral Tribunal sees no basis for specific performance either. Apart from that the Arbitral Tribunal fails to see how specific performance could be an appropriate remedy for [buyers] in this case. They can hardly expect to be able, under the New York Convention or otherwise, to have an award enforced in Russia providing the [seller] must specifically perform its obligations under the various contracts for the next eight or ten years, producing the aluminum and delivering it to buyers. The Arbitral Tribunal will accordingly grant buyers' alternative request for relief in the form of damages."[14]

(b) Damages

(i) Right to Damages

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.[15] 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."

Damages cover an equal sum of loss, including 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."[16]

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 CISG.[17] The right to receive interest is also available in addition to the right to damages.[18]

The buyer's loss must have suffered as a consequence of the breach. The buyer has to prove that he suffered or will suffer from reasonable certainty the loss claimed. If the aggrieved party is able to meet the burden of proving damages with reasonable certainty, then he has the burden to prove the extent of damages, but need not do so with mathematical precision. The aggrieved party must only provide a basis upon which a tribunal can reasonably estimate the extent of damages. An aggrieved party may be able to do this through, for example, the use of expert testimony, economic and financial data, market surveys and analyzes, 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, stem from the breaching party's wrongful act.[19]

The other remedies do not hinder the right to claim damages. The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.[20] Thus, the buyer who requires the seller to

perform may also recover damages for the loss resulting from the delay or other deficiency in the seller's performance. Similarly, a buyer who avoids the contract may also claim damages for the loss suffered as a consequence of the breach.[21]

(ii) Measure of Damages

Article 74 does not provide specific guidelines for calculating damages. The tribunal authority determines the loss based on the circumstances of the particular case. Every type of loss may be recoverable, as long as the requirements under the CISG are met. The amount of damages is stipulated as "a sum equal to the loss, including loss of profit".[22]

The purpose of Article 74 is to place the buyer (the aggrieved party) in the same position it would have been had the breach not occurred and the contract been properly performed. In the case of non-conformity of goods, the contract is properly performed indicates that the goods must be in conformity. Therefore, to measure damages, it shall compare the price of the non-conforming goods and conforming goods. For example - a buyer who retains goods which are defective in some (less than fundamental) respect may recover damages calculated, *inter alia*, to compensate the difference between the value of the goods delivered and the value conforming goods would have had.[23]

Article 74 does not specify the time or place for measuring the loss suffered by the injured party. This issue is likely to arise in international transactions, particularly transactions involving goods which fluctuate significantly in price. Parties can eliminate the potential ambiguity of this aspect of Article 74 by including a clause in the contract that specifies time and place reference points for measuring damages.[24]

In ***Milling Equipment***, it has been held that a buyer who has received non-conforming goods and has not avoided the contract is entitled to recover damages measured by the difference between the value of components as specified in the contract and the components delivered by the seller.[25]

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 sometimes be entitled to compensation for consequential loss. Also, 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.[26]

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.[27]

When calculating lost profits, fixed costs (as distinguished from variable costs incurred in connection with fulfilling the specific contract) are not to be deducted from the sales price.[28] Another court awarded the buyer the difference between its unit costs for producing products using the defective production machine delivered by the seller and the buyer's unit costs if the production machine had not been defective.[29] An arbitral tribunal awarded the commission the buyer would have earned as damages for lost profit where the seller was aware of the commission.[30] One court calculated the damages for lost profits on the basis of the value of the goods on the intended market. Loss of profit will not be awarded where the loss could easily have been avoided by cover purchases of raw materials in accordance with Article 77.[31]

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 for the incorporation of an agreed sum into the contract. It is also undisputed that the CISG governs the formation of the agreed sums. The remaining difficulties primarily pertain to the protection of the debtor.[32]

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." Furthermore, awarding punitive damages is precluded under the CISG even if 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 applicable law.[33]

(iii) Limitation of Damages

All claims for damages are subject to limitations imposed by the rule of foreseeability and mitigation.

(1) Foreseeability

Article 74 limits damages within the foreseeability of the seller at the time of the conclusion of the contract; which states as "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".[34] The underlying idea is that the parties, at the conclusion of the contract, should be able to calculate the risks and potential liability they assume by their agreement. Judicial discretion in the assessment of damages can be reduced by standardizing the damages in question, but exceptions must remain for individual cases where a typically unforeseeable risk of damage has been assumed by the party in breach. In the event such damages were foreseeable to the seller, they can be awarded under the CISG. In assessing foreseeability, the usual or intended use by the buyer should be the decisive factor.[35]

In ***Macromex Srl. v. Globex International, Inc.***, it limits the damages that can be awarded for losses caused by the breach to the losses that the breaching party foresaw or should have foreseen at the time the contract was concluded. The term "foreseeability" here is the loss of profit foreseeable at the signing of the contract refers to circumstances similar to those raised here-preventing each side from using unforeseeable circumstances to modify the contract.[36] In ***Steel Bar*** case, the Arbitral Tribunal awarded the buyer the foreseeable losses consisting in costs for freight, insurance, duties, storage, expert examination of the goods and interest. The Arbitral Tribunal did not consider as a normal foreseeable cost under Article 74 the expenses of a legal dispute of the buyer with a forwarder.[37]

In ***Cooling System case***, from Article 74, the necessity to determine what degree a reasonable person within the meaning of Article 8(3)[38] in the circumstances known to the seller at the time of the conclusion of the contract could (or should) foresee such problems and expenses; and if need be, also whether or to what degree such damages (in this manner determinable, foreseeable, exceeding the loss, and resulting directly from seller's breach of contract) of the buyer were actually foreseeable for the seller at the time of conclusion of the contract. Since the time of the conclusion of the contract is the relevant moment, the circumstance emphasized by the Appellate Court, that the seller was informed of the threatening damages claims of the buyer's customer, would only be of essential importance to the decision if this information was given prior to or during the conclusion of the contract.[39]

(2) Mitigation of Loss

In accordance with Article 77, 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."

In ***T- Shirt*** case, the buyer set off the purchase price against several alleged claims for damages due to non-conformity and delay of the deliveries. The seller had sent the T-shirts directly to the defendant's customer. Being faced by its customer with the alternatives of accepting a reduction in price or taking back the T-shirts altogether, the buyer accepted a price reduction. Then the buyer claimed that it had given notice of non-conformity to the claimant via fax. The Court held that the defendant met its obligation under Article 77 of the CISG to take reasonable measures to mitigate the loss resulting from a breach of contract by accepting a reduction of the purchase price instead of accepting the goods back in all.[40]

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. In ***Aluminium hydroxide*** case, a German seller, plaintiff, made several deliveries of aluminium hydroxide to a French glass manufacturer, defendant. The buyer stored the chemicals in a silo, adding new material to that from previous deliveries. Due to the lack of quality of the aluminium hydroxide, the glass produced was defective. On the day after the second of the two deliveries in question, the buyer notified the seller that the goods received in two previous deliveries had been defective. The Court held that by mixing the aluminium hydroxide without prior examination, the buyer had failed to take due care of its own goods; consequently, it also failed to mitigate its loss. Thus, the buyer was not entitled to set-off with damages.[41]

The aggrieved buyer was found to have failed to mitigate damages in the following circumstances: failure to stop the use of vine wax after the aggrieved party had discovered the wax to be defective; failure to look for replacement goods in markets other than the local region; failure to cancel its contract of sale with sub-buyer or to conclude a substitute purchase; failure to provide evidence of the price it received on its sale of non-conforming goods to a sub-buyer; failure to provide evidence as to whether the aggrieved buyer could buy the same product from the wholesaler newly-designated by the seller.[42]

The timing of the non-breaching party's mitigation efforts is crucial to the ultimate calculation of damages owed. Several decisions have denied an aggrieved buyer's claim for reimbursement of expenditures because the expenditures did not limit the loss. One decision declined to award the buyer damages to compensate for the expenses of adapting a machine to process defective wire delivered by the seller because the cost of the adaptation was disproportionate to the purchase price of the wire. A buyer was denied recovery for the costs of translation of a manual to accompany the goods to be resold because the aggrieved buyer failed to notify

the seller, which, as it was a multinational company, would already have had manuals in the language into which the manual was translated. A few decisions have denied the aggrieved party's claim for the cost of enforcing its claim for breach of contract through a collection agent or lawyer.[43] A party is not required to mitigate before the date of avoidance. However, mitigation must take place within a reasonable time.[44]

III. UCC

If the seller delivers non-conforming goods, first, the buyer may reject the goods. The buyer can also buy substitute goods and claim the cost of cover under UCC 2-712. If the goods are unique, the buyer can ask for specific performance. Second, the buyer may accept the nonconforming goods. After that, the buyer must give notice about the non-conformity of goods promptly and claim damages for the defects in any accepted goods. Unlike the SGA, there is no different provision of damages rules for consumer sales under the UCC, which means both consumer sales and business sales are subject to the same rule.

(a) Specific Performance

Specific performance is the most accurate method to achieve compensation goals of contract remedies because it gives the promise the precise performance that he purchased. But why it is routinely unavailable.[45] Under the UCC, the buyer's right of specific performance is granted only where the goods are unique or proper circumstances. It is the extraordinary remedy where the monetary remedy or damages is not enough for the loss of the buyer. The court has the discretionary power to grant the specific relief if it thinks fit.

UCC 2-716(1) states that "specific performance may be decreed where the goods are unique or in other proper circumstances." This provision codified *uniqueness* test and *other proper circumstances* test. The buyer also has a right to obtain substitute goods from other markets. The buyer has the right to ask the seller to tender the goods, if the buyer cannot buy from other marketplaces of such goods identified to the contract if after reasonable effort he is unable to get such goods from other sources or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.[46]

The official comment to UCC-2-716 puts in this way:

"In view of this Article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which

are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances".[47] Therefore, the modern use of specific performance remedy has expanded beyond the traditional domain of land and unique goods such as artwork and antique.[48]

In ***Colorado-Ute Electric Ass'n v. Envirotech Corp,*** a specially designed pollution-control device "unique" and "essentially irreplaceable" once installed. This 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 specific performance is the appropriate remedy. [49]

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.[50]

Where evidence demonstrated that the goods were purchased at a close-out price and could not be replaced at the contract price, money damages would adequate remedy for the breach and specific performance was denied.[51]

Another case related to "other proper circumstances" is ***King Aircraft Sale v. Lane,*** in which the court found that specific performance was an appropriate remedy for the breach of a contract to sell collectible aircraft. As the court explained:

“The planes were fairly characterized as “one of a kind” or “possibly the best” in the United States; however, it was not proved that the planes were “unique” because there were others of the same make and model available. However, the planes were so rare in terms of their exceptional condition that King had no prospect to cover its anticipated resales by purchasing alternative planes because there was no possibility of finding similar or better planes.”[52]

(b) Damages

(i) Right to Damages

Damages for non-conformity of goods depends on whether the buyer accepted or rejected the goods. The buyer who rejects the nonconforming goods or revokes acceptance of the goods has two basic remedies. If the buyer in good faith covers by making a reasonable and timely purchase of substitute goods, the buyer may recover damages from the seller measured by the excess of the cover price over contract price.[53] Alternatively, the buyer’s damages will be the difference between market price “at the time when the buyer learned of the breach” and contract price.[54]

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. 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.”[55]Subject to foreseeability and mitigation rules, the buyer also entitled to recover incidental damages and consequential damages.[56]

Incidental damages 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.[57] 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.[58]

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.[59]

(ii) Measure of Damages

If the buyer elects to reject the non-conforming goods properly and buys substitute goods from somewhere, a measure of damages is the difference between the cost of buying substitute goods and the contract price together with any incidental or consequential damages.[60] If the buyer does not buy substitute goods, a measure of damages is the same as the one who never receive the goods. It is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages.[61] Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.[62]

In ***Dangerfield v. Markel***, the seller breached a contract with the buyer, who was then forced to cover the seller's breach on the open market. The District Court awarded the buyer damages. Both parties appealed to the Supreme Court of North Dakota. The Supreme Court affirmed the District Court's judgment and held that the damages to the buyer were appropriate and denied any incidental or consequential damages. In this case, the Supreme Court found that the buyer complied with UCC 2-712, acted reasonably and in good faith to cover the seller's breach and was not obligated to purchase the entire cover on the day of breach or shortly thereafter to mitigate his damages;….. The buyer was only entitled to recover for excess costs incurred as general damages because the cover was effected and the seller's breach did not put the buyer out of business or impede the buyer's operations. The court affirmed the district court judgment awarding damages to the buyer in a breach of contract action but denying the buyer any incidental or consequential damages.[63]

If the buyer elects to accept defective goods, the seller is still liable for breach of warranty. The damages for such a breach of warranty are the difference in the value of the goods accepted and the value of the goods that should have been delivered as warranted. UCC 2-714 states:

"The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

The usual, standard and reasonable method of ascertaining damages in the case of breach of warranty, but it is not intended as an exclusive measure. It departs from the measure of damages for non-delivery in utilizing the place of acceptance rather than the place of tender. In some cases, the two may coincide, as

where the buyer signifies his acceptance upon the tender. If, however, the non-conformity is such as would justify revocation of acceptance, the time and place of acceptance under this section is determined as of the buyer's decision not to revoke.[64]

In ***Stelco Industries, Inc. v. Cohen,*** a buyer who is suing for losses arising out of his acceptance of non-conforming goods ordinarily measures his damages by the difference between the value of the goods accepted and the value of the goods if they had been as warranted.[65] Other cases decided that the cost of repair considered as general damages for breach of warranty under UCC 2-714(2).[66]

(iii) Limitations of Damages

(1) Foreseeability

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.[67] Relating to foreseeability, the UCC refers to the ***Hadley v Baxendale*** case, which is a leading case of foreseeability rule in contract law.[68]

In ***Prutch v. Ford Motor Co.,*** the plaintiff buyer buys a tractor, plow, disc harrow, and hay baler to use in the farm. The plaintiffs' claim for damages was based upon the contention that the failure of the seller implements to comply with warranties adversely affected the crops which were produced or harvested by use of those implements in the year of the sale. Regarding the issue of foreseeability, it was held that “a manufacturer knowing that its products will be used for crop production 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.[69]

However, in ***Lenox, Inc. v. Triangle Auto Alarm,*** 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. Lenox claims for $125,000 in damages, representing the wholesale value of the stolen samples, plus costs and fees. Regarding the foreseeability, the Court held that, “it is generally accepted that where the plaintiff's injury resulted from the

same causes whose existence required the same exercise of greater care than was displayed and were of the same general sort expectable, unforeseeability of exact developments and of the extent of loss will not limit liability." ……..In this case, the Court believes that due to the magnitude and character of the plaintiff's injury, it was not "of the same general sort expectable" by the breach of the defendant's duty of care. Based on the facts in this case and the commercial context in which the loss occurred, it was not foreseeable that Lenox's agent would store an inventory of jewelry samples with a wholesale value of approximately $125,000 in the trunk of his car. …….The loss of valuable jewelry was not "highly foreseeable" under the circumstances because it was never disclosed to Triangle that its alarm was to protect valuable commercial property. Thus, the risk of theft of a set of jewelry samples was not one of the "hazards" against which defendant could reasonably be expected to protect.[70]

(2) Mitigation of Loss

The buyer has the duty to mitigate the loss in order to be entitled damages. Under UCC 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 causally-related consequential damages "which could not reasonably be prevented by cover or otherwise."[71] 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. The 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.[72]

In ***Texpor Traders, Inc. v. Trust Company Bank,*** the goods in first and second shipments were non-conforming; because the goods from the first shipment were delivered very close to the buyer's commercial deadline; and because the goods from the second shipment were delivered late, the buyer could not possibly cover or in any way recoup its loss. As a reputable dealer in the apparel industry, the buyer would not and could not pass on unacceptable merchandise to its customers. Hence, the buyer took the next best practicable business approach and held the goods until it received a commercially reasonable offer and sold

them in bulk as irregulars. In point of fact, the buyer refused to sell the goods at $2 per shirt and delayed until it received an offer from Marshalls for $4.75 to $5.00 per shirt.

As a result, the buyer is entitled to lost profits from the confirmed customer orders but is not entitled to an additional lost profit on potential customer orders. Such profits are speculative and no basis exists for computing the amount of damages. Hence, the buyer is not entitled to such potential damages.[73]

The UCC allows the parties to the contract to make an agreement on damages amount. A seller who wants to avoid consequential damages can limit 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. Therefore, the UCC does not allow the punitive damages. Liquidated damages will be enforced unless they are a penalty. According to UCC 2-718, 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. UCC 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 nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."

In ***Biotronik A.G. v Conor Medsystems Ireland***, the agreement included a damages limitation provision restricting the parties to general damages:

"Neither party shall be liable to the other for any indirect, special, consequential, incidental, or punitive damage with respect to any claim arising out of this agreement (including without limitation its performance or breach of this agreement) for any reason."

Based on the damages limitation provision of the agreement, the plaintiff may only recover lost profits if they are general damages. The limitations provision does not specifically preclude recovery for lost profits, nor does it explicitly define lost profits as consequential damages.General damages are "the natural and probable consequence of the breach" of a contract. The distinction between general and special contract damages is well defined, but its application to specific contracts and controversies is usually more elusive. Lost profits may be either general or consequential damages, depending on whether the non-breaching party bargained for such profits and they are "the direct and immediate fruits of the contract." It was held that plaintiff could recover as general damages "money which defendant undertook to pay under the contract."

The schedule of the plaintiff's estimated losses and profits "reflected the cost of this joint venture to the defendant." Accordingly, the lost profits were the natural and probable consequence of defendant's breach.[74]

IV. UK Law

(a) Specific Performance

Specific performance is a decree by the court to compel a party to perform his contractual obligations. Specific performance is usually a remedy sought only by a buyer since specific performance for the seller is usually receipt of the purchase price, which can almost always be compensated for by damages or by an action for payment of the purchase price under Section 49 of the SGA.[75] According to the SGA, granting specific performance of the terms of a contract is an extraordinary remedy, 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 substitute goods and be adequately compensated by a money payment.[76]

In order to grant specific performance, the Court would have taken consideration of two criteria: the uniqueness of the goods and adequacy of damages. Among the unique goods that have been the subjects of an order for specific performance are great artwork. The category has sometimes been enlarged to include goods which are "commercially unique". In that, there are no other goods with like characteristic easily obtainable elsewhere.[77]

Traditionally, specific performance is granted by the court of equity. 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 would enforcement of contractual obligation.[78] 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.[79]

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 decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."[80]

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 a contract of

sale is made" or "identified in accordance with the agreement after the time a contract of sale is made." However, in a leading modern case where the question arose that the judge did, in fact, grant specific performance of a contract for uncertain goods. The case was ***Sky Petroleum v. VIP Petroleum.*** In this case, the parties had a long-term contract for the supply of petrol to a filling station. When the seller defaulted, the buyer was unable to locate an alternate supply of petrol due to an interruption of supply as a result of the Yom Kippur war. Given the circumstances, the court exercised its discretion to grant a decree of specific performance. **Goulding J** held that-

"While the general rule is that courts grant only damages for breach of contract to supply non-specific goods, the unusual state of the market made specific performance of supplying petrol the appropriate remedy. Damages were not adequate. …the court refuses specific performance of a contract to sell and purchase chattels not specific or ascertained... under the ordinary contract for the sale of non-specific goods, damages are a sufficient remedy... [However] the petroleum market is in an unusual state in which a would-be buyer cannot go out into the market and contract with another seller, possibly at some sacrifice to price. Here, the defendants appear for practical purposes to be the plaintiffs' sole means of keeping their business going, and I am prepared so far to depart from the general rule as to try to preserve the position under the contract until a later date."[81]

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. And 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, the performance of a contract which required continuous Court supervision. This reflects a judicial aversion to valuable court time being expended in policing contentious and difficult issues out of the performance of the promisor on potentially countless occasion. [82]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."[83]

Specific performance in the consumer sales contract is granted under Section 48(A) of the SGA as a result of transposition of the EC Directive in the Sale Law.[84]As envisaged by the EC Directive, the consumer's right to require the seller to perform either act is not subject to a discretion and is especially not subject to the type of discretion exercised by a court of equity.[85]According to Section 48A (2) (a), 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 were acquired.[86] The enforcement of consumer buyer's right to repair or replacement is tantamount to specific performance of the contract though it is not directly described as specific performance. According to Section 48E (2), on the buyer's application, the court may make an order for specific performance. This is not the same thing that the court must make an order for specific performance if the buyer has the right to repair or replacement.[87]

There are two limitations on the right to repair or replacement which provided for in Section 48 B (3) - 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 goods is a good example of the impossibility for the replacement.[88]

(b) Damages

(i) Right to Damages

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.[89]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-

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.

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[90] or even the breach of condition, but the buyer chooses to treat the breach as a warranty[91]and the buyer is not entitled to reject the non-conforming goods.[92]

Normally, there are two forms of loss caused by the breach of contract. The primary loss suffered from the consequences of a breach of contract and the secondary loss or consequential loss. It is possible for the buyer to claim damages not only for non- conforming goods but also where other loss have been suffered as a result

of the breach of contract. This is referred to consequential loss damages and the consequential loss is limited by the rule of remoteness or foreseeability.[93]

(ii) Measure of Damages

Where the buyer accepts the non-conforming goods, the measure of damages provides for in Section 53 of the SGA-

(2)The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

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.[94]

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 with the contract and, in fact, they are worth at the time of delivery in consequence of the breach of contract.[95]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:

"*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.*"[96]

Until recently, the SGA gave all buyers of non-conforming goods two main remedies. To reject the goods outright and claim a full refund (plus damages, if appropriate) or bring a claim of damages for the cost of a

repair. Where the buyer lawfully rejects the non-conforming goods, the buyer can claim fully refund and damages.

In *Clegg v Andersson (Trading as Nordic Marine),* the case concerned the question of breach of condition and consequently the claimant (buyer) were entitled to reject the goods. Whether the buyer were entitled to damages and if so how much. In this case, the Court of Appeal decided on the issue of breach of condition based on Section 14 of the SGA. Regarding the buyer's right to reject the nonconforming goods, the Court of Appeal states in conclusion:

"If a buyer is seeking information which the seller has agreed to supply which will enable the buyer to make a properly informed choice between acceptance, rejection or cure, and if cure in what way, he cannot have lost his right to reject."

The Court of Appeal held that the claimants were entitled to reject the yacht and obtain a full refund plus other acquisition costs and consequential losses.[97]

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.[98]

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 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."[99]

(ii) Limitation of Damages

Under the SGA, the recoverability of damages for breach of contract may be restricted on the grounds of

remoteness or foreseeability and the buyer's duty to mitigate the loss. An award of damages in contract law is subject to the application of the rules of remoteness and mitigation.

(1)Remoteness/ Foreseeability

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, according to the normal course of things from the breach of contract

2. Losses which may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as a probable result of the breach.[100]

In ***Jackson v Royal Bank of Scotland,*** the claimants carried on the business of importing goods and selling them on for resale. His main customer was a business called Economy Bag. Both businesses banked at the Royal Bank of Scotland (RBS), the defendant. RBS mistaken revealed some invoices to Economy Bag which showed the markup that they were receiving for the services they provided. This revelation was in breach of confidence and amounted to a breach of contract. Economy Bag were outraged at the amount the claimants were receiving and they were also concerned that the claimants had taken steps to hide that amount. Consequently, Economy Bag ceased to trade with the claimants. Consequently, the claimants were deprived of their main source of income and were forced to cease trading. The claimants brought an action against RBS to recover their loss. The trial judge found for the claimants and ordered RBS to pay damages based on their loss of profit from trading with Economy Bag over a four-year period. The Court of Appeal reduced this to one year. The claimant's appealed the reduction and RBS cross-appealed contending that the loss of profit was too remote. It was held that "the loss of profit was not too remote. The Court of Appeal had erred in its application of Hadley v Baxendale to reduce the loss of profit to one year. The trial judge's findings as to the assessment of damages restored."[101]

In Parsons v Uttley Ingham, the claimant pig farmers purchased a food storage hopper from the defendant for the storage of pig feed. The hopper was installed negligently and lack of ventilation caused the pig feed to go mouldy. As a result, many of the pigs contracted e-coli and died. The Claimant claimed over £36k in respect of the loss of profit, vet bills and other costs relating to the death of the pigs. The Defendant contended this damage was too remote as it was not in the contemplation of the parties that the poor ventilation would cause e-coli and death of the pigs. The case was held that "the death of the pigs was a natural result of feeding the pig's mouldy food within the first limb of Hadley v Baxendale. There was no need to consider whether the death by e-coli was in the reasonable contemplation of the parties under the

second limb."[102]

(2)Mitigation of Loss

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.[103]

In the landmark case of Mitigation Rules, ***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; but 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 the damage which is due to his neglect to take such steps."[104]

In the recent case ***Saipol SA v. Inerco Trade SA***, the seller shipped 3000MT of as part of a total cargo of about 16,600 MT of Ukrainian crude sunflower seed oil, and the balance of the cargo loaded onto the Vessel (approximately 13,600 MT) was shipped by four other sellers. Before shipment, all five consignments of cargo had been commingled and the whole cargo was loaded, commingled into the ship's tanks ("the entire cargo"). The entire cargo was discharged at Dunkirk on 31 March 2008. In the weeks following discharge, it had become clear that the entire cargo had been contaminated prior to loading on board the Vessel.

The buyer claims for damages against the seller for breach of Section 13 (sale by description) and Section 14 (implied terms as to quality and fitness) of the SGA. The Tribunal upheld the buyer's claim to recover damages from the seller in respect of:

-the difference in value between sound and contaminated Product;

-costs incurred by the Buyer in respect of storage and financing of the contaminated Product; and

-sums paid by the Buyer to sub-purchasers to whom the contaminated Product had been sold.

The Buyer also contended that it was entitled to damages in respect of the contamination of the entire cargo and not only in respect of the 3,000 MT sold by the Seller.

The Tribunal held that 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 Tribunal's award was appealed by both the buyer and the seller. Before the Court, the questions of law 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 commingled 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 Section 53(3) of the SGA, particularly in circumstances where the buyer had advanced its case pursuant to Section 53(2) and Section 54 of the SGA.

The Court held that under Section 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. The case was remitted to the Tribunal for further consideration in light of the Court's findings.[105]

V. Conclusion

Legal remedies for non-conformity of goods under the CISG, UCC and UK Sale Law are specific performance and damages. Under the UCC and the SGA, specific performance is granted on the grounds of

the uniqueness of the goods and inadequacy of damages. It is rare to grant specific performance in the sale of goods. However, under the CISG, suspension of performance is based on the seriousness of the breach of contract. In other words, if the breach is fundamental breach the buyer is entitled to ask for redelivering the substitute goods. If the breach is not fundamental, the buyer is entitled to repair. Under Article 28, the CISG has a limitation on specific performance which require to subject the domestic Law. Therefore, specific performance for fundamental breach under the CISG is not sure to be granted if the domestic law follows the Common Law system which the reason of granting such remedy should be the uniqueness of the goods and inadequacy of damages.

As mentioned above, there are six types of damages. Among them, punitive damages is not enforceable for breach of sales contract. The CISG does not allow punitive damages because the damages shall be equal sum of the loss. The UCC and the SGA do not allow the punitive damages, because the purpose of damages is to compensate the injured party and not to punish the breaching party. Incidental and Consequential damages are allowed subject to foreseeability rule. Liquidated damages is not enforceable if they are not reasonable amount. Compensation damages is recognized by all legal systems.

There are the same rules on damages under the three legal systems: causality, foreseeability, mitigation. In order to recover damages, the loss must be the result of a breach of contract, the loss must not too remote and the buyer has the duty to mitigate the loss. Regarding the measure of damages, the CISG does not provide specific guidelines for calculating damages. There are different ways of measure of damages between the UCC and the SGA. Although both apply the market price value to calculate the loss, the UCC bases on the market price at the time of acceptance and the SGA bases on the market price at the time of delivery. Relating to the measure of damages, if the market price is fluctuating, the rule under UCC 2-713 (1) is not suitable in every condition to calculate the loss of the buyer.

When would the buyer prefer specific performance or when would the buyer prefer the damages as a remedy for non-conforming goods? The answer is simply based on whether the buyer accepts or rejects the goods. As long as the buyer is not entitled to reject the non-conforming goods because of failure to give notice or defective goods does not amount to a fundamental breach, the buyer must accept the goods, the only remedy that the buyer can recover is monetary damages. The loss cannot fully recover from damages remedy because of the foreseeability rule. The buyer will not recover damages for loss of business reputation because of reselling the non-conforming goods to third parties.

If the buyer is entitled to reject the goods, the remedy is a full refund and any incidental or consequential

damages under the SGA. Unlike the SGA, the UCC has the rule to measure damages for rejected goods. A measure of damages is the difference between the cost of buying substitute goods and the contract price together with any incidental or consequential damages.

If the amount of damages does not adequate for a loss then the buyer can claim for specific performance. One should be noted that specific performance is difficult to be granted, especially in long-term sales contract because it required the court's supervision for the enforcement of such remedy. The other impossible reason is the case like no substitute goods for second-hand goods.

Endnotes

1 Nominal damages awarded to an individual in an action and it may be recovered by a plaintiff who is successful in establishing that he or she has suffered a loss or injury as a result of the defendant's wrongful conduct but is unable to adequately set forth proof of the nature and extent of the injury.
2 Article 46 of the CISG.
3 Jussi Koskinen in *CISG, Specific Performance and Finnish Law*, Publication of the Faculty of Law of the University of Turku, Private law publication series B: 47 (1999). [Cited from: http://www.cisg.law.pace.edu/cisg/biblio/koskinen1.html] (Last accessed on 20.11.2015).
4 Chengwei, Liu, Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL, 2003. [Cited from: http://cisgw3.law.pace.edu/cisg/biblio/chengwei.html#03-2] (Last accessed on 20.11.2015).
5 Article 25 of the CISG.
A breach of contract committed by one of the parties is fundamental 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, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result; See also Robert Koch , *Review of the Convention on Contracts for the International Sale of Goods*, 199Kluwer Law International (1999) 177 - 354; [Cited from http://cisgw3.law.pace.edu/cisg/biblio/koch.html] (Last accessed on 20.11.2015).
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7 Switzerland 27 January 2004 District Court Schaffhausen (Model locomotives case) [Cited from: http://cisgw3.law.pace.edu/cases/040127s1.html] (Last accessed on 25.11.2015).
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14 Switzerland 31 May 1996 Zürich Arbitration proceeding (Soinco v. NKAP) [Cited from: http://cisgw3.law.pace.edu/cases/960531s1.html] (Last accessed on 29.11.2015).
15 Article 45 of the CISG.
16 Jeffrey S. Sutton, *Measuring Damages under the United Nations Convention on the International Sale of Goods*, 50 Ohio S. L.J. (1989) 737-752 [*Cited from* http://cisgw3.law.pace.edu/cisg/biblio/sutton.html] (Last accessed on 11.12.2015).
17 Australia 20 April 2011 Federal Court (Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd) [Cite from: http://cisgw3.law.pace.edu/cases/110420a2.html] (Last accessed on 22.11.2015).
18 Article 78 of the CISG.
19 CISG Advisory Council Opinion No. 6 [Cited from: http://www.cisg.law.pace.edu/cisg/CISG-AC-op6.html] (Last accessed on 5.12.2015).
20 Article 45(2) of the CISG.

21 Peter Huber& Alastair Mullis, *supra* note 13 at p 256.
22 Article 74 of the CISG.
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(2)Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.
(3)Nothing in this section prejudices the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.
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