Non-Conformity of Goods and Limitation Clause under CISG, UCC and UK Law

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要　旨

本稿の目的は、売買契約における共通の問題である商品の不適合と制限条項に関する問題を研究することにある。多くの売買契約において、商品の品質に関連する契約条項は、売主が買主に何を売ることに同意したかを明らかにするために置かれる。売主は、契約条件と一致した商品を届ける責任がある。しかしながら、法律に定められたいくつかの条件を前提として、売主は、制限条項を含めることによってかような契約条件に対する責任を除外または制限する権利を有する。本稿は 3 つの法制度、すなわち国際物品売買契約に関する国連条約（CISG）、米国の統一商法典（UCC）および連合王国売買法における商品の不適合と制限条項の問題を分析するものである。

Keywords: non-conformity, fit for purpose, satisfactory quality, limitation clause

I. Introduction

Contract lies at the heart of commercial life and development in national and business activities has become increasingly global. International sales contracts are entered into day by day. In every sales contract, both international and national, the seller has obligation to deliver goods conforming to not only contract terms but also the conditions required by law. The goods must be conformed in accordance with 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 law. If the seller fails to do so, the seller is liable for the nonconformity of the goods. The term nonconforming is relevant when the goods delivered are not in accordance with the purchase contract or the required quality under the law. A buyer may reject, accept all, or accept some of the goods if a seller delivers nonconforming goods. If the buyer rejects the nonconforming goods in a reasonable time after delivery, the buyer has no liability to pay for the goods rejected. 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 really important to understand the term of non-conformity in a broader meaning to assess whether the goods quality is in conformity or not.

As the contract law recognizes, under the freedom of contract, in most contracts, the parties may draw up their contract as their will. In the legal text of sale of goods, the law provides that the seller is liable for non-conformity and the seller has right to limit or exclude the liability for non-conformity. Liability means responsibility to compensate for failure to perform in accordance with contract terms and the law. Since there is an element of risk inherent in most business contracts, limitation of liability clauses are common in all areas of contract. The seller can exclude the liability by incorporation of the limitation clause at the time of conclusion of the contract. Limitation clause typically favors whichever party drafted the agreement, usually the seller-for example, the limitation clause limits liability for implied terms or amount and types of remedy that the buyer can recover from the seller.

However, the freedom of contract rule is not unlimited.[1] Such exclusion of liability clause must be within the law admitted. It must subject to provisions of the law which are related to the balancing of rights and obligations between buyer and seller. Whether limitation or exclusion of liability is enforceable or not is the question of law. In other words, the validity of exclusion or limitation clauses is subject to the law. Therefore, the question arises to what extent the law admit the seller to limit or exclude liability. The buyer's remedies are decided depending on the contract terms and the sale law. The clash of contract terms of freedom of contract

rule and the boundary of law which limits the freedom of contract creates the complicated issue in deciding the validity of contract terms and consequential remedies of buyer.

The scope of this research is limited to the issue of the limitation of implied term or warranty for non-conformity of goods under the United Nations Convention on Contract for International Sale of Goods (hereinafter as the CISG), Uniform Commercial Code of the US (hereinafter as the UCC) and the UK Law. This paper is intended to discuss on the issue of defining non-conformity of goods under those three legal systems. The second issue is related to the validity issue of limitation clause. The third issue is on uncertainty of buyer's remedy under the contract with limitation clause which exclude the liability of the seller. This paper suggests that the limitation clause of implied terms has bad impact on the buyer's rights and remedies under the law. Therefore, the law should not allow limitation clause as implied terms.

This research paper is comprised of five parts. Section I is introduction of the research. Section II will discuss the concept of non-conformity of goods, freedom of contract and limitation clause and fairness as well as validity issue of limitation clause under the CISG. Section III and IV will analyze the concept of non-conformity of goods and freedom of contract and limitation clause, reasonableness and validity issue of limitation clause in the UCC and UK Law. Finally, this research concludes with the discussion of three legal systems comparatively.

II. CISG

(i) Non-conformity of Goods

The goods is the subject matter of the sales contract and the rule on the conformity plays a crucial part for assessing the fundamentality of the breach of contract and the choice of remedies. Without this rule, it is very difficult to determine what the seller agreed to deliver. Many buyers may complain about the non-conformity of the goods, allege breach and seek for remedies.

Under the CISG, the rule concerning conformity is provided for in Article 35. According to Article 35, the goods must be in accordance with the ***expressed terms*** of the contract and ***implied terms*** under the CISG's provision. It is based on the uniform concept of "lack of conformity" that includes not only discrepancies in quality, but also in quantity and packaging defects.[2] When goods delivered, goods must be met the specification of contract regarding description, quality, quantity and packaging. If there are no such express terms, goods must be in accordance with certain implied terms as to fitness for ordinary purpose, fitness for

particular purpose, quality as a sample or model and packaged or contained as usual manner.[3]

However, 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.[4] If the buyer did not rely, or that it was unreasonable for him to rely on the seller's skill and judgement, 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."[5] 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 judgement in making the purchase. If the seller knew that 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 and purchased the goods it would then be clear that he did not rely on the seller's skill and judgement.[6]

In the ***Sport 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".[7] In the ***Hydraulic Press case,*** the buyer listed several defects of the machines delivered which were all contested by the seller in detail. However, the arbitral tribunal shortened the whole dispute by finding upon presentations of the parties that the buyer had already had purchased the same type of machine with the same defects 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.[8]

However, in the ***Used Car case***, the seller knew that a used car had been licensed two years earlier than indicated in the cars documents and 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 (itself a used car dealer) should have detected the problems. Article 35(3) could not be relied on by a fraudulent seller, referring to the general principles embodied in Articles 40 and 7(1) CISG. According to the appellate court, even a very negligent buyer deserves more protection than a fraudulent seller.[9]

(a)Express Terms

According to the CISG's provision, the goods must be conformed in accordance with quality, quantity and packaging manner as expressed in the contract, so that the important of contract is stressed.[10] In ***Granulated Plastic case***, a shipment of raw plastic that contained a lower percentage of a particular substance than that

specified in the contract, as a result, produced window blinds that did not effectively shade sunlight, did not conform to the contract, and the seller had therefore breached its obligations.[11] 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, 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 shipment, 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 distinguished from other barley, the consumer pays a substantial higher price for an organic product not for a proven quality but for the observation of the inspection scheme at production, transport and processing.[12]

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), since the provision expressly states that a lack of conformity encompasses both a lack of quality of the goods delivered and a lack of quantity; partial deliveries.[13] 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 delivered contained a different proportion of clay, the court found a violation of Article 35(1).[14]

(b) Implied Terms

Under the CISG, the question whether the goods is in conformity or not has to be tested by the 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.[15]

(1) Fitness for Ordinary Purpose

Article 35(2) (a) states "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." In other words, Article 35(2) (a) requires the seller to deliver goods which does not require that the goods be perfect or flawless, unless perfection is required for the goods to fulfil their ordinary purposes. The standard of Article 35(2) (a) has been variously described as requiring goods of *average* quality, *marketable* quality, or *reasonable* quality. It has also been stated that *resaleability (tradability)* of the goods is an aspect of their fitness for ordinary purposes under Article 35(2) (a), that foodstuff intended for human consumption must, at least, not be harmful to health, and that mere suspicion that the goods are harmful to health may give

rise to a breach of Article 35(2) (a).[16]

Several decisions have discussed whether the quality standard prevailing in the buyer's or seller's jurisdiction is to apply when determining lack of conformity under Article 35 (2) (a). This is especially relevant to the issue of compliance with particular public law.[17] As a general rule, the seller is not responsible for compliance with the regulatory provisions or standards of the importing country even if he or she knows the destination of the goods unless:

a. The same regulations exist in the seller country.
b. The buyer drew the seller's attention to the regulatory provisions and relied on the seller's expertise.
c. The seller knew or should have known of the requirements because of special circumstances. Special circumstances many include:

-The fact the seller has maintained a branch in the importing country.

-The existence of a long-standing connection between the parties.

-The fact that the seller has often exported into the buyer's country.

-The fact that the seller has promoted its products in the buyer's country.[18]

In the ***Mussels case***, the parties have not agreed on anything, the goods do not conform with the contract if they are unsuitable for the ordinary use or for a specific purpose expressly or impliedly made known to seller. The delivered mussels are not inferior quality and there is no evidence that the parties agreed to comply with the ZEBS-standards.[19] Therefore, the court denied the buyer's right to declare the contract avoid and the law of buyer's country cannot applied in order to determine whether the goods conformed to the contact.[20] 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.[21]

(2) 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, 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.[22] 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 particular purpose

and the problem arise only with respect to implicit knowledge.[23]

Suppose that buyer knows about a general description of the goods to meet some particular purpose 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. If the buyer expressly or impliedly makes known to the seller such purposes by the time of the conclusion of the contract, the seller must deliver goods fit for that purpose.[24]

It would also be unreasonable for the buyer to rely on the seller's skill and judgement if the seller did not purport to have any special knowledge with respect of the goods in question. In ***the Second Hand Bulldozer*** case, the buyer has been held to have assumed the risk of defects in a used bulldozer that the buyer inspected and tested before purchasing.[25]

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 judgement of the seller.

(3) 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.[26] But, 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.[27]

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.[28]

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.”[29]

(4) 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 governed by article 35 (2) (d) of the CISG. 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.[30]

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 buyer's country because it had had dealings with the buyer for several months, and 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.[31]

(ii) Freedom of Contract and Limitation Clause

As mentioned before, the implied obligations set forth in Article 35(2) apply on the condition “except where the parties have agreed otherwise.” In other words, the parties to the contract can agree to exclude the implied terms. As the CISG recognizes the freedom of contract rule,[32] 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 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.[33]

In practice, there are various forms to exclude the seller’s liability by incorporating the limitation clause. In some contracts, the parties use the one’s standard form contract for convenience or contractual advantages. A standard form contract is a contract between two parties, where the terms and conditions of the contract are set by one of the parties, and the other party has little or no ability to negotiate more favorable terms and is thus placed in a “take it or leave it” position. Where the parties concluded the contract with limitation clause or standard terms which excluded the liability of the seller for non-conformity, the question of the fairness of

limitation clause or standard terms arose. The fairness of limitation clause or standard terms can be tested by three criteria: incorporation, interpretation and validity.

The **incorporation** of limitation clause or standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts. Regarding the issue of validly **incorporation of standards terms**, in the ***Tantalum case***,[34] 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 terms depend 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 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.[35]

The issue of **interpretation** is 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.[36] In interpretation of the intent 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. Criteria for cases in which the addressee might be expected to have knowledge and understanding of standard terms written in foreign language are: length, intensity and economic importance of business relationship between the parties, as well as the spreading and use of language within their society. During the business relationship with seller, the buyer on several occasions referred in English to his German written standard terms printed in 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.[37]

Regarding the **validity** issue, it lies outside the CISG. The CISG clearly excludes the issue of validity of contract in Article 4(a) as follows:

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage.

The issue must be settled in accordance with the applicable domestic law. The purpose of validity exception under Article 4 is to preserve national rule that embodied the social value and cannot be erased by mutual agreement.[38] Where the domestic law has to apply to decide the validity of international sales contract, the CISG suggests that the contract shall interpret according to Article 7 of the CISG. Article 7 suggests to interpret according to good faith, general principles which the CISG based on and conflict of laws rule as follows:

(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 are 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.

The buyer's remedy will be decided upon the result of the validity of contract clause. If the exclusion or limitation clause is not valid, the seller is liable for the non-conformity of goods and the buyer's claim will be favored by the court. If the exclusion or limitation clause is decided as valid, the buyer's claim will be rejected. In practice, at the time of conclusion of contract, the buyer should know that the seller is liable for quality of the goods according to the implied term. The buyer should be very careful about that there are many forms of standard contract terms which exclude or limit the seller liability and the law recognized them as valid. It is really important to make sure which contract terms is valid in accordance with the relevant domestic law. By means, the buyer can avoid the problem of uncertainty of remedy.

III. UCC

(i) Non-conformity of Goods

The Uniform Commercial Code (UCC), is one of a number of uniform 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. Under the Uniform Commercial Code (UCC), conforming goods is the goods which is in accordance with the agreement between the parties to contract. Article 2-106 (2) states 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 express and implied warranties for the sale of goods and the whole purpose of warranties is to

determine what the seller has essence agreed to sell.　Non-conformity of goods is the goods which is differed from quality or description or sample or promise that the seller has made in the contract.

(a) Express Warranty

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 is 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.

Affirmative promises about the quality and features of the goods being sold 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.”[39]

Descriptions of the goods being sold or samples 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 specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform to them.[40]

In ***Rite Aid Corp. v. Levy-Gray***, the consumer bought a prescription 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.[41]

Express warranties are required to include the warranties in the contract. If they are not stated in the contract, than they are not part of the contract. It is not necessary to use words like “warranty” or “guarantee” to create express warranties. It was decided in ***Durant v. Palmetto Chevrolet Co.,*** that the seller was required to demonstrate that the written warranty was made known to the buyer at the time of the sale.[42]

(b) Implied Warranties

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.[43] 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.

(1) 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, are adequately packaged, conform to all promises or affirmations of fact on the container, and are fit for the ordinary purposes for which such goods are used.[44] The implied warranty of merchantability also includes a promise that multiple goods will be of even kind and quality.[45] 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.[46] 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.[47]

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 companies had the case removed on the grounds that diversity jurisdiction existed because 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.[48]

(2) 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 also that the buyer is relying upon the seller to select the suitable goods to meet that 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.[49] 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 the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.[50]

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 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.[51]

(ii) Freedom of Contract and Limitation Clause

Under Article 1-103, the UCC has to be liberally construed and applied and recognized the rule of freedom of contract.[52] 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.[53] 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.*

Since warranties typically only become an issue when a buyer is dissatisfied, a prudent seller tries to limit the scope of the warranties he makes before a problem arises. The UCC specifically allows sellers to exclude or limit both express and implied warranties on goods they sell, within certain limits. Certain limits means that attempts to exclude or limit warranties should be construed reasonably and enforced unless doing so is unreasonable under the circumstances.[54]

The seller's right and the methods of exclusion or modification of warranties are provided for in Article 2-316 of the UCC.[55] Where the limitation clause (which is also called a disclaimer clause in the US) met the 2-316 (2) requirements of conspicuousness and mentioning merchantability, there is no warranty to breach and thus there can be no damages either direct or consequential.[56] Unlike the UK law, there is no difference between B2B contract and B2C contract regarding the required criteria for exclusion of limitation clause. The seller can exclude implied terms in accordance with Article 2-316 of the UCC. However, the seller cannot exclude liability for tort. To be effective limitation clause, the exclusion or limitation clause must be included in the contract, clear expression of purpose and pass the test of unconsciousability.

(a) Incorporation

To exclude or limit implied warranties, the warranties must be included in the contract. If they are not stated in the contract, than they are not part of the contract. The limitation or exclusion clause must be specific, must be in writing and must be conspicuous.[57] An exclusion of the implied warranty of merchantability must specifically mention "merchantability" in the clause.[58] A seller may exclude all implied warranties by stating that the good is being sold "as is," "with all faults," or by stating some other phrase that makes it plain to the buyer there are no implied warranties.[59]

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."[60]

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 be conspicuous.[61] 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.[62]

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.[63]

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. Article 1-201(10) defines "conspicuous", as a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is conspicuous or not is to be decided by the court.

Conspicuous terms include the following:

(a) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(b) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

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 incurred 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.[64]

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 trade.[65]

Under Article 2-316(3) (b), warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. 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.[66]

Under Article 2-316(3) (c), in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.[67]

(b)Interpretation

(1)Four Corners Rule applies when considering only the agreement itself and when the contract terms is clear. It requires to interpret the meaning and understanding of the provisions contained in a document by considering the overall meaning and intention of that document. In such an interpretation of document, the external factors will not influence the meaning. But the meaning of a sentence or clause is influenced by the document as a whole. Thus it is presumed that parties to a contract will not exclude liability for losses arising from acts not authorized under the contract. However, if acts of negligence occur during authorised acts, then the exclusion clauses shall still apply. In ***Luckel v.White,*** the primary duty of a court when construing such a deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the four corners rule. [68]

(2) Contra Proferentem Rule means ambiguities are construed against the drafting party. The party drafting the contract should always include a provision that the general rule of construction that any uncertainty in a contract will be construed against the drafter will not apply to the subject contract.[69] This is particularly true in cases where the drafter will be relieved from liability. However, this is merely a general rule of interpretation and the parties are therefore free to agree that the rule shall not apply

(3)The Parol Evidence Rule is a legal rule that applies to written contracts. Parol evidence is evidence pertaining to the agreement that isn't included in a written contract. Courts generally don't allow this extra evidence, because the court must determine the parties' intentions. The written contract is considered to be the best description of the parties' intentions. 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 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.”[70]

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 to 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. The court held that 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.[71]

(b) Validity of Limitation Clause

The UCC provides explicit guidance on what rules need to be followed in order for a warranty disclaimer or exclusion to be valid. The standard for enforcing a warranty disclaimer or exclusion is unconscionability. The doctrine of unconscionability, codified in article 2-302 which permits courts to invalidate whole contracts, or particular provisions in contracts if they find fundamentally unfair, which provides that-

(1)If the court as a matter of law finds the contractor 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.[72]

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.[73] In ***Hall v. Treasure Bay Virgin Corp.,*** for a contract to be considered unconscionable, it must be both procedurally and substantively unconscionable. "Procedural unconscionability pertains 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 disfavored party does not truly assent.[74]

In ***Williams v. Walker-Thomas Furniture Co.,*** bargaining power of the party was considered to decide the unconsciousability, Judge J. Skelly Wright held that "...we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But 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. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld."[75]

When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.[76]

In ***Haugen v. Ford Motor Co.,*** the requirement of article 2-302(2) that the court required to afford opportunity for the buyer to present evidence to aid court in making 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 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 fire was reversed.[77]

III. UK Law

(i) Non conformity of Goods

The goods must comply with *express terms* which are properly incorporated in the contract and the *implied terms* concerning the description,[78] fitness,[79] quality[80] and sample[81] unless the parties excluded them within the limit permitted by the Law.[82] According to Section 48 (f) of the Sale of Goods Act, 1979, in consumer sales contract, “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 or 15.”

(a) Express Terms

Unlike the UCC, there is no clearly provision regarding the express terms under the SGA. However, the express term here means the terms which is properly incorporated in the contract. On the other hand, terms which are not expressly agreed between the parties but are inserted by law into the contract are called implied terms.[83]

(b) Implied Terms

1. 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." [84] In order to determine whether the goods correspond with the description, it may be necessary to determine the exact scope and meaning of description.[85] First**,** the implied term as to description is application to all sales contracts, both B2B and B2C. Second, the goods are sold by description where the buyer has not seen the goods but is relying on the description alone. In ***Grant v Australian Knitting Mills***, Lord Wright states - there 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.[86] 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.[87] Third, the goods which is defective in quality is not relevant fact in deciding whether they correspond with their description.[88] In ***Arcos v Ranaason***, a contract for the 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 were entitled to reject the goods under Section 13 as they were not as described.[89]

2. 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.[90] Unlike sale by description, this implied term applies only to when the seller sell 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.[91]

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 revealed 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.[92]

For the purpose of Section 14(2B), 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.[93] 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.[94] 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.[95]

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.[96] In ***KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co KG v Petroplus Marketing AG, Justice Field*** said**:** "To deliver the gasoil that was of satisfactory quality not only when the cargo was delivered on the vessel but also for a reasonable time after. In addition, under the term implied at common law, the gasoil had to remain in accordance with the contractual specification after delivery on the vessel for a reasonable period."[97]

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. The skill and experience of the seller in his ability to ascertain the buyer's purpose is also taken into account. Furthermore, the requirement would apply even if the purpose is different from what would be usually expected for goods of that type.[98]

The importance case deciding on the issue of fitness for purpose is ***BSS Group v Makers (UK) Ltd,***[99] the issue in this case was whether supplying Makers (buyer) particular type of adaptor and value for use in connection with particle plumbing project, the BSS (seller) was in breach of implied term as to fitness for purpose under Section 14(3) of the SGA. 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 judge held that the seller breached the implied term and found it liable accordingly. The seller challenged the decision. In the court of appeal, whether the goods is fitness for purpose under section 14(3) was tested by three questions: (1) whether the buyer expressly or by implication 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.[100]

Lord Justice Rimmer decided as follows:

BSS had known that Makers was using an Uponor system. It had previously bought goods for an Uponor system. This meant there was an "irresistible inference" from Maker's request for a further quote that it intended to use the valves for the same project. It had to be, at the very least, apparent to BSS that Makers was likely to use the valves for the project. Makers therefore made a particular purpose for the valves known to BSS.

The valves were not fit for purpose because "they were incompatible with the Uponor adaptors and would be likely to (and on 24 August 2007 did) fail when used in conjunction with them." If a buyer has made a particular purpose known, either expressly or impliedly, then there was a presumption that they would be fit for purpose. The seller could only overcome that presumption by proving that the buyer had not relied on, or that it had been unreasonable to rely on, the skill and judgement of the seller. BSS did not discharge the burden of proof: its argument that Makers was content 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".[101]

3. 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. This is the question of fact, easier to resolve than the test of satisfactory quality.[102] 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. Sale by sample is applied to all sales contracts irrespective of whether it is a private sale, consumer sale or business to

business sale. It is a condition in a consumer sale and an innominate term in non- consumer sales.[103] In ***Steels & Busks v Bleecker Bik & Co***, where the sale of goods is recognized as a sale by sample, the bulk must correspond with the sample. However, that does not mean the bulk has to be exactly the same, but only that it will be like as the sample as an ordinary comparison or inspection would reveal.[104]

(ii) Freedom of Contract and Limitation Clause

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 the Unfair Contract Terms Act, 1977, by express agreement or by course dealing and usage between buyer and seller. The importance of freedom of contract rule in making contract is obvious.[105] It seem the seller has the advantages to exclude his liabilities for implied terms. In the B2B contract, the seller can exclude implied terms as to description, satisfactory quality and fitness for purpose, but the seller must prove that the exclusion clause satisfies the requirements of reasonableness test.[106] However, in the B2C contract, usually the seller use the standard term and conditions of contract and the consumer has no bargaining power. Where the buyer is a consumer, it is impossible for the seller to exclude the implied terms.[107] Therefore, Section 55 of the SGA cannot applied in B2C contract. Whether the contract is consumer deal is the answer of this point. Section 12 of the Unfair Contract Terms Act define the term “consumer buyer”. A buyer deals as a consumer if he is not in the course of a business and does not hold himself to do so and the other party is in the course of a business and in sale of goods contract, the goods are of a type “ordinarily supplied for private use or consumption”. A party is not a consumer if dealing at an auction where he has the opportunity to attend in person or is not a natural person buying auction.[108]

In ***Air Transworld Ltd. v Bombardier Inc,*** the court decided the contract as dealing in the course of business on the ground that “the purchase, ownership and operation of the aircraft were deliberately assigned to this company and therefore the purchase was an integral part of the business carry on by it, and the Challenger jet was not of a type ordinary supply for private use or consumption.”[109]

In ***R & B Customs Brokers v United Dominion Trusts Ltd***, the plaintiff company, which was a shipping agency, bought a car for a director to be used in business and private use. It had bought cars once or twice before. The sale was arranged by the defendant finance company. The contract excluded the implied conditions about merchantable quality. The car leaked badly. It was held by the Court of Appeal that where a transaction was only incidental to a business activity, a degree of regularity was required before a transaction could be said to be an integral part of the business carried on and so entered into in the course of that business.

Since here the car was only the second or third vehicle acquired by the plaintiffs, there was not a sufficient degree of regularity capable of establishing that the contract was anything more than part of a consumer transaction. Therefore, this was a consumer sale and the implied conditions could not be excluded.[110]

A limitation clause may be inserted into a contract which aims to exclude or limit one party's liability for breach of contract or negligence. However, to be effective, a limitation clause must satisfied the three requirements (a) incorporation (b) interpretation and (c) Reasonableness tested under the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Regulations1999.

1. Incorporation

Incorporation is concerned with whether limitation clause has been included in a contract and it is a question of fact.[111] A limitation clause is of no effect unless it is incorporated as a term in the contract. It must be incorporated when the contract is made. Any attempt to incorporate it after the contract is made will be unsuccessful. A limitation clause which purported to exclude liability for implied terms does not exclude liability for the express term.[112] A clause can be incorporated by many means. It can be incorporated by course of dealing if the parties, in the past, have regularly made contract with each other upon the same terms. Before inclusion of the exclusion clause by course of dealing, the three requirements must be satisfied: the sufficient 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.[113]

In addition, if the contract includes 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 is incorporate those terms.[114]

In some cases, it is difficult to prove limitation clause.e.g.in case of oral agreement between buyer and seller, unsigned contractual document. It is also difficult for buyer to prove that the clause was not agreed upon if it is contained in a document signed by the buyer. 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."[115]

2. Interpretation

The purpose of interpretation is to establish the purpose of the parties intended to agree in the contract. The meaning of written clause is a question of law. A limitation clause is construed ***contra proferentem,*** i.e. narrowly against the interest of the person relying upon it. A limitation clause is usually inserted for the sole benefit of one of the parties, in a contract of sale, the seller. 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.[116] For example, a clause excluding liability for breach of implied terms does not exclude liability for breach of express terms and a clause certifying the quality of goods does not extend to packaging requirements.[117]

In ***Baldry v Marshall,*** the plaintiff asked the defendants, who were motor dealers, to supply a car that would be suitable for touring purposes. The defendants recommended a Bugatti, which the plaintiff bought. The written contract excluded the defendant's liability for any "guarantee or warranty, statutory or otherwise". The car turned out to be unsuitable for the plaintiff's purposes, so he rejected it and sued to recover what he had paid. The Court of Appeal held that the requirement that the car be 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.[118]

In ***Air Transworld Ltd v Bombardier Inc,*** the court has held that an exclusion clause was effective to disapply sections 13 and 14 of the Sale of Goods Act 1979 (SGA) despite making no express reference to "conditions".[119]

3. Reasonableness Test

The fairness of contract terms has to be tested by the reasonableness test under Schedule 2 of the Unfair Contract Terms Act and Section 6 of the Unfair Terms in Consumer Contracts Regulation. But this provision cannot prevent the court or tribunal in deciding the exclusion clause as it is not a term of the contract.[120] In deciding whether the terms is reasonable or not, it should be taking consideration on the nature of the goods, all circumstances inclusion of the contract and all other terms of the contract. There are four criteria of reasonableness test:

-Bargaining power,

-The ability to acquire the goods elsewhere,

-The existence of an inducement to the buyer to accept the exclusion clause, and

-Whether the buyer should have known of the term.[121]

It is fair to say that any question of reasonableness relating to exclusion clauses always depend upon the

individual circumstances of the case. Regarding the bargaining power, in ***Peter Symmons & Co v Cook,*** the plaintiff firm of surveyors bought a second-hand Rolls Royce from the defendants which developed serious defects later. It was held that the firm was acting as a consumer and that to buy in the course of a business "the buying of cars must form at the very least an integral part of the buyer's business or a necessary incidental thereto". It was emphasized that only in those circumstances could the buyer be said to be on equal footing with his seller in terms of bargaining strength.[122]

In ***Watford Electronics Ltd v Sanderson CFL Ltd,*** the court held that where the parties were experienced in business and of equal bargaining power, clauses of this nature were reasonable and the court should not interfere unless "one party has… taken unfair advantage of the other or the term is so unreasonable that it cannot properly have been understood or considered."[123]

In ***St Albans City and District Council v ICL***, the court found in favour of St Albans (the customer), holding that a clause limiting ICL's liability was unreasonable. St Albans contracted with ICL for the supply of a software system, which, when supplied, was defective and caused St Albans losses of around £1m. ICL sought to rely on a clause limiting its liability to £100,000, but both the High Court and the Court of Appeal found that this was unreasonable. ICL was in a stronger bargaining position than St Albans when negotiating the contract, it was covered by insurance that bore no relation to the £100,000 limitation (ICL had insurance of £50m), and the limit bore little relation to St Albans' potential risk and actual loss. When looking at contracts, the courts will usually take into account the fairness within the contract when considering liability.[124] In the case of ***Schenkers Ltd v Overland Shoes Ltd***, the requirements under the Unfair Contract Terms Act 1977 had been fulfilled. This was appealed by the defendants; the court decided the defendants could not claim that the clause was unfair or unreasonable.[125]

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, have no effect.[126] Under the UK law, it can conclude that the consumer always have more protection than the buyer dealing in the course of business. The law stipulates that the implied terms cannot be excluded in consumer sales contract under section 14 of the SGA and section 6(2) (a) of the Unfair contract Terms. Whereas, in business sales contract, even though the limitation clause is unreasonable and unfair, it is just 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.[127]

V. Conclusion

In all three legal systems, the definitions of non-conformity of goods cover all the situations of defective goods, express and implied. All three systems expressly states the seller is liable to deliver the goods which comply with the contract terms and implied terms under the provisions of law. The problem is the issuance of incorporation of limitation or exclusion clause and the validity of limitation clause. The CISG does not provide for any formal rule relating to the issuance of limitation clause, and it entrusts to domestic laws.

The UCC provides a solid, uniform law covering most common business transactions throughout the United States. It places certain responsibilities on the sellers by creating express and implied warranties covering the goods they sell. The UCC also provides for which express and implied warranties are covered and how to disclaim these warranties with a properly drafted disclaimer.

The UK Sale of Goods Act plays a crucial role together with Unfair Contract Terms Act and Unfair Terms in Consumer Contracts Regulations. The Sale of Goods Act provides for the express and implied terms to make sure which goods the seller to sell. To exclude or limit the implied terms, there are differences between business sales contract and consumer sales contract. The seller cannot not exclude the implied terms in consumer sales contract but he can exclude in business sales contract if it satisfies the reasonableness test under the Unfair Contract Terms Act.

As shown above, the target laws imposed express and implied warranties on sellers, but allowed sellers to limit their liability by excluding these warranties in three legal systems. The suggestion for this legal issue is that the law should not allow the seller to exclude the express or implied terms. Rather, the law should only allow seller to limit or alter the remedies for nonconforming goods which are fair enough for both sides of seller and buyer. It is fair to say that the buyer should have some meaningful remedy if the goods he receives are nonconformity.

However the law should provide for the requirements to test the limitation clause for both business and consumer sale. In practice, there are a lot of cases which evidence that the seller include the unfair limitation clause and standard terms to exclude liability for nonconforming goods. Both sides of the buyer and the seller have important issues to consider. At least, the buyer must be aware of the practical effects of such a disclaimer. Further, the seller should ensure that the buyer knows the clause is in the contract, and ensure that the buyer does not rely upon any other information conveyed by the seller.

Endnotes

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24 Article 35(2) UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, New York, 2012, p 145.
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27 Austria 9 November 1995 Appellate Court Graz (Marble Slabs case)
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28 *Ibid.*
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30 China 18 September 1996 CIETAC Arbitration proceeding (Agricultural products case)
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31 France 13 September 1995 Appellate Court Grenoble (Caito Roger v. Société française de factoring) [cited from: http://cisgw3.law.pace.edu/cases/950913f1.html](last accessed on 8.9.2015).
32 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.
33 *Ibid.*
34 Austria 31 August 2005 Supreme Court, (Tantalum case) [cited from: http://cisgw3.law.pace.edu/cases/050831a3.html] (last accessed on 8.9.2015).
35 Tantalum case, *supra* note 34.
36 CISG Advisory Council [1] Opinion No. 13.

37 Tantalum case, *supra* note 34.
38 Ingeborg Schwenzer, Christiana Fountoulakis and Mariel Dimsey, *supra* note 2 at 30.
39 Article 2-313(1) of the UCC.
40 Article 2-313 (2) and (3) of the UCC.
41 Rite Aid Corp. v. Levy-Gray, 391 Md. 608 (Court of Appeals of Maryland).
42 Durant v. Palmetto Chevrolet Co., 241 S.C. 508 (S.C. 1963) (Supreme Court of South Carolina).
43 T. E. Lauer, Sales Warranties under the Uniform Commercial Code, 30 Mo. L. Rev. (1965).
[Cited from: http://scholarship.law.missouri.edu/mlr/vol30/iss2/6] (last accessed on 8.9.2015)
44 Article 2-314 (1) Unless excluded or modified (Article 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
(2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; an
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promise or affirmations of fact made on the container or label if any.
(3) Unless excluded or modified (Article 2-316) other implied warranties may arise from course of dealing or usage of trade.
45 *Ibid*.
46 Wojcik v. Empire Forklift, Inc., 14 A.D.3d 63, 66 (3d Dep't 2004). (Supreme Court of New York).
47 *Ibid*.
48 Sparks v. Total Body Essential Nutrition, Inc., 27 So. 3d 489 (Supreme Court of Alabama).
49Article 2-315 of the UCC.
50 Comment 2 to Article 2-315 of the UCC.
51 Ole Mexican Foods, Inc. v. Hanson Staple Co., 285 Ga. 288 (Supreme Court of Georgia)
52 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.
53 Thomas M. Quinn, *supra* note 1 at 1-3.
54 Article 2-316 of the UCC.
55 Article 2-316. Exclusion or Modification of Warranties.
(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Article 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
(2)Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
(3)Notwithstanding subsection (2)
(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Article 2-718 and 2-719).
56 Thomas M. Quinn, *supra* note 1 at 2-498-499.
57 *Ibid*.
58 Article 2-316(2) of the UCC.
59 *Ibid*.
60 South Carolina Electric & Gas Co. v. Combustion Engineering, Inc., 283 S.C. 182 (1984) (Court of Appeals of South Carolina).

61 *Ibid*
62 Comment 6 to Article 2-315 of the UCC.
63 Hartman v. Jensen's, Inc., 277 S.C. 501 (1982) (Supreme Court of South Carolina).
64 South Carolina Electric & Gas Co. v. Combustion Engineering, Inc., *supra* note 61.
65 Article2-316(3) (a) of the UCC.
66 Article2-316(3) (b) of the UCC.
67 Article 2-316(3) (c) of the UCC.
68 Luckel v.White, 819 S.W.2d 459 (1991) (Supreme Court of Texas).
69 Temple-Eastex, Inc. v. Addison Bank, 672 S.W.2d 793, 798 (Tex. 1984) (Court of Appeals of Texas).
70 Wind Wire, LLC v. Finney, 977 N.E.2d 401 (Ind. Ct. App. 2012) (Indiana Court of Appeals)
71 Agri-Tech v. Brewster Heights Packing, 24 U.C.C. Rep. Serv. 2d (Callaghan) 440(United States Court of Appeals for the Fourth Circuit).
72 Article 2-302(1) of the UCC.
73 Comment 2 and 3 to Article 2-302 of the UCC.
74 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).
75 350 F.2d 445 (C.A. D.C. 1965) (United States Court of Appeals for the District of Columbia Circuit).
76 Article 2-302(2) of the UCC.
77 Haugen v. Ford Motor Co., 219 N.W.2d 462, (Supreme Court of North Dakota).
78 Section 13(1) of the Sale of Goods Act, 1979 (the SGA).
79 Section 14 of the SGA.
80 *Ibid*.
81 Section 15 of the SGA.
82 Section 15 (A) (B) of the SGA.
83 Paul Dobson & Robert Stokes, Commercial Law, 8th ed., Sweet & Maxwell, London, 2012, p 121.
84 Section 13(1) of the SGA.
85 Paul Dobson & Robert Stokes, *supra* note 84 at 129.
86 Grant v Australian Knitting Mills, [1936] A.C.85.
87 Beale v Taylor, [1967] 3 All ER 253.
88 Paul Dobson & Robert Stokes, *supra* note 83 at 130.
89 Arcos v Ranaason, [1933] AC 470.
90 Section 14(2) of the SGA.
91 William Stevenson and Anthony Stevenson v Martyn Rogers CA, [1998] EWCA Civ 1931, [1999] QB 1028.
92 Section 14(2C) of the SGA.
93 Paul Dobson & Robert Stokes, *supra* note 84 at135.
94 Paul Dobson & Robert Stokes, *supra* note 84 at 132.
95 Bartlett v Sidney Marcus, [1965] 1 WLR 1013 Court of Appeal.
96 Section 14(2B) of the SGA.
97 KG Bominflot Bunkergesellschaft Für Mineralöle mbh & Co KG v Petroplus Marketing AG, [2009] EWHC 1088 (Comm) [cited from: http:// www.bailii.org/ew/cases/EWHC/Comm/2009/1088.html] (last accessed on 1.9.2015).
98 Section 14(3) of the SGA.
99 BSS Group v Makers (UK) Ltd [2011] EWCA Civ 809, [cited from: http://www.bailii.org/ew/cases/EWCA/Civ/2011/809.html] (last accessed on 1.9.2015).
100 *Ibid.*
101 *Ibid.*
102 M.G Bridge, The sale of Goods, 3rd ed., Oxford University Press, 2014, p 409.
103 Section 15 of the SGA.
104 Steels & Busks v Bleecker Bik & Co, 1 Lloyld's Rep 228.
105 Section 55 of the SGA.
106 Section 6 and 7 of the Unfair Contract Terms Act, 1977.
107 Section 6 of the Unfair Contract Terms Act, 1977.
108 "Dealing as a consumer"
(1)A party to a contract "deals as consumer" in relation to another party if—
(a)he neither makes the contract in the course of a business nor holds himself out as doing so; and
(b)the other party does make the contract in the course of a business; and
(c)in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.
(1A)But if the first party mentioned in subsection (1) is an individual paragraph (c) of that subsection must be ignored.
(2)But the buyer is not in any circumstances to be regarded as dealing as consumer—
(a)if he is an individual and the goods are second hand goods sold at public auction at which individuals have the opportunity of attending the sale in person;

(b)if he is not an individual and the goods are sold by auction or by competitive tender.]
(3)Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

109 Air Transworld Ltd -v- Bombardier Inc [2012] EWHC 243 (Comm) para120-122.
110 R & B Customs Brokers v United Dominion Trusts Ltd [1988] 1 WLR 321.
111 M.G Bridge, *supra* note 103 at 474.
112 Andrews Brothers (Bournemouth) Ltd v Singer and Co Ltd [1934] 1 KB 17.
113 Paul Dobson & Robert Stokes, *supra* note 84 at 185-187.
114 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.
115 L'Estrange v Graucob, [1934] 2 KB 394.
116 Paul Dobson & Robert Stokes, *supra* note 84 at 190.
117 M.G Bridge, *supra* note 103 at 477-478.
118 Baldry v Marshall, [1925] 1 KB 260.
119 Air Transworld Ltd -v- Bombardier Inc [2012] EWHC 243 (Comm).
120 Section 11(2) of the Unfair Contract Terms Act, 1977.
121 Schedule 2 of the Unfair Contract Terms Act, 1977.
122 Peter Symmons & Co v Cook, (1981) 131 NLJ 758.
123 Watford Electronics Limited v Sanderson CFL Limited (CA) [2001] 1 All E.R. (Comm) 696.
124 St Albans City and District Council v ICL [1996] EWCA Civ 1296.
125 Schenkers Ltd v Overland Shoes Ltd, [1998] All ER (D) 50.
126 Section 20(2) (b) of the Unfair Contract Terms Act, 1977.
127 M.G Bridge, *supra* note 103 at 496.

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