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The Buyer's Remedies for Lack of Conformity under the PELS*

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I. Introduction

It has been submitted that the U.N. Convention on Contracts for the International Sale of Goods (1980)(*here-in-after* CISG) is one of “the most successful attempts to unify an important part of the many and various rules of the law of international commerce.”¹⁾ The

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1) P. Schlechtriem, Preface, in: P. Schlechtriem and I. Schwenzer (ed.), Commentary on the U.N. Convention on Contracts for the International Sale of Goods (CISG), 2nd (English) (ed.), Oxford: Clarendon (2005). At present, the CISG is in force in more than 70 countries including Republic of Korea which ratified it in 2004 and new ratification continue to come in. See the United Nations Commission on International Trade Law (“UNCITRAL”), Status: 1980 – United Nations Convention on Contracts for the International Sale of Goods, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_

great success of the CISG was regarded as a model for unification in the arena of international commercial law and stimulated EU to carry on the discussion on the harmonization of commercial and consumer sales law on EU level.²⁾ In their attempt to harmonize private law in Europe, the European academics have taken initiative and their approaches can be divided into three groups at the moment.³⁾ The first group concentrates on an already existing civil code as a model, the Italian one, and a draft by the English Law Commission, the so called McGregor Code and aims to create a whole civil code.⁴⁾ The second group tries to develop some principles for European use on the basis of the already existing EU *acquis communautaire*.⁵⁾ The third group aims to produce a codified set of Principles of European Law on various fields of law complete with commentary and comparative annotations.⁶⁾ It is based on the results of a very detailed analysis of the European *acquis communautaire*, the various existing European legal systems, international instruments like those of the Commission on European Private Law (PECL) and UNIDROIT (PICC) as well as the CISG.

The third group is divided into several working teams⁷⁾ and the

[goods/1980CISG_status.html](#)

- 2) V. Heutger, "Do We Need a European Sales Law", (2004) 4(2) Global Jurist Topics 1, at 1. In fact, the discussion on harmonization of European sales law started with the official appearance of the CISG in 1980. Ole Lando founded the Commission on European Contract Law as a European initiative which commenced its activities in 1980.
- 3) V. Heutger, *op cit.*, at 5 ff.
- 4) This group is called "Accademia dei Giusprivatisti Europei" which is "The Academy of European Private Lawyers" in English translation.
- 5) This group is called "European Research Group on Existing EC Private Law (Acquis Group; <http://www.acquis-group.org/>)" which was founded in 2002 and the main purpose of which is "a systematic arrangement of existing Community Law which will help to elucidate the common structures of the emerging Community private law." See V. Heutger, *op cit.*, at 6 et seq.
- 6) This group called "the Study Group on a European Civil Code (*here-in-after* SGECC; <http://www.sgecc.net/pages/en/home/index.htm>)" is a network of academics, from across the EU, conducting comparative law research in private law in the various legal jurisdictions of the Member States.
- 7) The existing and prospective Working Teams which are part of the Study Group on a European Civil Code are as follows: "The Working Team on Sales, Services and

main concern of this paper is dealt with by the Utrecht team on sales law which started conducting comparative research on sales contracts in 1999. Since the end of year 2000, the Utrecht team was able to provide the several indicative black letter rules on sales, which rested upon the basis of the PECL, but has also been inspired by the two main international instruments with regard to European sales law:⁸⁾ the CISG and the European Community Consumer Sales Directive (*here-in-after* the EC Consumer Sales Directive) which regulates aspects of the law of sale of consumer goods and associated guarantees.⁹⁾ Some fine tunings have been added on them to bring them into coherence with other chapters drafted by other working teams of the SGECC and their completed set of rules was presented at the conference hosted by the Academy of European Law on 19–21 September, 2007, “Principles of European Law on Sales Contracts, Personal Security, Service Contracts, Commercial Agency, Franchise and Distribution Contracts.” And at last they published their commentary book in early 2008.¹⁰⁾

The main purposes of “Principles of European Law on Sales” (*here-in-after* PEELS) are to provide, first, “an academic answer to the on-going process relating to the EU wide harmonization of contract law”, second, “a model law for further comparative activities within European contract law.”¹¹⁾ That is to say, the PEELS is intended to

Long-term Contracts”, “The Working Team on Financial Services”, “The Working Team on Credit Securities”, “The Working Team on Extra-Contractual Obligations”, “The Working Team on Rental of Movable Property”, “The Working Team on Transfer of Moveable Property”, “The Working Team on Trust Law”. In addition, the Study Group works in cooperation with the associate team “Project Group on a Restatement of European Insurance Contract Law”.

8) The latest black letter rules made their appearance in December 2004, which are obtainable at http://www.sgecc.net/media/downloads/sales04_12.pdf.

9) Directive 1999/44/EC of the European Parliament and of the Council of 25th May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees (1999) O.J.L171/12, 7 July 1999.

10) E. Hondius et al. (ed.), Principles of European Law on Sales, Oxford: Oxford University Press (2008).

11) V. Heutger & C. Jeloschek, “Toward Principles of European Sales Law”, in: A.

provide a stimulus to both the national and European legislator for moulding private law and encourage further discussion about the creation of a European Civil Code, or a Common Frame of Reference in the area of patrimonial law, by submitting a concrete model. One thing to note is that the PELS are designed to operate within the PECL so that general issues like validity or formation are left with the PECL.¹²⁾ As regards the application of the PELS, it may, first of all, serve “as an optional instrument in cross-border transactions, allowing the parties to simply refer to this instrument as the applicable law”.¹³⁾ However, as mentioned above for the purposes of the PELS, it may at the end govern all sales transaction, domestic and trans-national one alike, taking the place of the CISG and the EC Consumer Sales Directive, although there may be long way to go.¹⁴⁾

Having said that, the main purpose of this paper is to describe and analyze the rules on the buyer's remedies for the seller's delivery of goods which are not in conformity with the contract under PELS. It will particularly place its emphasis on the PELS's unique system of remedies in a hierarchial manner; two-tier remedial scheme for the seller's delivery of non-conforming goods. This may provide with legal advice business people in practice who intend to enter into or already extended their business into European commercial and consumer sales markets.

Hartkamp et al. (ed.), *Towards a European Civil Code*, 3rd ed, Nijmegen: Kluwer Law International (2004), at 545.

12) *Id.*

13) *Id.*, at 547.

14) *Id.*

II. The Buyer's Remedies in General for Lack of Conformity

1. General

In the event of the seller's non-performance of any his obligation under the contract,¹⁵⁾ the buyer may resort, first of all, to the remedies provided in Chapters 8 and 9 of the Principles of European Contract Law (*here-in-after* the PECL).¹⁶⁾ Therefore, the buyer may be entitled to claim the following rights; the right to performance, withholding performance, termination of the contract, price reduction, damages and interest.¹⁷⁾ However, one must note that, as expressly provided in the PELS, such general remedies under the PECL may be precluded from its application as long as they are inconsistent with sales-specific rules on remedies provided under the PELS.¹⁸⁾ The reason for having such sales-specific rules is that the rules on remedies under the PECL are deemed to be too general and problematic in order to solve all the specific matters in the context of remedies under a sales contract.

The sales-specific rules on remedies modify or add the general remedial regime provided by the PECL. The modifications or additions are divided into two distinctive groups. The first group can be applicable to a breach of any obligation under the contract unless the parties have agreed otherwise.¹⁹⁾ These modifications or additions are

15) The non-performance may consist in a defective performance or in a failure to perform within due time, be it a performance which is effected too early, too late or never. It may also include a breach of an accessory obligation such as the obligation of the seller to cooperate with the buyer's performance of his obligation and not to disclose the buyer's trade secrets.

16) PELS Art. 4:101.

17) PECL Arts. 9:101 et seq.

18) PELS Art. 4:101.

19) PELS Arts. 4:102(Termination of the Contract), 4:103(Limits on derogation in a consumer sale).

applicable for any remedy in a sales transaction even if it is generally resolved along the lines of the PECL. Contrary to the following second group, they are available to both the seller and the buyer. The second group provides a separate set of the buyer's remedies for lack of conformity which govern a particular non-performance on the part of the seller which is specific to sales contract; it includes the buyer's right to require repair or replacement. This group is only applicable to the cases where the seller breaches his obligation to deliver the goods in conformity with the contract.²⁰⁾ In contrast with this group, the first group deals with other types of non-performance such as delayed performance or no delivery at all.²¹⁾

2. Hierarchical Scheme of the Buyer's Remedies for Lack of Conformity

The buyer's remedies for lack of conformity under the PECL operate in a hierarchical manner which is alien to the CISG and the PECL²²⁾ That is, the PECL takes its unique two-tier remedial scheme for the seller's delivery of non-conforming goods. The two-tier remedial scheme means that the buyer's rights to require either repair or replacement take the position of primary remedy, whereas the rights of termination, price reduction and damages are secondary remedies which

20) PECL Arts. 2:101 et seq. For a detailed study on the seller's obligation to deliver the goods in conformity with the contract under the Draft PECL, see W. Oh, and B. Lee, "A Comparative Study on the Seller's Duty to Deliver the Goods in Conformity with the Contract in International Sale of Goods", (2008) 37 *International Commerce and Law Review* 3.

21) For other examples, see E. Hondius et al. (ed.), *op cit.*, at 250 et seq.

22) The hierarchical remedies are actually originated in the EC Consumer Sales Directive. For a detailed study on the buyer's remedies for lack of conformity under the EC Consumer Sales Directive, see B. Lee, "Remedies for the Seller's Delivery of Defective Goods under EC Directive in Comparison with English Law, Korean Law and CISG", (2003) 19 *International Commerce and Law Review* 33.

are available only where the primary remedies cannot be invoked.²³⁾ Therefore, broadly speaking, a buyer who has received non-conforming goods is entitled to require the seller to remedy the non-conformity by repair or replacement, having done so will not be able to resort to other remedies until the seller has had a chance to do so.

III. The First Tier Remedies

1. General

As mentioned above, the hierarchy of remedies adopted by the PELS places the buyer's rights to require repair or replacement at the position of primary remedies. The details of such rights are provided in arts. 4:201 et seq. which elaborate the rules on the conditions of exercise, the costs of having the lack of conformity remedied, and the seller's right to remedy the lack of conformity.

The term "repair" and "replacement" should be given a wide interpretation which is not restricted to the general meaning of repair which denotes adjusting the goods delivered in order to conform with the contract and to the general meaning of replacement which denotes exchanging the goods delivered with new goods.²⁴⁾ Thus, repair or replacement may include delivery of parts that are missing or the supply of manuals, instructions or the like.²⁵⁾ Furthermore, it may also include some adjustment to or modification of the goods to make in conformity with the contract which might not be a clear cut case of either repair or replacement.²⁶⁾

As clearly stated under the PELS, the seller should bear the cost of

23) PELS Art. 4:205.

24) E. Hondius et al. (ed.), *op cit.*, at 268.

25) *Id.*

26) *Id.*

having the lack of conformity remedied.²⁷⁾ There are non-exhaustive list of such cost under the PEELS which includes any charge for labour, materials or any necessary transport of the substitute goods. It may be restricted to the costs which are reasonable and directly related to the remedies in question.²⁸⁾ It is to be noted that it is unnecessary for the buyer to compensate the seller for any additional profit for the buyer as a result of repair or replacement.²⁹⁾

2. Limitations

As provided in the PEELS, the buyer is entitled to have the lack of conformity remedied free of charge by repair or replacement only if performing the remedy in question is not unlawful or impossible and does not cause the seller unreasonable effort or expense.³⁰⁾ The followings are some limitations to the buyer's rights to require repair or replacement.

First of all, as regards limitation in terms of the unlawfulness or impossibility of repair or replacement, it is suggested that it will be impossible to replace goods that are unique or of specific nature, *e.g.*, second-hand goods,³¹⁾ whilst a repair will usually be impossible if the goods have been misdescribed, *e.g.*, a clocked car cannot be put right.³²⁾ If the substitute goods still exist somewhere, but their location is unknown and cannot be ascertained, this should be treated as the

27) PEELS Art. 4:202(2).

28) E. Hondius et al. (ed.), *op cit.*, at 269.

29) *Id.* For instance, any gain made where the buyer receives a newer model of products.

30) PEELS Art. 4:202(1).

31) E. Hondius et al. (ed.), *op cit.*, at 268.

32) J. Williams and J. Hamilton, "The Impact in the U.K. of the E.U. Directive on the Sale of Consumer Goods and Associated Guarantees: Part 2", (2001) 12(1) I.C.C.L.R. 32, at 33. In addition to this, the nature of non-conformity may make impossible to be repaired because the goods have been completely destroyed or rotten or because there are no spare parts available both by the seller himself and by any third party. E. Hondius et al. (ed.), *op cit.*, at 268.

case of impossibility.³³⁾ Although there is no specific provision to deal with this case, it seems self-evident. In addition, even if a case is related to generic goods, this does not necessarily mean that replacement is always possible particularly where generic goods out of a special source are sold, e.g., a farmer's crop or the cargo of a certain ship. In this case, the buyer may not be allowed to require the seller to obtain a replacement from other sources.³⁴⁾

Secondly, as regards limitation in terms of unreasonable effort or expense, one must take into account a proportionate relationship between the value of a given remedy to the buyer and the cost incurred by the seller.³⁵⁾ The question of when one remedy is disproportionate to another is decided by the reasonableness of the cost of a remedy.³⁶⁾ It is disproportionate where the chosen remedy imposes on the seller costs which, in comparison with the other alternatives, are unreasonable. For instance, where there is a cosmetic defect in a domestic appliance on a part which will not be visible when it is installed, it will be difficult to insist on a repair which might be quite expensive taking into account labour charges in comparison to giving a reduction in price.³⁷⁾ In addition, where the cost of repair would exceed the value of the product which is low, it is unlikely that repair could be insisted upon when replacement would be a cheaper option.³⁸⁾ However, it seems unfortunate that, in assessing disproportionality of a chosen remedy, the PEELS expressly requires the factor of cost to be considered, whereas it does not require the other factors, for instance, the significance of the lack of conformity, to be considered. This seems to be particularly problematic

33) Cf. P. Schlechtriem and I. Schwenzer (ed.), *op cit.*, at 538 et seq.

34) E. Hondius et al. (ed.), *op cit.*, at 269.

35) *Id.*

36) The question of what amounts to an unreasonable cost should be answered by referring to art. 1:302 PECL.

37) Cf. C. Ervine, "The Sale and Supply of Goods to Consumers Regulations 2002", (2003) 8 *Scots Law Times* 67, at 69 et seq.

38) Cf. *id.* See also DTI, *The Sale and Supply of Goods to Consumers regulations 2002: A Brief Introduction – Full Version*, at 10.

in that the consequences of replacement are no different from those of termination, the availability of which is generally depended upon the significance of the lack of conformity.

Thirdly, it must be stressed that, contrary to the position under the PECL, there is no limitation for the buyer's right to require repair or replacement in terms of the reasonable possibility of having the lack of conformity remedied from another source, that is, through a third party.³⁹⁾ Accordingly, the buyer's rights to require repair or replacement may not be precluded on the basis of such possibility. Since it is, in most cases, possible for the buyer to obtain repair or replacement elsewhere, such limitation to the buyer's right to repair might render this remedy almost devoid of purpose or unreasonable, particularly in a consumer sale.⁴⁰⁾ However, it is submitted that this could not be always justified in a commercial sale. This is because economic efficiency often asks the question of whether the buyer or the seller may have lower cover costs for one of the parties to locate and obtain for the aggrieved buyer an alternative to what was promised under the contract.⁴¹⁾ This question seems to make the possibility of having the lack of conformity remedied from another source imperative to decide the more efficient remedy, particularly in a commercial context.

3. Choice between repair and replacement

In the exercise of the buyer's right to require repair or replacement,

39) PECL Art. 4:204(3). This rule intends to exclude the application of art. 9:102(d) PECL under which the seller is exempted from his duties to carry out specific performance if the buyer could reasonably obtain performance from another source.

40) E. Hondius et al. (ed.), *op cit.*, at 270.

41) D. Harris and D. Tallon (ed.), *Contract Law Today*, Oxford: Clarendon (1989), at 262. The comparative cover costs depend partly upon the functioning and accessibility to the market. See S. Walt, "For Specific Performance Under the United Nations Sales Convention", (1991) 26 *Tex. Int'l L. J.* 211, at 237.

the choice of how to bring the goods into conformity is generally given to the seller.⁴²⁾ However, the seller's right to choose between repair and replacement is limited in two cases.

First, the seller's right to choose can not be applicable where the method chosen by the seller causes the buyer unreasonable delay.⁴³⁾ What constitutes such a unreasonable delay can be established only on the basis of the circumstances of the particular case, for instance, the type of goods (e.g., products for every day use v. goods not used at the moment) and the buyer's intended usage of the goods.⁴⁴⁾ In order to clarify the situation, it may be advisable for the buyer to fix a reasonable additional period of time for the seller to cure the lack of conformity by repair or replacement.⁴⁵⁾ If the seller is aware of the existence of the lack of conformity, the period for exercising the right to cure may begin to run from the moment of his knowledge. On the other hand, if the seller is not aware of the existence of the lack of conformity (e.g., if he could not have been aware of it), the period may begin to run from the moment a notice of lack of conformity is given.

Second, the seller's right to choose can not be also applicable where the method chosen by the seller causes the buyer unreasonable inconvenience.⁴⁶⁾ In practice, such inconvenience can be found particularly where a defect is being cured by means of repair which can be carried out only at the buyer's works and may lead to noise or dirt or a suspension of production and etc.⁴⁷⁾ In addition, the fact that repeated attempts at cure have proved necessary may also show unreasonable inconvenience.⁴⁸⁾

42) PELS Art. 4:204(1).

43) *Id.*

44) E. Hondius et al. (ed.), *op cit.*, at 280.

45) Cf. P. Schlechtriem and I. Schwenzer (ed.), *op cit.*, at 565 et seq.

46) PELS Art. 4:204(1).

47) E. Hondius et al. (ed.), *op cit.*, at 281.

48) *Id.*

It seems unfortunate that there is no express provision for the exclusion of the seller's right to choose on the basis of unreasonable uncertainty in reimbursing the expenses advanced by the buyer.⁴⁹⁾ However, although it may be arguable, it is submitted that if the buyer is demanded to advance significant sums and there is unreasonable uncertainty in reimbursement by the seller of them, this should be regarded as causing the buyer an unreasonable inconvenience.

As an exception to the general rule that the right to choose is primarily given to the seller, the right is rendered rather to the buyer in a consumer sale.⁵⁰⁾ However, it is to be noted that this right is restricted in the cases where the buyer's choice is unlawful or impossible, or causes the seller unreasonable effort or expense.⁵¹⁾ These cases are in fact based on the requirements provided in art. 4:202. Therefore, the consumer buyer is allowed to choose provided that there are actually several alternatives and all of them comply with those requirements of art. 4:202.⁵²⁾

4. Cumulation with other remedies

In addition to the buyer's right to require repair or replacement, he may be allowed to also cumulatively exercise the right to withhold his performance until the seller has remedied the lack of conformity,⁵³⁾ and the right to claim damages for any loss not remedied by the seller's cure.⁵⁴⁾

As to the buyer's right to withhold his performance which includes,

49) Cf. CISG Art. 48(1). Examples of such expenses may include, for instance, costs involved in returning the goods or in some act of cooperation necessary in connection with remedying a defect or in suspending production at the buyer's works.

50) PELS Art. 4:204(2).

51) *Id.*

52) E. Hondius et al. (ed.), *op cit.*, at 281.

53) PELS Art. 4:205(1).

54) PELS Art. 4:205(3).

particularly, payment, the detailed rules are provided in art. 9:201 PECL. This right can be applicable in two situations; first, where payment is due upon delivery and the goods delivered are not in conformity with the contract, second, where the lack of conformity could not be discovered upon delivery.⁵⁵⁾ In the first case, the buyer may refuse to pay the price until the seller cures the lack of conformity.⁵⁶⁾ In the second case, the buyer's right to refuse to pay the price may be applicable if payment is not due upon delivery, but only at a later point in time.⁵⁷⁾

As regards the buyer's right to damages, it is clearly established under the PECL that the buyer's damages claim is limited to all the losses not remedied by repair or replacement.⁵⁸⁾ Such losses can be categorized into three groups. The first group is any loss sustained as a result of the initial lack of conformity unless such loss can be indemnified under other provisions concerning like repair or replacement or a price reduction; for instance, phone calls, postage or travel in connection with notifying the seller of the lack of conformity, or the costs of transportation.⁵⁹⁾ The second group is any loss caused by the fact that the buyer can not use the goods; for instance, costs for renting substitute goods or services.⁶⁰⁾ The third group is any other losses like loss of income; for instance, if the purchased car becomes defective and consequently the buyer arrives late for work, or if he has to stay at home to immediately mitigate the damage caused by the lack of conformity.⁶¹⁾

55) E. Hondius et al. (ed.), *op cit.*, at 286.

56) *Id.*

57) *Id.*

58) PECL Art. 4:205(3).

59) E. Hondius et al. (ed.), *op cit.*, at 287.

60) *Id.*

61) *Id.*

IV. The Second Tier Remedies

1. General

This chapter deals with the buyer's right to resort to other remedies than repair or replacement; the termination of contract, a price reduction and damages. As mentioned long before, the hierarchy of remedies adopted by the PELS puts those remedies at the second place where the buyer can rely on in the event of the seller's delivery of non-conforming goods.⁶²⁾ The details of such rights are mostly dependant upon the relevant provisions of the PECL and some provisions of the PELS which derogates from those of the PECL. The latter elaborate the rules on standard of termination, partial termination, termination of the entire contract⁶³⁾ and limitation of liability for damages of non-professional sellers.⁶⁴⁾

The secondary remedies are basically available in four cases; first, where both repair and replacement are unavailable by virtue of art. 4:202(1),⁶⁵⁾ second, where the seller's right to cure is unavailable by virtue of art. 4:203,⁶⁶⁾ third, where the seller refuses to cure the lack of conformity in accordance with art. 4:202,⁶⁷⁾ fourth, where the seller has failed to cure the lack of conformity within a reasonable time or without causing significant inconvenience to the buyer.⁶⁸⁾ The followings are the cases where the secondary remedies are available and the detailed contents of such remedies.

62) PELS Arts. 4:201(2), 4:205.

63) PELS Art. 4:206.

64) PELS Arts. 4:207.

65) PELS Art. 4:205(1)(a).

66) PELS Art. 4:205(1)(b).

67) PELS Art. 4:205(2).

68) Id.

2. The Cases where the Secondary Remedies are Available

1) Cure can not be made in accordance with art. 4:202(1)

The first case where the buyer can resort to the secondary remedies is when the seller can not bring the goods into conformity in accordance with art. 4:202(1).⁶⁹⁾ Therefore, the buyer may be entitled to resort to one of the secondary remedies if the seller's cure either by repair or replacement is unlawful or impossible,⁷⁰⁾ or causes the seller unreasonable effort or expense.⁷¹⁾ Notwithstanding the buyer's right to rely on the secondary remedies, one should bear in mind that the seller is still entitled to cure the lack of conformity under art. 4:203.⁷²⁾ For example, there may be some case where the seller still prefers to cure the lack of conformity rather than the contract being terminated even if such cure may cause him unreasonable effort or expense because he does not want to lower his business reputation.

As regards the meaning of unlawfulness, impossibility, unreasonable effort and expense, it has been already examined above.⁷³⁾

2) The seller's right to cure is unavailable by virtue of art. 4:203

The second case where the secondary remedies are available for the buyer is when the seller can not exercise his right to cure the lack of conformity under art. 4:203.⁷⁴⁾ That is, the seller may be deprived of his right to cure because of the following reasons. First, there is no reason for the buyer to believe that the seller will be unable to remedy it within a reasonable time and without unreasonable inconvenience

69) PELS Art. 4:205(1)(a).

70) PELS Art. 4:202(1)(a).

71) See *supra* Chap III, 2. Limitations.

72) *Id.*

73) *Id.*

74) PELS Art. 4:205(1)(b).

to the buyer.⁷⁵⁾ For example, the seller may not be allowed to cure the lack of conformity where the buyer knows that the seller does not have the capacities to carry out a repair because of the fact that the seller has already unsuccessfully tried to cure the lack of conformity.⁷⁶⁾ Second, the nature of the lack of conformity gives the buyer reason to believe that he can not rely on the seller's future performance.⁷⁷⁾ This is the case where the buyer has justifiably lost confidence in the seller.⁷⁸⁾ In addition to that, the seller may lose his right to cure where the seller fails to indicate his willingness to cure the lack of conformity promptly after being notified by the buyer in accordance with the rules on the notification requirement of the lack of conformity under art. 4:302.⁷⁹⁾

As regards the seller's right to cure under art. 4:203, one must note that the seller's right to cure under art. 4:203 deals only with the seller's cure after the agreed date of delivery.⁸⁰⁾

3) The seller's refusal to cure

The third case where the buyer can rely on the secondary remedies is when the buyer demands the seller to cure the lack of conformity

75) PELS Art. 4:203(a).

76) E. Hondius et al. (ed.), *op cit.*, at 275. This can be also seen in the following case. "A buys a new car from B, a professional car dealer. Shortly after delivery, A notices that the windscreen of the car is damaged. B replaces the windscreen, however the new windscreen is not installed properly and water leaks in. B again tries to seal the windscreen properly, but fails. In this case, the seller has not succeeded in rectifying the lack of conformity. The buyer is not obliged to put up with a further attempt to cure the defect since the repair per se can not be regarded as complicated and the two unsuccessful attempts to rectify indicate that the seller is unable to cure the defect properly." *Id.*, at 276.

77) PELS Art. 4:203(b).

78) E. Hondius et al. (ed.), *op cit.*, at 275. This can be seen, for example, in the following case. "A has bought a pair of jeans of a well known brand in a store. Afterwards, it turns out that the jeans are actually pirate copies. Even though the shopkeeper offers to replace the fakes with a pair of jeans of the right brand, A may refuse this offer." *Id.*, at 276.

79) PELS Art. 4:203.

80) The seller's right to cure before the agreed date is dealt with under art. 2:103.

in accordance with art. 4:202(1), but the seller refuses to cure the lack of conformity.⁸¹⁾ Here one thing to be noted is that this case can be applicable whether or not the seller's refusal is justified in light of the buyer's demand to cure being unlawful or impossible, or causing him unreasonable effort or expense under art. 4:202(1). However, if the seller's refusal is not justified, the buyer may, in practice, bring an action requiring repair or replacement in exceptional case. The seller's refusal can be made either implicitly or expressly and there is no formal requirements to constitute the valid refusal.

- 4) The seller's failure to cure within a reasonable time and without unreasonable inconvenience to the buyer

The fourth case where the buyer can rely on the secondary remedies is where the seller has failed to cure the lack of conformity within a reasonable time and without unreasonable inconvenience to the buyer.⁸²⁾ Here, the seller's failure to cure the lack of conformity can arise in the situations where the seller attempted to cure the lack of conformity in response to the buyer's demand under art. 4:202 or in exercising his right to cure under art. 4:203. The concept of the seller's failure under art. 4:205(2) may also include the situations where the seller simply declares that he can not satisfy with such requirements or it is clear that he is not able to finish his cure within a reasonable time and without unreasonable inconvenience to the buyer.⁸³⁾

As regards the meaning of a reasonable time, although it is impossible to provide a clarified guideline, it is submitted that the length of this period is close to the reasonable period of notice that the aggrieved

81) PELS Art. 4:205(2).

82) PELS Art. 4:205(2).

83) E. Hondius et al. (ed.), *op cit.*, at 285.

party can give under art. 8:106(3) PECL.⁸⁴⁾ The question of what constitutes a reasonable time is depended primarily upon the circumstance of each case. The delay caused will be usually unreasonable at any rate if it is so serious as to amount a fundamental non-performance in itself as defined in art. 8:103 PECL.⁸⁵⁾ However, it can also be unreasonable below that threshold. For example, the delay may be unreasonable where it make the buyer liable toward his own sub-buyers.⁸⁶⁾ As to the meaning of unreasonable inconvenience to the buyer, it refers for instance to the disturbances that the seller's cure would bring to the buyer's business.⁸⁷⁾

3. Remedies Available in the Second Tier

1) Termination of the contract

Assuming that one of the above cases explained arises, the buyer is entitled to terminate the contract in the event of the seller's non-conforming delivery of the goods only if the lack of conformity is fundamental in accordance with art. 9:301(1) PECL.⁸⁸⁾ However, the concept of fundamental non-performance contained in the PECL is modified for sales contract; it is prevented from treating strict compliance with the obligation as being of the essence of the contract unless the

84) E. Hondius et al. (ed.), *op cit.*, at 285. Cf. O. Lando and H. Beale (ed.), *Principles of European Contract Law*, Part I and II, London; Kluwer Law International (2000), at 372 et seq.

85) Cf. O. Lando and H. Beale (ed.), *op cit.*, at 364 et seq.

86) Cf. Amtsgerricht München 23 June 1995, CISG-Online No. 368.

87) For more detail, see *supra* Chap III. 3. Choice between repair and replacement

88) PECL Art. 4:206(1). Fundamental non-performance is defined in art. 8:103, "A non-performance of an obligation is fundamental to the contract if: (a) strict compliance with the obligation is of the essence of the contract; or (b) the non-performance substantially deprives the aggrieved party of what he was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or (c) the non-performance is intentional and gives the aggrieved party reason to believe that he cannot rely on the other party's future performance." Cf. O. Lando and H. Beale (ed.), *op cit.*, at 364 et seq.

parties have expressly agreed on this.⁸⁹⁾ Namely, in a non-consumer sale, there is no chance at all for the buyer to terminate the contract for slightly defective goods unless the parties have expressly agreed on that strict compliance with the obligation is only of the essence of the contract.⁹⁰⁾ Therefore, it is strongly advised for the commercial buyer to make it expressive in his contract in order to retain the right of termination regardless of the significance of lack of conformity.

The fundamentality of a lack of conformity under a sales contract is depended upon the question of whether the lack of conformity amounts to a certain degree of seriousness. In addition, the individual needs of the buyer should be considered in order to decide the existence of fundamental non-performance because a lack of conformity which might be of minor importance to one buyer may be of major importance to another.⁹¹⁾ However, this can be applicable unless the seller did not foresee and could not reasonably have foreseen that result.⁹²⁾ Furthermore, one must also take into account any possibilities to easily rectify the lack of conformity⁹³⁾ or to compensate the buyer through other remedies like a price reduction or damages.⁹⁴⁾

Contrary to the buyer's right to terminate the contract based on the fundamental non-performance, the buyer, in a consumer sale, may be entitled to terminate the contract regardless of the question of whether the lack of conformity is fundamental. The consumer's

89) PELS Art. 4:102.

90) PELS Art. 4:102. This case can be seen in the following case. "A and B agree on the sale of 200 TVs to be delivered by the end of June. A delivers the goods on July 31. Upon delivery B notices that some of the TVs are of the wrong description. B is not entitled to terminate the contract for the reason that strict compliance is of the essence of the contract unless the parties have expressly agreed on this." E. Hondius et al. (ed.), op cit., at 257.

91) E. Hondius et al. (ed.), op cit., at 291.

92) PECL Art. 8:103.

93) For example, if a lack of conformity in a machine can be easily rectified, for instance, through tightening a screw, the lack of conformity does not amount to a fundamental non-performance. Id.

94) E. Hondius et al. (ed.), op cit., at 291 et seq.

right to terminate the contract is restricted only in the cases where the lack of conformity is minor.⁹⁵⁾ Therefore, the consumer buyer has wider rights to terminate than the normal buyer does because only a minor lack of conformity does not justify termination.⁹⁶⁾ A minor lack of conformity can be defined as one constituting "a lack of conformity of slight importance, or a defect which is relatively small in relation to the overall value of the product."⁹⁷⁾ However, it seems that some degree of vagueness is unavoidable in defining a minor lack of conformity. Thus, it is submitted that the vagueness has produced undesirable uncertainty as to when the buyer is entitled to the right of termination, and the uncertainty has been often used against the consumer, but in favour of the seller who has a relatively stronger bargaining position.⁹⁸⁾

If the seller delivers only a part of the goods or only parts of the goods delivered conform to the contract, the buyer may be allowed terminate part of the contract in respect of the non-conforming part.⁹⁹⁾ Therefore, it leaves the contract as regards the remaining part still alive. However, the buyer may terminate the entire contract if the lack of conformity amounts to a fundamental non-performance as regarding its effects on the contract as a whole.¹⁰⁰⁾

95) PELS Art. 4:206(2).

96) But, again, one must keep in mind that the hierarchy of remedies for lack of conformity generally does not allow the buyer to immediately terminate the contract even if the lack of conformity does not amount to a fundamental non-performance until the seller has been given an opportunity to cure the lack of conformity. PELS Art. 4:205.

97) E. Hondius et al. (ed.), *op cit.*, at 292.

98) Law Commission 160, 'Sale and Supply of Goods', (1987), at para. 4.12.

99) PELS Art. 4:206(3)(a).

100) PELS Art. 4:206(3)(b). The buyer's right to terminate the entire contract can be seen in the following example case. "If the buyer has bought paint which was mixed specially to repaint his house and part of the paint is missing or is not in conformity, the contract is per se a severable one. However, since it will be almost impossible to match the colour of the first delivery the buyer has an interest in receiving the whole contract (provided that the general conditions for termination are fulfilled)." E. Hondius et al. (ed.), *op cit.*, at 294.

2) Price reduction

The buyer is also entitled to reduce the price in the event of the seller's delivery of non-conforming goods.¹⁰¹⁾ Again, the exercise of this right is subject to the hierarchy of remedies established in art. 4:205 PELS. There is no further specific provision for the details as to a price reduction under the PELS, and thus they rely upon the relevant rules of the PECL.¹⁰²⁾

3) Damages

Subject to the hierarchy of remedies, the buyer may resort to damages for the lack of conformity.¹⁰³⁾ One must note that the right to claim damages in the second tier of remedies is different from the right to claim damages for any loss not remedied by the seller's cure which can be cumulatively exercised with the right to require repair or replacement in the first tier of remedies. The buyer's right to claim damages in the second tier of remedies is restricted to a claim for damages for losses that are incurred if the goods are not repaired or replaced by the seller so as to conform with the contract, for instance, the costs of having the goods repaired by a third party or the costs of purchasing replacement goods.¹⁰⁴⁾

Since there is no detailed rules for the quantification of damages under the PELS, the relevant rules of the PECL must be correspondingly applied to this matter.¹⁰⁵⁾ However, there is an exception to this; the buyer is not allowed to claim damages exceeding the contract price as long as the seller is a natural person acting for purposes not to any extent related to that person's trade, business or profession.¹⁰⁶⁾ This

101) PELS Art. 4:201(2)(b).

102) PECL Art. 9:401.

103) PELS Art. 4:201(2)(c).

104) E. Hondius et al. (ed.), *op cit.*, at 264.

105) See PECL Arts. 9:501 et seq.

106) PELS Art. 4:207(1).

exception is intended to protect the non-professional seller against excessive claims for damages particularly where he sells the goods to a commercial buyer.¹⁰⁷⁾ Thus, the amount of damages the non-professional seller must pay is restrained to the contract price in the event of his delivery of non-conforming goods. However, this rule can not be applicable where the seller, at the time of passage of risk, knew or should have known of the lack of conformity without disclosing it to the buyer before that time.¹⁰⁸⁾

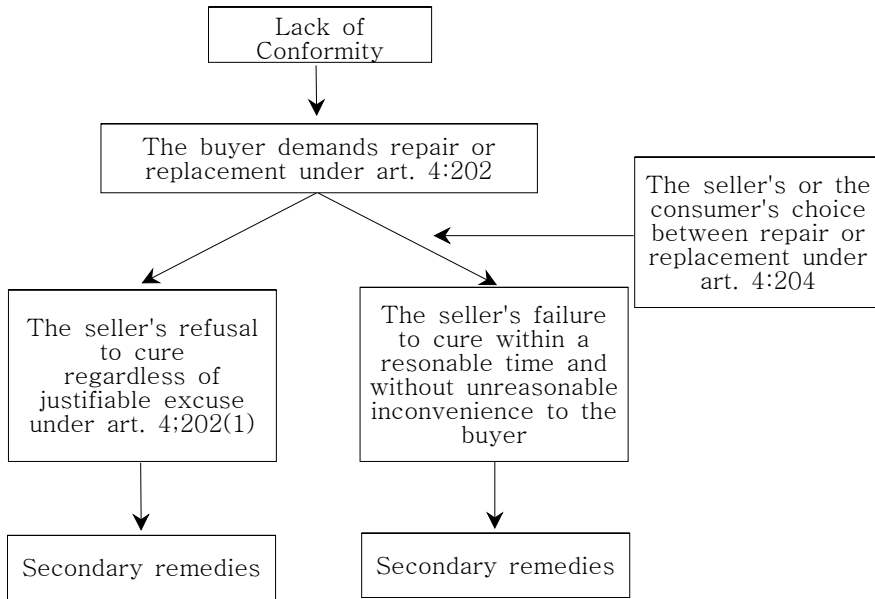
V. Concluding Remarks

In accordance with the purposes of this article, it has been attempted to describe and analyze the rules on the buyer's remedies for the seller's delivery of goods which are not in conformity with the contract under PELS. It has found that the buyer's remedies for lack of conformity operate in a hierarchial manner which is unknown to both domestic and international legal systems; the two-tier remedial scheme for the seller's delivery of non-conforming goods. That is, a buyer may be entitled to rely on the first tier remedies (repair or replacement) in the first place when he received non-conforming goods. On the other hand, he may rely on the second tier remedies (termination, price reduction and damages) only if the first tier remedies can not be invoked. The operation of the two tier remedial scheme can be summarized by the flow chart below. The first track for the secondary remedies denotes when the buyer himself has demanded repair or replacement under art. 4:202, whereas the second track does when the seller exercises his right to cure the lack of conformity under art. 4:203.

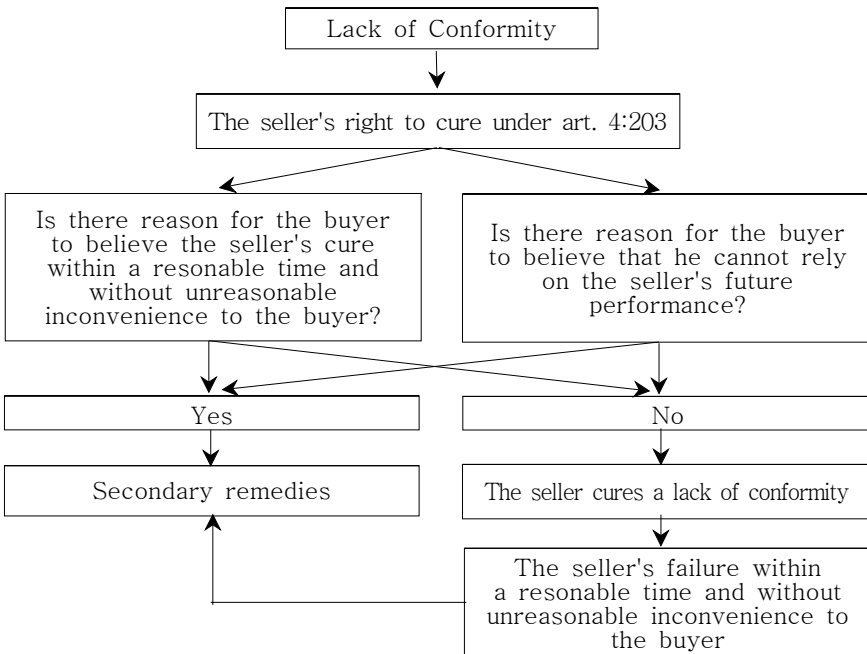
107) For example, the case where a private seller sells his used car to a used car dealer.

108) PELS Art. 4:207(2).

[Track 1]



[Track 2]



Having said that, it has also found that, notwithstanding its superiority, the PELS have some drawbacks in several aspects. First, the PELS seems to place its focus on the factor of cost except the other factors, for instance, the significance of the lack of conformity, when one decides whether the first tier remedies cause the seller unreasonable effort or expense. However, although this seems to be problematic particularly in the case of replacement, one could hope that the factors are considered by referring to art. 1:302 PECL.

Second, the PELS does not expressly provide any exclusion of the seller's right to choose between repair or replacement on the basis of unreasonable uncertainty in reimbursing the expenses advanced by the buyer. However, one may hope that the existence of such uncertainty means to cause the buyer an unreasonable inconvenience under art. 4:204(1).

Third, the PELS does not seem to properly reflect the consumer's interests in that most consumers prefer to have the absolute right of termination as against the commercial sellers who have a relatively stronger bargaining position. This is, not only because the consumer must overcome a big hurdle, which is the hierarchial remedy system, in order to battle with the commercial seller, but also because unavoidable vagueness in defining a minor lack of conformity has been often used against the consumer, but in favour of the commercial seller with a strong bargaining position.

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ABSTRACT

The Buyer's Remedies for Lack of Conformity under the PELS

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This article attempts to describe and analyze the rules on the buyer's remedies for lack of conformity under PELS. It shows that such remedies under the PELS operate in a two-tier remedial scheme which is alien to both domestic and international legal systems. That is, repair and replacement take the position of primary remedy, whereas termination, price reduction and damages are secondary remedies which are available only where the primary remedies cannot be invoked. Notwithstanding its superiority, the PELS have some drawbacks in several aspects. First, the PELS seems to place its focus on the factor of cost except the other factors, for instance, the significance of the lack of conformity, when one decides whether the first tier remedies cause the seller unreasonable effort or expense. It is argued that the factors can be considered by referring to art. 1:302 PECL. Second, the PELS does not expressly provide any exclusion of the seller's right to choose between repair or replacement on the basis of unreasonable uncertainty in reimbursing the expenses advanced by the buyer. It argues that if there is such uncertainty, it should be regarded as causing the buyer an unreasonable inconvenience under

art. 4:204(1). Third, the PELS does not seem to properly reflect the consumer's interests in that most consumers prefer to have the absolute right of termination as against the commercial sellers who have a relatively stronger bargaining position. The reasons for that is that there is a big hurdle, i.e., a hierarchy of remedies, to be overcome by the consumer to battle with the commercial seller, and that unavoidable vagueness in defining a minor lack of conformity has been often used against the consumer, but in favour of the commercial seller with a strong bargaining position.

Key Words : PELS, PECL, Buyer's Remedies, Defective Goods, Lack of Conformity
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