

APPENDIX D

COMPARATIVE CONSUMER LAW

This appendix has been completed with the assistance of experts and researchers in other jurisdictions. We are particularly grateful to: Laura Treacy; Professor Simon Whittaker; Professor Hans-W Micklitz and Kai P Purnhagen; Professor Cynthia Hawes; and Professor John Adams.

IRELAND¹

- D.1 The European Commission described Irish domestic consumer sales laws as having a “pioneering, exemplary character”.² Under the domestic regime (the Sale of Goods and Supply of Services Act 1980), consumers have a right to reject, but also a secondary right to request cure (repair or replacement).
- D.2 Irish commentators take the view that the Irish domestic regime provides superior protection to consumers than the Consumer Sales Directive (CSD) regime.

The Sale of Goods and Supply of Services Act 1980

- D.3 The Sale of Goods Act was introduced in both the UK and Ireland in 1893. It was extensively amended in Ireland 1980 by the Sale of Goods and Supply of Services Act 1980.

The Right to Reject

- D.4 Under the Sale of Goods Acts, where there has been a breach of a condition the buyer has the right to treat the contract as repudiated and to reject the goods.³ If there has been a breach of a warranty this may give rise to a claim to damages but not to a right to reject the goods.⁴
- D.5 However, the right to reject for breach of a condition may be lost in the following circumstances. Under section 11(3) of the 1893 Act (as amended by section 10 of the 1980 Act) if the buyer accepts the goods, the condition breached by the seller can only be treated as a breach of a warranty in terms of the remedies available. Thus, the buyer loses the right to reject the goods upon acceptance and the remedy lies solely in damages.
- D.6 As explained below, however, in cases where the buyer deals as a consumer the effect of section 11(3) has been modified by section 21(2) of the 1980 Act.

¹ The Irish comparative section was drafted with assistance from Laura Treacy.

² See White, “The EC Directive on Certain Aspects of Consumer Sale and Associated Guarantees: One Step Forward, Two Steps Back?” (2000) 7(1) CLP 3; Walley, “The Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees—Implications for Irish Consumer Sales Law” (2000) 18 ILT 23.

³ Sale of Goods Act 1893, s 11(2) as amended by s 10 Sale of Goods and Supply of Services Act 1980.

⁴ Sale of Goods Act 1893, s 11(2) as amended by s 10 Sale of Goods and Supply of Services Act 1980.

Acceptance

D.7 Acceptance, the test for determining whether the buyer has lost the right to reject, is defined in section 35 of the 1893 Act. This definition was amended in the 1980 Act with the result that it varies slightly from the current UK definition of acceptance.⁵ Under the amended section 35, the buyer is deemed to have accepted the goods when

- (1) he intimates to the seller that he has accepted them, or
- (2) subject to the buyer's right to examine the goods, when the goods have been delivered to the buyer and he does any act in relation to the goods which is inconsistent with the ownership of the seller, or
- (3) when without good and sufficient reason, he retains the goods without intimating to the seller that he has rejected them.

D.8 The words "after the lapse of a reasonable time" (as found in section 35 of the 1893 Act and current UK legislation) were substituted by the 1980 Act for the words "without good and sufficient reason". Thus the issue in Ireland is not whether the buyer acted within a reasonable time but rather whether the buyer had good and sufficient reason for not acting. It appears that this change was made to avoid the difficulties which have arisen in the UK with regard to defining "a reasonable time".⁶

Breach of Condition and Acceptance in Consumer Cases: Right to remedy or replace and possible revival of right to reject

D.9 There is yet another difference between the Irish and UK legislation, which has a significant impact on the remedies available to consumers for faulty goods. Section 21 of the 1980 Act altered section 53 of the 1893 Act (remedies for breach of warranty) by introducing a new course of action in consumer cases where there has been a breach of a condition by the seller, which the buyer is compelled to treat only as a breach of warranty due to acceptance of the goods.

D.10 Typically where there is a breach of a condition by the seller, but the buyer has accepted the goods and thus lost the right to reject, the buyer's remedy is to claim for damages.⁷ This can be done in one of two ways: (a) the buyer can set off the breach of warranty against the purchase price or (b) pursue an action in damages against the seller for the breach.⁸

⁵ 1980 Act, s 20.

⁶ It is reported that the amendment was made to reverse the decision in *Lee v York Coach and Marine Ltd* [1977] RTR 35. In that case the buyer of a defective car did not reject the goods outright but rather spent six months attempting to have it repaired and to have the garage remedy the problem. The buyer was deemed to have accepted the goods. See Grogan, King and Donelan, *Sale of Goods and Supply of Services, A Guide to the Legislation* (1982), p 39.

⁷ 1893 Act, s 11(3).

⁸ 1893 Act, s 53(1); 1980 Act, s 21(1).

D.11 However, under section 21(2) of the 1980 Act where

- (1) the buyer deals as a consumer, and
- (2) there is a breach of a condition by the seller but the buyer has accepted the goods, and
- (3) the buyer promptly upon discovering the breach requests that the seller either remedy the breach or replace the goods,⁹ and
- (4) the seller refuses to comply with the above request or fails to do so within a reasonable time,

the buyer is entitled to either

- (a) reject the goods and repudiate the contract or
- (b) to have the defect constituting the breach remedied elsewhere and to take an action against the seller for the cost thereby incurred on him.¹⁰

D.12 Thus, under Irish law, in these circumstances, consumers are given a right to have the fault cured (by repair or replacement) and if the seller refuses or fails to do so within a reasonable time then the right to reject is revived.

D.13 As noted by White, the right to reject is the primary right given to consumers. The right to remedy or replace is secondary and “operates to provide a consumer buyer with a second chance to reject”.¹¹ There is not a general right to have the defect cured or the product replaced. It arises only where the consumer buyer has lost the right to reject by accepting the goods.

D.14 In summary:

- (1) Where there has been a breach of a condition by the seller the buyer is entitled to reject the faulty goods (and demand a refund of the price if paid).
- (2) Where there has been a breach of a condition by the seller and the buyer has accepted the goods and is dealing as a consumer, the consumer is entitled to request that the seller remedy the fault (by repair or replacement). If the seller refuses to do so or fails to do so in a reasonable period the consumer has the choice to either reject the faulty goods or have the defect remedied elsewhere and claim for the cost against the seller.

⁹ Under s 21(2) the onus of proving that the buyer acted with promptness is upon the buyer himself. There is no guidance in the legislation as to what constitutes acting “promptly”.

¹¹ White, *The EU Directive on Certain Aspects of Consumer Sale and Associated Guarantees: One Step Forward, Two Steps Back?* (2000) 7(1) CLP 3 at 10.

- D.15 It should also be noted that the buyer, in addition to any right to reject the goods, also has a right to sue for damages for breach of contract.¹²

European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003

- D.16 Directive 1999/44 EC was implemented into Irish law by way of statutory instrument. The text of the Directive was transposed into the EC (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (the Consumer Sales Regulations).
- D.17 Under section 7 of the Consumer Sales Regulations the seller is liable to the consumer for any lack of conformity which exists in relation to the goods at the time of delivery.¹³ The consumer's primary remedy is to have the seller bring the goods into conformity free of charge by repair or replacement unless this is impossible or disproportionate.¹⁴
- D.18 The right to reject the goods is secondary under the Directive. The consumer has the right to demand a reduction in the price of the goods or to have the contract rescinded if
- (1) they are not entitled to a repair or replacement, or
 - (2) the seller has not completed the repair or replacement within a reasonable time, or
 - (3) the seller has not completed the repair or replacement without significant inconvenience to the consumer.
- D.19 Thus, the transposition of Directive 1999/44 has led to an anomaly in Irish consumer sales law. Under the Sale of Goods Acts 1893 and 1980, the consumer's primary means of redress is the right to reject the faulty goods. Whereas, under the Consumer Sales Regulations 2003, the repair or replacement of the defective goods is the initial remedy. It has been noted that this shifts the balance in favour of the seller when compared with the traditional domestic position.¹⁵

¹² 1893 Act, ss 11 and 53.

¹³ Under s 8 any lack of conformity which appears within six months of delivery is presumed to have existed at the time of delivery of the goods.

¹⁴ Consumer Sales Regulations 2003, s 7(2) and (3).

¹⁵ White, "The EC Directive on Certain Aspects of Consumer Sale and Associated Guarantees: One Step Forward, Two Steps Back?" (2000) 7(1) CLP 3 at 10. Walley notes, "the complex hierarchy of remedies is not as potent as the immediate right to reject goods for breach of an implied condition under Irish law" in "The Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees—Implications for Irish Consumer Sales Law" (2000) 18 ILT 23 at 23.

- D.20 In addition, under section 8 of the Consumer Sales Regulations, the consumer does not have a right to rescind the contract if the lack of conformity is minor. However, under domestic law, the right to repudiate the contract depends solely on whether a condition, warranty or innominate term has been breached and not the severity of the breach.
- D.21 Thus Irish domestic law offers consumers a more powerful set of remedies than the Directive. Prior to the incorporation of the Directive into Irish law a number of commentators drew attention to this fact and highlighted the need for a method of transposition which would address this problem.¹⁶

The Interaction of the Consumer Sales Regulations and the Sale of Goods Acts

- D.22 The implementation did not involve any alteration to the existing remedies available under the Sale of Goods Acts. The Consumer Sales Regulations explicitly state that the Regulations are in addition to and not in substitution for the Sale of Goods Acts. It should also be noted that the Directive was a measure of minimum harmonisation, leaving member states free to provide stronger statutory protections to consumers. It is in this regard that the Sale of Goods Acts were maintained.
- D.23 The interaction of the Sale of Goods Acts and the Consumer Sales Regulations is set out in sections 3 and 4 of the Consumer Sales Regulations. Section 3 states that where the level of protection afforded to a consumer by the Regulations is greater than that provided by the Sale of Goods Acts, the consumer can choose to rely on the Consumer Sales Regulations to the exclusion of the Sale of Goods Acts.
- D.24 Where a consumer would be better protected by the Sale of Goods Acts, the consumer can invoke the Sale of Goods Acts to the exclusion of the Consumer Sales Regulations. However, the Acts must be construed so as not to reduce the level of protection under the Consumer Sales Regulations. The consumer can also invoke the Consumer Sales Regulations, however, they must be construed in a manner which does not diminish the level of protection provided under the Sale of Goods Acts.¹⁷

¹⁶ White, "The EC Directive on Certain Aspects of Consumer Sale and Associated Guarantees: One Step Forward, Two Steps Back?" (2000) 7(1) CLP 3 at 13. Walley states, "the method of transposition has significant implications not alone for the clarity of the law governing consumer transactions, but for the general integrity of Irish sale of goods law" in "The Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees—Implications for Irish Consumer Sales Law" (2000) 18 ILT 23 at 23.

¹⁷ Consumer Sales Regulations, s (4)(a) and (b).

FRANCE¹⁸

- D.25 In France, the Consumer Sales Directive gave rise to a dispute as to whether it should be implemented by amendment of the general law of sale in the Civil Code following the Directive's model or instead by the insertion into the Consumer Law Code of a supplementary set of rights especially for consumer buyers.¹⁹ At a substantive level, this dispute principally concerned the extent to which either change would extend or reduce the protection of consumers, but it also involved much wider issues as to the appropriateness of changing long-established provisions of the Civil Code on a European model designed for consumer sales. The French government chose the more restricted option, but specifically retained the existing remedies for consumer buyers under the existing law.²⁰

Domestic law

- D.26 French law governing buyers' rights in respect of defects in the property sold before implementation of the Directive was already very complex, giving a range of remedies to consumer buyers, some under the general law of contract (and in particular based on duties of information (*obligation d'information*) in sellers justified by reference to the principle of good faith or based on contractual obligations of conformity of the goods), and some under special rules governing contracts of sale which impose a "legal guarantee" on sellers in respect of latent defects in property sold (*la garantie légale contre les vices cachés*), rules ultimately deriving from the Roman aedilician edicts.²¹
- D.27 The complexity of these various bases of liability extended to the rules governing the availability of rights to damages, to termination of the contract and restitution of the price (referred to as *action résolutoire* where the basis of liability was contractual non-conformity, the *action réhibitoire* where liability was based on the "legal guarantee") and to the periods within which a claim must be brought. One of the arguments in favour of wider reform was the need to reduce this complexity.

¹⁸ The French comparative section was drafted by Professor Simon Whittaker of St John's College, Oxford.

¹⁹ S Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) chap. 19 and esp. pp. 574 – 83. On the law earlier developed under the Civil Code, see *ibid.* chap. 4.

²⁰ *Ordonnance* no. 2005-136 of 17 February 2005; arts L 211-4 – 211-14 *Code de la consommation*.

²¹ Arts 1603-4 *Code civil* ('obligation to deliver (conforming) property'); arts 1641 - 1648 *C. civ.* ('legal guarantee'); Whittaker, *op. cit.*, pp. 69-72.

- D.28 In terms of the buyer's rights under the "legal guarantee" in sale, French courts have interpreted the provisions of the Civil Code in question so as to allow all buyers (and not merely consumers) to choose whether (a) to terminate the contract and recover their money in exchange for the return of the goods; (b) to require a reduction in the price taking into account the nature and extent of the defect; and/or (c) to claim damages, though this last right is restricted to sellers acting in the course of business or their profession (*vendeurs professionnels*).²² While the basis of these rights was expressed in the Code simply as a 'latent defect' (without more explanation), the case-law made clear that this notion included functional and qualitative defects as well as physical defects, subject to a criterion of seriousness that the defect rendered the property unfit for the use for which it was intended, or which so diminished its use that, had the buyer known, he would not have acquired it, or would have acquired it only at a lesser price.²³ The great disadvantage of this scheme of rights was that any claim had to be brought within a "brief period" (*un bref délai*), and though there was some judicial discretion here, both as to the date from which time ran and the length of the period, buyers could find themselves out of time after a mere six months.²⁴ Moreover, under this scheme, the consumer buyer had no right to require the seller to repair or replace property suffering from a latent defect.²⁵
- D.29 By contrast, the main significance of a failure to perform an *obligation d'information* (whether as regards instructions or warnings) was the imposition of liability in damages (whether these were considered contractual or extra-contractual) and these grounds of liability enjoyed longer periods within which claims could be brought (10 or even 30 years).²⁶ The non-performance of the seller's contractual obligation to deliver conforming property could give rise to a claim for enforced proper performance (*exécution forcée en nature*) or to obtain a substitute performance elsewhere (*remplacement judiciaire*) and damages or retroactive termination of the contract with restitution, counter-restitution and damages, subject in the case of the latter to a condition that the non-performance was sufficiently serious.

²² Whittaker, *op. cit.*, 79 - 91.

²³ Art. 1141 Code civil.

²⁴ Art. 1648 Code civil; Whittaker, *op. cit.*, pp. 91-93.

²⁵ Whittaker, *op. cit.*, p. 79 - 81.

²⁶ The difference between the two periods depended on whether the contract was classed as "commercial" or "civil". Recent legislation has, however, replaced these general prescription periods with a new general period of five years as from the date when the right-holder knew or ought to have known of the facts which allowed him to exercise the right: *loi no. 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile* creating (inter alia) a new art. 2224 Code civil.

- D.30 These rights had the advantage of a prescription period that was, in principle, of 10 or 30 years from the failure to perform.²⁷ However, while some courts and writers were content to see “contractual non-conformity” as extending to failures in the quality or fitness for purpose of the property sold, others saw it as properly restricted to situations where the property differed from the contract's specifications: it concerned the delivery of property other than that which had been contracted for, rather than worse than that which had been contracted for: *aliud not peius*.²⁸

The Consumer Sales Directive

- D.31 Implementation of the Directive in French law in the Consumer Law Code²⁹ means that sellers are bound to deliver conforming property and are liable for “defects of conformity” existing at the time of delivery.³⁰ The definition of “conformity” for this purpose is taken almost unaltered from article 2 of the Directive;³¹ similarly, the buyer's rights are taken from article 3 of the Directive with only some changes for the benefit of consumers.³² The period within which a claim can be brought under this scheme was set at two years from delivery of the property.³³
- D.32 As has been noted, the legislation which implemented the Directive in France specifically retained existing grounds of recovery for buyers.³⁴ This means that a consumer buyer can now claim under: (i) pre-contractual or contractual duties to provide information; (ii) contractual failures to deliver conforming property under the general law of sale; (iii) the rights provided by the law of sale under the “legal guarantee”; or (iv) the new consumer rights provided by the Consumer Law Code.

²⁷ See note 8.

²⁸ In favour of the extension: J.Ghestin, *Conformité et garanties dans la vente (Produits mobiliers)* (LGDJ, Paris, 1983) 134; against: O. Tournafond, ‘Les prétendus concours d'actions et le contrat de vente (erreur sur la substance, défaut de conformité, vice caché)’ D 1989 Chron. 237, 238 (against).

²⁹ Arts. L 211-4 – L 211-14 Code de la consommation.

³⁰ Art. L 211-4 Code de la consommation.

³¹ Art. L 211-4 – L211-6 Code de la consommation.

³² Art. L 211-8 – L211-13 Code de la consommation. It is not clear whether or not liability in damages also arises under this scheme: art. L 211-7 al. 2 Code de la consommation.

³³ Art. L 211-12 Code de la consommation.

³⁴ Art. L 211-13 Code de la consommation.

- D.33 The relative attractiveness of these various grounds of claiming from the point of view of a consumer buyer will depend on the circumstances, but three factors may be particularly significant. First, the rights contained in the Consumer Law Code enjoy the advantage of a legislative presumption that any defect of conformity which appears within six months of delivery existed on delivery;³⁵ by contrast, under the general law, in principle, the buyer must prove that the defect existed on delivery, though lower courts (and the experts who advise them on any technical question) have a good deal of leeway in deciding the issue.³⁶
- D.34 Secondly, the rights contained in the Consumer Law Code specifically provide for the buyer to have the choice between repair or replacement of the property by the seller, though the seller can contest this on the basis of “manifestly disproportionate cost”;³⁷ by contrast, while such rights do not exist under the “legal guarantee” and remain somewhat uncertain under the *wider* law of “contractual non-conformity” provided by the Civil Code, a buyer can opt for a reduction in price without the need for this first level of rights to have become ‘impossible’. Moreover, rights to terminate the contract under the “legal guarantee” (under the *action rédhibitoire*) are available without the formal restriction to non-minor defects found in the scheme of the Consumer Law Code, though, as has been seen, they possess their own criterion of seriousness.³⁸
- D.35 Thirdly, the legislation implementing the Directive also amended the “legal guarantee” in sale under the Civil Code by replacing the traditional but restrictive and uncertain “brief period” within which claims must be brought with a fixed period of two years from the discovery of the defect.³⁹ This change has the effect of making claiming under the “legal guarantee” more attractive in some cases than the special scheme in the Consumer Law Code, where a claim must be made within two years of delivery of the property. So, at the same time at which France granted new special rights to consumer buyers by implementing the Directive, it reinvigorated its very traditional rights for all buyers under the “legal guarantee”.

³⁵ Art. L 211-7 al 1 Code de la consommation.

³⁶ Whittaker, op. cit., pp. 76, 78-9.

³⁷ Art. L 211-8 – 211-9 Code de la consommation.

³⁸ Art. 1641 Code civil.

³⁹ *Ordonnance* n. 2005-136 of 17 February 2005 amending art 1648 al. 1 C.civ.

Conclusion

- D.36 French law already possessed a complex and protective system of rights for buyers in respect of defects in goods sold, developed by the courts on the basis of the traditional bases provided by Roman law. While implementation of the Directive offered an opportunity for wider reform (as had already been undertaken by German law in 2002), the French government was persuaded by French business which saw wider reform on the basis of a European directive protecting consumers as going too far in the direction of contractual fairness and away from freedom of contract and by French consumer groups who argued that wider reform which abolished the traditional grounds of recovery could actually prejudice consumer buyer rights. Given that implementation of the Directive only took place in 2005, it remains unclear as to whether the advantages of the Directive's scheme as implemented into the French Consumer Law Code will provide any considerable new protection to French consumers as contrasted in particular with the reinvigorated scheme under the "legal guarantee".

GERMANY⁴⁰

(A) INTRODUCTION

- D.37 In order to bring the Consumer Sales Directive and other European legislation into effect, Germany completely reformed sales law and incorporated consumer law into the Roman law based civil code (the *Bürgerliches Gesetzbuch*, “BGB”⁴¹) in 2002.⁴² Before that consumer law was regulated in special legislative acts.
- D.38 Along with the implementation of consumer sales law, some parts of general sales law, limitation periods, consequences of breach of contract, the law of services, credit law, and other consumer law were reformed.⁴³ The following overview provides neither an exhaustive, nor a comprehensive account of German consumer law. However, it will draw a general picture of German consumer and sales law reform and its application in practice. It should be noted, that in some special cases additional regulations apply which are not presented here.
- D.39 Before the 2002 reforms German law looked towards the theory of specific performance, which could normally be claimed by a contracting party. The right to specific performance, however, was only granted until the delivery of the respective good. From the moment of delivery the system switched to a special warranty regime (*Gewährleistungshaftung*), which was advantageous to the buyer as it allowed immediate withdrawal of the contract and reduction of price.⁴⁴ Repair and replacement were not general remedies in general contract law.⁴⁵ In practice, however, parties often agreed to repair.

⁴⁰ Drafted by Kai P Purnhagen, LL.M, M.Res. (Law), researcher at the department of law at the European University Institute in Florence (EUI) and Dr. iur. Hans-W. Micklitz, Professor for Economic Law at the EUI.

⁴¹ A non-official translation of the BGB may be found on the website of the Federal Ministry of Justice, http://www.gesetze-im-internet.de/englisch_bgb/. All sections referred to herein may be available in English there. Where applicable, the terms used for translation therein were also used here.

⁴² See H -W Micklitz, *Münchener Kommentar zum BGB*, 5th edition 2006, Vorbemerkungen zu §§ 13, 14, para 15; S. Grundmann, *European sales law – reform and adoption of international models in German sales law*, *European Review of Private Law* 2&3, p. 239-258, 2001 refers to it as the “most important law reform in German contract law since the entering into force of the German Civil Code in 1900” (p. 239) Grundmann furthermore provides a sophisticated summary of the legal problems and discussions in the prefield of the reform; P. Rott, *German Sales Law Two Years After the Implementation of Directive 1999/44/EC*, *German Law Journal* 5, 237-256, 2004, available at http://www.germanlawjournal.com/pdf/Vol05No03/PDF_Vol_05_No_03_237-255_Private_Rott.pdf; P. Schlechtriem, *The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*, *Oxford University Comparative Law Forum*, 2002, available at <http://ouclf.iuscomp.org/articles/schlechtriem2.shtml>.

⁴³ P. Rott, *supra* note 2, p. 241 (providing citations of German speaking publications to each of these issues).

⁴⁴ P. Rott, *id.*, p. 238, 239.

⁴⁵ Regulations on replacement were only provided for generic goods.

- D.40 The new approach completely restructured the old system.⁴⁶ The right to specific performance was widened to apply after the delivery of the good. Section 433 paragraph 1 section 2 BGB⁴⁷ explicitly states that the seller has to deliver goods in conformity with the contract. This switch from “warranty theory” to “performance theory” marked the reform's biggest theoretical change in German private law that specifically affected the law of remedies.
- D.41 A second cornerstone in the reform of German sales law was the incorporation of consumer law into the BGB. Along with that, special remedies for consumer sale contracts and other regulations supporting consumer rights were introduced.
- D.42 It should be noted, however, that the terms used herein are the ones used in the non-official translation of the BGB of the German Federal Ministry of Justice. Therefore, they may differ from the terms in the English versions of EC legislation. For example, the term “withdrawal”, which in the non-official translation of the German BGB means revocation.

(B) GENERAL REMEDIES IN SALES LAW

- D.43 Section 437 BGB contains a catalogue of remedies available to any purchaser of defective goods. It defines the legal consequences of a seller's breach of obligations to deliver goods in conformity with the contract.⁴⁸ Section 437 Number 1 BGB provides the right to cure, which is the primary remedy. If this right cannot be exercised, the purchaser either has a right of reduction of the price or rescission of the contract.⁴⁹ Additionally, the buyer usually has the right to claim for damages or futile expenditure.⁵⁰ However, those rights are null and void if the buyer knew about the respective defect when entering the contract.⁵¹
- D.44 The right to cure, however, is regularly referred to in German legal theory as the seller's “right to second performance”. It is the primary remedy of the purchaser. However, in certain circumstances the seller may deny this right. The *Quelle* decision⁵² (presented later in detail) clarified that it is not the seller's right. Otherwise there would have been no justification for finding that the seller cannot claim compensation for the first (defective) product's loss of value through its use.

⁴⁶ This process, however, caused a huge debate in Germany. Especially the reform of remedies was a matter of criticism as it meant a huge break in traditional German legal doctrine, see inter alia J. Schapp, *Empfiehl sich die "Pflichtverletzung" als Generaltatbestand des Leistungsstörungenrechts?*, *Juristenzeitung* 2001, p. 583.

⁴⁷ Sec. 433 BGB is the entry section of Germany's special law of obligations and also the first section in Germany's sales law. In Germany's legal system the most prominent sections usually leads the respective act or part of the act.

⁴⁸ Sec. 433 para 1 s. 2 BGB.

⁴⁹ Sec. 437 No. 2 BGB.

⁵⁰ Sec. 437 No. 3 BGB.

⁵¹ Sec. 442 BGB.

⁵² ECJ, C-404/06.

D.45 Moreover, this judgment clarified that it is a remedy of the consumer for the consumer's benefit. In terms of continuity and to present the German debate as it stands this abstract will, however, still use the term "right to second performance" in addition to the "right to cure".

I. The Primary Right to Cure

D.46 Section 439 BGB substantiates the right to cure. It is clarified in paragraph 1 that this right consists of the purchaser's choice to repair or replacement. The seller has to pay for all expenses thereby occurred, that is, as explicitly stated therein, costs for transportation, workmen's travel, and the cost of labour and materials.

D.47 In return, the seller is entitled to claim back the defective product after delivery of a non-defective one (paragraph 4). This procedure follows the rules originally designed for rescission. According to German law this right of the seller includes compensation for the performance received and also the emoluments received by the buyer during the time of use of the then not yet defective product.⁵³

D.48 This section, however, was subject to a lot of debate in German literature and courts. Therefore, the Bundesgerichtshof (Federal Supreme Court, hereinafter BGH) issued a Preliminary Ruling Procedure to the ECJ,⁵⁴ regarding whether such a regulation would comply with Articles 3 and 4 of the Consumer Sales Directive. The ECJ answered in the negative. Such a national rule that allows a seller "who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods" violates Articles 3 and 4 of the Directive and is therefore precluded by European law.⁵⁵

D.49 If the "second performance" is impossible, the seller is automatically discharged from this duty.⁵⁶ He also has the right to deny his "second performance" if it is at disproportionate expense to the buyer's interest in performance,⁵⁷ or, in case the seller has to perform in person, if a cure cannot be reasonably expected.⁵⁸ The seller may also deny cure if the costs of cure are disproportionate.⁵⁹

⁵³ Sec. 439 para 4 in connection with sec. 346 para 1 BGB.

⁵⁴ BGH reference for a preliminary ruling of 16. 8. 2006 - VIII ZR 200/05 (OLG Nürnberg), *Neue Juristische Wochenschrift* (hereinafter NJW) 2006, 3200.

⁵⁵ ECJ C-404/06, *Quelle AG*, judgment of 17 April 2008, 44, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0404:EN:HTML>.

⁵⁶ Sec. 275 para 1 BGB.

⁵⁷ Sec. 275 para 2 BGB.

⁵⁸ Sec. 275 para 3 BGB.

⁵⁹ Sec. 439 para 3 BGB.

D.50 The first two exemptions (section 275 paragraphs 2 and 3 BGB) are of little practical value. They were designed for remedies for all types of contracts, not only for sales.⁶⁰ Section 439 paragraph 3 BGB, however, is practically and academically the most important remedy of these three.⁶¹ The interpretation of the term “costs at disproportionate expense” is highly debated to date. Several percentage limits have been proposed in different situations.⁶² Until now there is no general rule about what might be understood by this term and it seems that there will be no general rule in the near future.⁶³ The meaning of this term will be investigated on a case-to-case basis.

II. The Secondary Rights

D.51 If the “second performance” is impossible or the seller legally refused his “right to second performance”, the buyer still holds a right to reduction of the price or rescission of the contract.⁶⁴ Additionally, the buyer usually has the right to claim for damages or futile expenditure.⁶⁵

D.52 Because both remedies are derivative, the purchaser has to set the seller a target of a reasonable time for exercising the “right to second performance” before claiming for price reduction, rescission, damages or expenses. Price reduction and rescission are exclusive to each other (see section 437 number 2 BGB “or” and section 441 paragraph 1 “instead of exercising the right to rescission...”). Damages may be claimed in addition, although some are logically exclusive. For example, the buyer cannot claim price reduction and compensation for the whole product value at the same time.⁶⁶

⁶⁰ In the German private legal system, rules applicable for all kinds of contracts regarding the law of obligations may be found in the general part of the law of obligations (sec. 241-432 BGB), while rules for a specific type of contract in this respect might be found in the special part of the law of obligations (sec. 433 – 853 BGB).

⁶¹ See P. Rott, *supra* note 2, p. 248.

⁶² P. Rott, *id*, provides some examples. A summary of the recent cases may only be found in German at E. Faust, Beck’scher Online Kommentar BGB (Bamberger/Roth eds.), 9th ed., sec. 439 BGB, para 49.

⁶³ There were, however, some subjects identified that may be taken into account when interpreting this respective term. That is the amount of time the purchaser could not use the product, the value of the product free of defect, the type and severity of the defect.

⁶⁴ Sec. 437 No. 2 BGB.

⁶⁵ Sec. 437 No. 3 BGB.

⁶⁶ Faust, Beck’scher Online Kommentar BGB (Bamberger/Roth eds.), 9th ed., sec. 437 BGB, para 173.

1. Right of Rescission and Reduction

- D.53 The right of rescission follows the rules of sections 440, 323 and 326 paragraph 5 BGB. Rescission is effected by declaration to the other party.⁶⁷ As noted above, the buyer has to set the seller a reasonable time limit before exercising his right to rescission.⁶⁸ Immediate rescission, however, is possible under three circumstances: first, if a balancing test of both contracting parties' interests justifies such;⁶⁹ second, if the seller already denied cure;⁷⁰ or third, if cure already failed or is not reasonable for the buyer.⁷¹
- D.54 As stated earlier, in the case of rescission the seller has the right to claim back the defective product in return. With respect to the emoluments received by the buyer, according to European law the right only exists in the limits set by the ECJ. It remains to be seen, however, whether the *Quelle* judgment is of general application.
- D.55 Alternatively, the purchaser might claim for price reduction,⁷² in which case the purchase price will be reduced in the proportion to which the value of the product free of defects would, at the time when the contract was entered into, have had to the actual value. To the extent necessary, the price reduction is to be established by appraisal (paragraph 3). If the buyer has paid more than the reduced purchase price, the excess amount is to be reimbursed by the seller (paragraph 4).
- D.56 Although there is no such explicit rule, price reductions may also only be claimed after the buyer has set a reasonable time limit for second performance. Basically, in this respect the same rules apply as to rescission. There are two reasons: first, section 441 paragraph 1 section 1 BGB links price reduction to the non-exercise of rescission ("instead of exercising the right to rescission..."), thus price reductions are on the same level as rescission. There is no reason to treat both differently. Second, section 441 paragraph 1 section 2 BGB excludes section 323 paragraph 5 section 2 BGB from the application to price reductions. This would make no sense if section 323 BGB were not applicable at all.

⁶⁷ Sec. 349 BGB.

⁶⁸ Sec. 323 para 1 BGB.

⁶⁹ Sec. 323 para 2 No. 3 BGB.

⁷⁰ Sec. 323 para 2 No. 2 BGB.

⁷¹ Sec. 440 s. 1 BGB.

⁷² Regulated by sec. 441 BGB.

2. Right to Claim Damages and Futile Expenditure

- D.57 The buyer's right to claim damages for all kinds of breach of duty is one of the main innovations of the reformed German sales law. It grants rights way beyond both the previous German "extremely restrictive regime"⁷³ and the demands of the Consumer Sales Directive. However, in contrast to Article 74 CISG, the German right remained a defect-based system, in general.⁷⁴ Technically, section 437 number 3 BGB from general sales law refers to general contractual liability law in sections 280 - 286 BGB. Thereby it clarifies the applicability of such in addition to other secondary remedies from sales law.
- D.58 The seller has three options: firstly, "simple" compensation,⁷⁵ that is compensation for damages the purchaser suffered from the delivery of a defective product or from the seller's breach of accessory obligations;⁷⁶ secondly, the seller may claim compensation for damage suffered from delayed performance;⁷⁷ and, thirdly, compensation for missing performance.⁷⁸
- D.59 Additionally, the purchaser may claim for damages not directly connected to the defect but to the other actions related to the contract.⁷⁹ It should also be noted that after the reform, the burden of proof was switched. It is now the seller who has to provide evidence that the breach of duty was not his.⁸⁰

III. Deviating Agreements

- D.60 The remedies granted in this title are generally negotiable. Therefore, deviating agreements between the parties are also possible in general. However, agreements between a consumer and a seller that deviate the rights granted by section 433 to 435, 437, 439 to 443 BGB to the disadvantage of the consumer may not be invoked.⁸¹

(C) SPECIAL CONSUMER REMEDIES

- D.61 In addition to the general remedies in German sales law, consumers are granted special protection. Remedies such as withdrawal (revocation) and the right to return are granted to consumers entering certain types of contract. Some provisions do not provide remedies, but ensure the enforcement of consumer rights in sales law, and in standard business terms.
- D.62 To ensure effective enforcement of consumer law in these cases, consumer associations were legitimized to claim collective redress in case of a violation of such regulations regarding standardized business terms and other consumer related provisions.

⁷³ P. Rott, *supra* note 2, p. 249.

⁷⁴ *Id.*

⁷⁵ Sec. 280 para 1 BGB.

⁷⁶ Sec. 241 para 2 BGB.

⁷⁷ Sec. 280 para 1 and 2, 286 BGB.

⁷⁸ Sec. 280 para 1 and 3, 281 or 282 or 283; or sec. 311a para 2 BGB.

⁷⁹ Sec. 280 BGB.

⁸⁰ Sec. 280 para 1 s. 2 BGB, double negation.

- D.63 In practice, however, many sellers grant consumers a general right of withdrawal or return regardless their statutory obligation. These rights are often provided for in standard business terms in face-to-face shop sales, for reasons of consumer satisfaction.⁸²

(D) CONCLUSION

- D.64 The “most important law reform in German contract law since the entering into force of the German Civil Code in 1900”⁸³ is still in its test tube. Although the European Courts or the BGH clarified several uncertainties there is still debate about the interpretation of even the basic terminology of the law as it stands. However, the system described above seemed to have proven its practical use and functionality.

⁸¹ Sec. 475 para 1 BGB.

⁸² See e.g. the guideline of the Industrie- und Handelskammer Nürnberg für Mittelfranken [Chamber of Industry and Commerce Nuremberg for Middle Franconia] Nr. 111/89, Rückgabe- und Umtauschklauseln im Einzelhandel [Withdrawal- and return-clauses in the retail industry], available at http://www.bayreuth.ihk.de/xist4c/download/web/5899228400_946_uplId_102643__cold_842_.pdf;jsessionid=2D8CCB278ED1B9E1846130F936638ED8.

⁸³ S. Grundmann, *supra* note 2, p. 239.

NEW ZEALAND⁸⁴

INTRODUCTION

- D.65 The Consumer Guarantees Act 1993 introduced into New Zealand a new regime of rights and remedies with respect to transactions involving the provision of goods and services to consumers. Generally speaking, the purpose of the Act was to ensure that consumers enjoyed a greater degree of protection than was previously available. It created a number of statutory guarantees upon the supply of certain goods and services to consumers, and provided rights of redress against suppliers and manufacturers in respect of the failure of goods or services to comply with the guarantees. In the case of the supply of goods to a consumer, the guarantees imposed relate to title, quality, fitness for purpose, compliance with description and sample, price, repairs and spare parts, and express guarantees.
- D.66 With respect to the provision of services, the guarantees created by the Act concern care and skill, fitness for purpose, time of completion and price. As the right to contract out of the Act is very limited and the definitions of key concepts within the Act are wide, the effect of the Act is significant.

GUARANTEE AS TO ACCEPTABLE QUALITY

- D.67 Section 6 of the Consumer Guarantees Act provides that where goods are supplied to a consumer there is a guarantee that the goods are of acceptable quality.
- D.68 Pursuant to section 7, goods are of acceptable quality if they are: (1) fit for all the purposes for which goods of the type in question are commonly supplied; (2) acceptable in appearance and finish; (3) free from defects; (4) safe; and (5) durable, as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to: (6) the nature of the goods; (7) the price (where relevant); (8) any statements made about the goods on any packaging or label on the goods; (9) any representation made about the goods by the supplier or the manufacturer; and (10) all other relevant circumstances of the supply of the goods. Where the defects in question have been specifically drawn to the consumer's attention before the agreement was made, the goods will not fail to comply with the guarantee; and where goods are displayed for sale or hire, the only defects to be treated as having been specifically drawn to the consumer's attention are those disclosed on a written notice displayed with the goods.

⁸⁴ The New Zealand comparative section was extracted from a paper prepared by Professor Cynthia Hawes of the University of Canterbury, New Zealand.

GUARANTEES AS TO FITNESS FOR PURPOSE

- D.69 Section 8 sets out two guarantees as to fitness for purpose. The first is a guarantee that where goods are supplied to a consumer they will be reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer. The second is a guarantee that the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit. The guarantees are inapplicable, however, where the circumstances show that the consumer does not rely on the supplier's skill or judgment, or where it is unreasonable for the consumer to rely on the supplier's skill or judgment

GUARANTEE AS TO CORRESPONDENCE WITH DESCRIPTION

- D.70 Section 9 provides a guarantee that, where goods are supplied by description to a consumer, the goods correspond with the description.

GUARANTEES THAT GOODS COMPLY WITH SAMPLE

- D.71 Section 10 provides that where goods are supplied to a consumer by reference to a sample or demonstration model, there are implied the guarantees that the goods correspond with the sample or demonstration model in quality and that the consumer will have a reasonable opportunity to compare the goods with the sample. Goods which are supplied by reference to a sample or demonstration model as well as by description are subject to the guarantees found in both sections 9 and 10.

GUARANTEE AS TO REPAIRS AND SPARE PARTS

- D.72 The guarantee as to repairs and spare parts applies to manufacturers and not to suppliers. Section 12(1) states that where goods are supplied to a consumer, there is a guarantee that the manufacturer will take reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are reasonably available for a reasonable period after the goods are first supplied to the consumer. This obligation is quite new in New Zealand; and is based on similar statutory obligations imposed in Australia and Saskatchewan.
- D.73 The guarantee does not apply where reasonable action is taken to notify the consumer who first acquires the goods from a supplier, at or before the time the goods are supplied, that the manufacturer does not undertake that repair facilities and parts will be available or that they will be available for only a specified period. Presumably, it is the responsibility of the manufacturer to so notify the consumer.

RIGHTS OF REDRESS AGAINST SUPPLIERS OF GOODS

- D.74 The consumer's remedial options are set out in section 18.

The right to reject

- D.75 Where the failure cannot be remedied or is of a “substantial character”, the consumer may reject the goods or obtain compensation from the supplier for any reduction in the value of the goods below their purchase price. Section 21 provides that a failure is of a substantial character where: (1) The goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or (2) The goods depart in one or more significant respects from their description or any sample or demonstration model; or (3) The goods are substantially unfit for a purpose for which goods of the type in question are commonly supplied or a particular purpose made known to the supplier or represented by the supplier to be a purpose for which the goods would be fit; or (4) The goods are not of acceptable quality because they are unsafe.
- D.76 It is possible that the rejection of goods may be justified on more than one ground. For example, in *AK 004/99, MVD 314/98*, it was shown that there had been interference with an odometer in a second-hand vehicle imported from Japan. Although the extent to which the odometer had been wound back was not established, it was held that the consumer could reject the vehicle on two bases; either because the failure could not be remedied, or, because no reasonable consumer acquainted with the odometer tampering would have bought the vehicle, the failure was substantial.
- D.77 It was said in *Stephens v Chevron Motor Court* [1996] DCR 1 that whether a failure is substantial or not is a question of degree. On a monetary level, the necessity to spend \$1000 in respect of goods purchased for \$5000 might indicate a failure of a substantial character, though this would not necessarily be the same in the case of goods of significantly greater value. Ultimately, the question in the case was whether a reasonable consumer would purchase the goods if told of the defect and the cost of repair. If not, the failure would be of a substantial character. The cost of repairs was also considered relevant in *AK 45/95* [1995] NZAR 230, in which the Motor Vehicle Disputes Tribunal held that serious rust variously estimated to cost between \$1200 and \$2070 to repair, and likely to recur, was a defect of a substantial character in a vehicle with a purchase price of \$3800.
- D.78 The standard is based on reasonableness, and not perfection. In *Norton v Hervey Motors Ltd* [1996] DCR 427 the consumer wished to reject a vehicle on the ground of minor problems which could be remedied within minutes, and defective paintwork. It was held to be a fact of life with complicated machinery that a reasonable consumer must expect that there might be some matters which would require to be remedied; a vehicle could suffer damage of a greater or lesser degree during delivery and such minor and repairable matters did not justify rejection.
- D.79 A congeries of defects, none of which is individually substantial, may amount to a failure of a substantial character. It was said in *Cooper v Ashley & Johnson Motors Ltd* [1997] DCR 170 that section 21 clearly contemplated a multiplicity of faults which individually went beyond mere trivia but which might not individually have prevented a buyer from purchasing the goods. In *Rask v Kelly* (DC, Dunedin 941/96, 22 July 1997) it was held that three defects in a computer system purchased by the consumer amounted cumulatively to a failure of a substantial character, justifying rejection of the system by the consumer.

D.80 Pursuant to section 22, the right to reject the goods is exercised by notifying the supplier of the decision to reject and the grounds of rejection. The consumer must return the rejected goods to the supplier unless the failure to comply with the guarantee or the size or height or method of attachment of the goods makes the cost to the consumer of transporting them “significant”, in which case the supplier must collect the goods at the supplier’s own expense. The Act is silent as to when rejected goods must be returned. In *Cooper* the consumer had placed the rejected vehicle in storage and subsequently the dealer obtained possession of it to carry out tests in relation to the litigation. It was argued that the consumer had not, therefore, returned the goods to the supplier as s 22 required. The Court held that it was not unreasonable for a consumer who had rejected goods to retain possession of them until such time as the purchase price was in fact refunded. Such retention of possession would not of course include a continuing use of the goods by the consumer.

A reasonable time for rejection

D.81 Pursuant to section 20, the right to reject the goods is lost if the right is not exercised within a reasonable time; or the goods have been disposed of by the consumer; or have been lost or destroyed while in the possession of anyone other than the supplier or the supplier’s agent; or if the goods were damaged by the consumer after delivery to the consumer for reasons not related to their state or condition at the time of supply; or they have been attached to or incorporated in any real or personal property and they cannot be detached or isolated without damaging them.

D.82 What constitutes a reasonable time for rejection of the goods will depend on the period in which it would be reasonable to expect the defect to become apparent, having regard to the type of goods, the use to which a consumer is likely to put them, the length of time for which it is reasonable for them to be used and the amount of use to which it is reasonable for them to be put before the defect becomes apparent: section 20(2).

D.83 The nature of the goods was considered relevant in *Nesbit v Porter* (1998) 8 TCLR 493, where the Court discussed what constituted a reasonable time to reject a utility vehicle of a kind which was intended to be driven hard, away from roads, for recreational and occupational activities. Because the use to which the consumer would put such a vehicle would be hard and energetic, the High Court considered that a maximum of six months would be a reasonable time. In the case of a more sedate vehicle, the period would be longer.

D.84 In *Cooper v Ashley & Johnson Motors Ltd* [1997] DCR 170 the Court considered that the state of the consumer’s knowledge of the defects was relevant in evaluating what would constitute a reasonable time. In that case, the consumer had used the vehicle he had purchased for nearly a year and had travelled some 8500 km before he rejected it. During this period, the vehicle ran poorly, and a number of attempts were made to diagnose and correct problems. The Court held that time would begin to run as soon as it could be said that the goods had a substantial defect, the substance of which was known by the consumer.

- D.85 In the congeries of defects situation, a point would eventually be reached in which the consumer could say convincingly that he or she had no confidence in the goods. A lapse of years would be unlikely to be tolerated but several months might well pass, during which minor problems might become apparent and so known to the consumer. The consumer would be expected to reject immediately at the point where he or she could be said to have lost confidence in the goods. Where the defect was latent, time would not begin to run until the defect had been identified because it was only with the benefit of full information that a consumer could make a decision whether to reject the goods or not.
- D.86 In the view of the Court in *Cooper* it was the responsibility of the supplier to provide the consumer with sufficient information to make an informed decision; and the supplier was primarily responsible for the diagnosis of the problem. A supplier who abdicated that responsibility could not complain if the consumer took a long time to carry out the diagnosis. In considering the question of when a consumer would lose a right to reject defective goods, the Court observed that little assistance could be gained from case law on section 37 of the Sale of Goods Act 1908, for that section presented a far more restrictive regime than that set out in section 20 of the Consumer Guarantees Act.
- D.87 The Act does not contemplate that the supplier of goods should be compensated for the consumer's use of the goods between the dates of supply and rejection, even if that period is a long one which results in extensive use of the goods and their consequent depreciation. It was stated in *Stephens v Chevron Motor Court Ltd* [1996] DCR 1 that the legislation was probably deliberately framed in that way; otherwise, it would reduce the incentive of dealers to comply with their obligations under the Act. This approach was followed in *Cooper*, where a full refund was ordered after the consumer had used the vehicle in question for several months and travelled 8500 km.
- D.88 The Act does not state what consequences may result if the consumer fails to give the supplier an opportunity to carry out repairs, but chooses to have repairs undertaken elsewhere. In *Cooper* the consumer was the purchaser of a vehicle which proved to have a number of defects. He chose to have repairs done himself at his own expense before he finally rejected the goods following unsuccessful repair attempts. He claimed these repair costs from the supplier. It was held that the consumer had had, during his ownership of the vehicle, the right to require the supplier to remedy any defects which arose within a reasonable time, or to reject the goods and seek compensation. In this case, the consumer had elected to have the work done himself without giving the supplier the opportunity to carry out repairs. Having failed to follow the prerequisites of section 18, the consumer was not entitled to recover his repair costs.
- D.89 However, in *Cooper*, this issue was not considered closely by the Court, the principal matter being whether the consumer was entitled to reject the goods and recover the purchase price. The matter came directly before the High Court in *Acquired Holdings Ltd v Turvey* (2008) 8 NZBLC 102 at 107. In that case, the supplier's defence to a consumer's claim for the cost of repair work done on a vehicle by a third party was that the consumer had failed to give the supplier of it an opportunity under section 18(2) to remedy the defects.

- D.90 Winkelmann J held that a plain reading of section 18 indicated that where a defect could be remedied and was not of a substantial character, the consumer was obliged to allow the supplier an opportunity to remedy it. Although section 18(2) provided that a consumer “may” require the supplier to remedy a defect, this wording did not imply that this procedure was optional; rather, the second, self-help, remedies of seeking repair elsewhere or rejecting the goods were available only after the supplier had failed to remedy the failure within a reasonable time as requested by the consumer.
- D.91 Winkelmann J pointed out that there existed good reasons for such a rule. It was practical, and allowed the supplier to assess the cause of the problem or whether the goods had been subjected to unreasonable use; it allowed the supplier to control the quality of the remedy, which would not necessarily be the case if repairs were carried out by an unauthorised repairer; and the supplier was also in a better position than a third party repairer to negotiate its own remedy with the manufacturer. Further, the policy of the Act was that suppliers of goods were liable, not because of their own default, but because they, rather than consumers, should bear the risk where the goods supplied failed to comply with consumers’ reasonable expectations. Given this burden, it is only reasonable that the consumer should first allow the supplier to remedy any defects.
- D.92 If property in the goods has passed to the consumer before rejection, it reverts in the supplier upon notification of the rejection. The consumer may then choose to have either a refund or goods of the same type and of “similar value” to replace the rejected goods if such goods are reasonably available to the supplier as part of the supplier’s stock. The refund must be a refund of the cash paid or value of other consideration provided by the consumer and permission to acquire other goods from the supplier is not sufficient; in other words, the consumer is not obliged to accept a credit from the supplier.
- D.93 The guarantees provided by the Act are applicable to the replacement goods if such goods are supplied to the consumer. Although the Act does not expressly provide that the consumer may be ordered to return goods when a refund is ordered, the Act has been interpreted so as to enable the Court to make such an order. It was said in *Stephens* that it would make nonsense of the Act if the Court did not have the power to order a consumer who was entitled to a refund to return the goods to the supplier; and that such a literal reading of the Act would allow the consumer both to retain the goods and receive a refund, an interpretation which the Court rejected.

Repair or replacement

- D.94 Where the failure to comply with the guarantee can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time, which means repairing the goods or curing any defect in title, or replacing the goods with goods of identical type. If the supplier refuses or neglects to do so, or does not succeed in doing so within a reasonable time, the consumer may have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied or the consumer may elect to reject the goods.

- D.95 The application of this regime in practice was considered in *Stephens v Chevron Motor Court Ltd* [1996] DCR 1, an appeal from the Motor Vehicle Disputes Tribunal. The consumer in that case had purchased a vehicle from a dealer. When the vehicle proved to have defects, the dealer had carried out some repairs. However, problems persisted and the consumer informed the dealer that she wished to reject the vehicle. Without consulting the consumer, the dealer had the vehicle examined by a specialist, who carried out further work to a value of \$1200, which was paid by the dealer. The consumer refused to uplift the vehicle and maintained her right to reject it. The Tribunal ruled that she was not entitled to do so.
- D.96 On appeal, the District Court held that the correct approach, and the one which the Tribunal should have adopted, was to consider first whether there had been a breach of the guarantee of acceptable quality; then, if such a breach were established, to go on to consider whether the failure could be remedied or was of a substantial character. If the failure were of a substantial character, and one which could be remedied, the consumer could elect between the options of repair of the goods or cancellation of the contract. In *Stephens*, the consumer had not had an opportunity to make an informed decision about whether or not the failure should be remedied, as she was unaware of the extent of the required repairs. The Court considered that, had she been consulted, she would have cancelled the contract, something which she had in fact attempted to do. The substantial failure gave her a right to cancel and in such circumstances it was not for the dealer to ignore this and to proceed to carry out unauthorised repair work.
- D.97 The remedies regime of the Act is intended to be self-policing. It was said in *The Original Car Warehouse Ltd v Milika Vuki* (DC, Auckland, NP 2157/97, 12 June 1998) that it provides the steps which a consumer may take and is of a self-help nature. It follows from this that if a consumer has a choice concerning remedies, the choice should be an informed one. It was suggested in *Cooper v Ashley & Johnson Motors Ltd* [1997] DCR 170 that there existed a continuing obligation on a supplier to furnish a consumer with sufficient information to make an informed decision, and for this purpose the supplier would primarily be responsible for the diagnosis of any problems relating to the goods.

CONSEQUENTIAL LOSS

- D.98 The Consumer Guarantees Act confers on consumers and recipients of gifts from consumers the right to obtain from the supplier of goods or services damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the goods or the product of the service) which was reasonably foreseeable as liable to result from the failure: sections 18(4) and 32(c). A similar right of redress is available to the consumer or any person who acquires goods from or through the consumer against the manufacturer of goods which fail to meet the guarantees imposed on manufacturers: section 27(1)(b). Suppliers and manufacturers are, therefore, potentially liable to a large class of people. The liability imposed on suppliers and manufacturers for losses other than in the value of the goods or products of services is also extensive, for the provisions appear to be drafted widely enough to cover consequential loss of the kind which would normally be recoverable in both contract and tort.

- D.99 Under the Saskatchewan legislation, which uses similar wording, damage which was reasonably foreseeable as liable to result from failure to comply with the statutory warranties has been held to include, in the case of a car sold in breach of the warranties of fitness for purpose and of durability, the plaintiff's lost income when he lost a customer as a result of being late for work, taxi fares and the expense of hotel accommodation when the plaintiff had to stay overnight away from home when the vehicle in question broke down: *Adams v J & D's Used Cars Ltd* (1983) 26 Sask R 40.
- D.100 Out of pocket expenses for trips to a garage as well as the increased fuel costs in running a substitute vehicle have also been held to be recoverable: *Kitely v Ford Motor Co of Canada Ltd* (1988) 61 Sask R 5. The cost of additional wear on a substitute vehicle has been successfully claimed: *Johnson v Northway Chevrolet Oldsmobile* (unreported, Sask Court of Queen's Bench, 1993, Hrabinsky J). However, a consumer who took out bank loans to purchase goods which proved to be insufficiently durable and not of acceptable quality as well as for replacement goods was held not to be entitled to the interest on the loans: *Paskiman v Meadow Ford Sales Ltd* (1985) 35 Sask R 81.
- D.101 In addition, the provision that damages are recoverable for any loss or damage resulting from a failure to comply with a guarantee which was reasonably foreseeable as liable to result from the failure is wide enough to encompass the case where defective goods or a product of a service cause damage to other property of the person who acquires the goods or product of the service. Such damage might also be recoverable in contract under the normal rules relating to foreseeability but there may, of course, be no contract in existence between the parties. The Act makes it explicit that "any" loss or damage reasonably foreseeable as liable to result is recoverable, and that this is in addition to any loss represented only by a reduction in the value of the goods or products of services themselves. An example of this kind of consequential loss is *A & W Holdings (NZ) v Hosking* (High Court, Auckland HC 191/98, 14 April 1999). The plaintiffs in that case bought an electric blanket which proved to be defective and so breached the guarantee of acceptable quality. A fire resulted from the defect, causing damage to the plaintiff's house and chattels. The plaintiffs were awarded \$50,000 as compensation for this damage, as well as general damages to compensate them for physical inconvenience, discomfort and mental distress.

THE UNITED STATES OF AMERICA⁸⁵

- D.102 In the USA, sales law is legislated at state level. There is no single sales law that applies across the fifty states. Despite this fact, there is a great deal of uniformity, achieved by individual states enacting legislation based upon “uniform” sales laws which have been drawn up by legal scholars at a national level. The first of these was the Uniform Sales Act 1906 which was similar to the Sale of Goods Act 1893 in the UK. At its peak, the Uniform Sales Act was adopted by over 80% of the states.⁸⁶
- D.103 The Uniform Sales Act was replaced by the Uniform Commercial Code (UCC), created by a Permanent Editorial Board under the auspices of the American Law Institute and the National Conference of Commissions on Uniform State Laws. By 1967 the sales Article of the UCC had been adopted by all states except Louisiana. State legislation does not always follow the UCC in all respects, so the following commentary on the UCC may not accurately reflect the complete law in any given state.
- D.104 UCC Article 2 deals with sales law in general. There are very few provisions that apply only to consumers,⁸⁷ though states are free to enact other consumer legislation to extend protection for consumers.
- D.105 A buyer’s remedies for faulty goods are derived from three principles found within the UCC: the buyer can rely on a right to reject,⁸⁸ and/or a right to revoke acceptance;⁸⁹ whilst in certain circumstances the seller is protected by the right to cure.⁹⁰ These are explained in turn.

The right to reject

- D.106 The right to reject under the UCC is drafted in very similar terms to the right to reject under the Sale of Goods Act 1979. It is available to the buyer of faulty goods provided that those goods have not yet been accepted and rejection is exercised within a reasonable time. Goods are accepted when the buyer fails to make an effective rejection despite having had a reasonable opportunity to inspect the goods. As in UK law, acceptance also occurs upon express notification of acceptance or where the buyer (subject to the buyer’s reasonable opportunity to inspect) has used the goods in a way that is inconsistent with the seller’s ownership of them.⁹¹

⁸⁵ The USA comparative section was drafted with assistance from Professor John Adams of Sheffield University.

⁸⁶ *Corbin on Contracts* (1993), § 1.21.

⁸⁷ For example § 2-719(3) which states that limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable.

⁸⁸ § 2-601.

⁸⁹ § 2-608.

⁹⁰ § 2-508.

⁹¹ § 2-606.

D.107 When considering the “reasonable time” for rejection, courts in the US have often restricted this to a very short period. The cases have led some to comment that this is “a persistently litigated yet perpetually confused question”,⁹² and that no guiding principles can be distilled. There are some cases that suggest that the ability to inspect a car and take it for a test drive prior to purchase means that rejection is impossible: the buyer had a reasonable opportunity to ascertain conformity with the contract prior to purchase.⁹³ On the other hand, there are other cases that suggest that rejection of motor vehicles is possible within the first couple of days.⁹⁴ However, there is one case in which a court allowed a jury verdict permitting rejection after 5 months and the use of a car for more than 3300 miles.⁹⁵ The behaviour of the seller is relevant in this regard, as in *Rogers v Parish (Scarborough) Ltd.*⁹⁶

Revocation of acceptance

D.108 Where the “reasonable time” criterion is interpreted restrictively, the US purchaser can attempt to rely upon their right to revoke acceptance. A purchaser may not revoke acceptance of goods unless the non-conformity substantially impairs the value of the goods to that buyer. In contrast, there is no equivalent requirement for a buyer who wants to reject goods - *any* failure to conform to the contract justifies rejection.⁹⁷

D.109 There are two grounds upon which the buyer can revoke acceptance. Firstly, the buyer may revoke where goods were purchased on the basis that the non-conformity in the goods would be cured, and there has been no “seasonable” cure. Secondly, revocation is acceptable where the non-conformity was difficult to discover prior to the acceptance. The revocation must take place shortly after the buyer has, or a reasonable buyer should have, discovered the non-conformity. It must also take place before a change in the condition of the goods not due to the non-conformity.

D.110 A buyer who is seeking to revoke their acceptance must give notice to the seller in a timely fashion. The buyer will then be entitled to all the same remedies as a buyer who rejects goods; the buyer should receive a refund of all money paid and is not required to give any credit for the beneficial use of the product.

⁹² J J White and R S Summers *Uniform Commercial Code* (2000), p 318.

⁹³ *Hummel v Skyline Dodge Inc* (1978) P 2d 73 (Colorado); *Pratt v Winnebago Industries Inc* (1979) 463 F Supp 709 (Pennsylvania); *Bicknell v B & S Enterprises* (1981) 287 SE 2d 310 (Georgia).

⁹⁴ *Zabriskie Chevrolet Inc v Smith* (1968) 240 A 2d 195 (New Jersey); *Jakowski v Carole Cabriolet Inc* (1981) 433 A 2d 841 (New Jersey); *Capitol Dodge Sales Inc v Northern Concrete Pipe Inc* (1983) 346 NW 535 (Michigan).

⁹⁵ *Sarnecki v Al Johns Pontiac* (1966) 3 UCC 1121.

⁹⁶ [1987] QB 933.

⁹⁷ See § 2–601; this is known as the “perfect tender” rule.

- D.111 The right to revoke acceptance has allowed purchasers to return goods long after purchase. A common fact pattern involves the purchaser informing the seller of defects soon after purchase. The seller then attempts to repair the goods, but the repairs fail. In these circumstances the courts seem willing to allow the purchaser to revoke acceptance. So, after 14 months in which a car was repaired eight times, and became undrivable five times, the purchaser was entitled to revoke acceptance.⁹⁸ Even after three years have passed, revocation may be made within reasonable time if a car has spent a lot of time in the seller's repair centre.⁹⁹
- D.112 The second ground for revocation is that non-conformity has been difficult to discover. On this basis, the purchaser can sometimes revoke acceptance without allowing the seller to cure the non-conformities. So, where a purchaser noticed that a car did not include a spare tyre, he could revoke his acceptance of the car the morning after delivery.¹⁰⁰ Some latent defects only become apparent after a fairly long time, and revocation is still allowed where the purchaser could not be expected to find the non-conformity earlier. After four months the purchaser of a jeep was entitled to revoke acceptance, when the drive shaft fell off.¹⁰¹

Cure

- D.113 Where a seller makes a non-conforming delivery, which is rejected by the buyer, and the time for performance has not yet expired, the seller may satisfy ("cure") the contract by making a conforming delivery. In addition, the seller has the right to cure non-conformities after the time for performance has passed, in certain circumstances:
- D.114 Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.¹⁰²
- D.115 There is little indication of how long the seller has to perform the cure. In one case, the seller offered to deliver a replacement shipment of oil a month after the original contract date, and this was held to be reasonable.¹⁰³ Factors that are likely to be relevant include the amount of inconvenience to the buyer and the length of time the cure is likely to take.¹⁰⁴

⁹⁸ *Conte v Dwan Lincoln-Mercury Inc* (1976) 374 A 2d 144 (Connecticut).

⁹⁹ *Aluminium Line Products Co v Rolls-Royce Motors Inc* (1994) 649 NE 2d 887 (Ohio).

¹⁰⁰ *Colonial Dodge Inc v Miller* (1984) 362 NW 2d 704 (Michigan).

¹⁰¹ *Maxwell v Crabtree Ford Inc* (1989) 543 NYS 2d 626 (New York).

¹⁰² § 2-508 (2).

¹⁰³ *T W Oil Inc v Consolidated Edison Co* (1982) 443 NE 2d 932 (New York).

¹⁰⁴ *Ramirez v Autosport* (1982) 440 A 2d 1345.

- D.116 Even where the seller is offering a cure, a buyer will still be entitled to reject in some circumstances. In one case involving a faulty car the Superior Court of New Jersey held that the purchasers could legitimately say that they had lost all faith in the vehicle and cure was therefore impossible.¹⁰⁵

The right to reject - conclusion

- D.117 There are similarities between the US right to reject and the UK right to reject. The UCC's regime effectively requires a purchaser to take active steps to identify patent defects at the time of purchase, and very soon after. Having identified any defects, the purchaser can immediately reject. If the seller tries to cure the defect, either by right or with the purchaser's consent, the right to reject is effectively suspended for as long as the repairs are attempted.
- D.118 Latent defects are treated differently, in that an extended period exists in which the purchaser can revoke acceptance. This looks similar to the UK right to reject, extended over a longer time period.
- D.119 There are significant differences between US law and the CSD regime in the Sale of Goods Act 1979. Firstly, upon revocation of acceptance, the US purchaser is entitled to a full refund, which is not reduced to take account of the purchaser's use of the goods.¹⁰⁶ Secondly, in cases of latent defects in the US the seller has no right to cure.

Warranties - The Magnuson-Moss Act

- D.120 The Magnuson-Moss Act was enacted in 1975.¹⁰⁷ It applies across the 50 states and other territories, and provides protection wherever goods worth more than \$5 are sold *with a written warranty*. The focus of the Act is on those warranties, and on the party that provides the warranty (whether seller or manufacturer of the goods). The Act provides that warranties must be "conspicuously designated" as either a full or limited warranty.¹⁰⁸
- D.121 Full warranties must comply with federal minimum standards, and will be deemed to do so even if their contents are different.¹⁰⁹ The minimum standards require the warrantor to remedy any faults with the products within a reasonable time and without charge, where those faults arise during the duration of the warranty. It is for the warrantor to choose between the remedies of repair, replacement or a refund.¹¹⁰ Where a reasonable number of attempts to remedy the problem have failed, however, the consumer becomes entitled to choose a refund or a replacement product.

¹⁰⁵ *Zabriskie Chevrolet Inc v Smith* (1968) 240 A 2d 195 (New Jersey).

¹⁰⁶ J J White and R S Summers *Uniform Commercial Code* (2000), p 331.

¹⁰⁷ Title 15 of the United States Code, Chapter 50.

¹⁰⁸ This is required whenever the goods cost more than \$10: above, s 2303.

¹⁰⁹ Above, s 2304.

¹¹⁰ Except that the supplier may not choose a refund unless a replacement is not practicable or the consumer is willing to accept a refund.

- D.122 The Magnuson-Moss Act does not specify how many attempts will be seen as reasonable. It allows the Federal Trade Commission to lay down a fixed number,¹¹¹ but this does not appear to have been done.¹¹² However, one consumer advice website appears to suggest that a consumer can demand a refund or replacement after two or three attempts.¹¹³
- D.123 Where a consumer is entitled to a refund, the Act says that the supplier may deduct an amount based on reasonable depreciation, where it is permitted by rules of the Federal Trade Commission. It does not appear that the Federal Trade Commission has made any relevant rules, and so it seems that the consumer should get a refund without a discount.¹¹⁴
- D.124 The Act states that the warrantor is not normally obliged to pay the incidental expenses of a consumer. However, the consumer is entitled to recover such expenses where remedies are not carried out within a reasonable time.¹¹⁵
- D.125 There are no minimum guarantees where a product is sold with a limited warranty. Consumers are protected by the general requirement that the terms of a warranty should “fully and conspicuously disclose in simple and readily understood language the terms and conditions”.¹¹⁶
- D.126 In conclusion, the Magnuson-Moss Act is based on a “signalling theory” - encouraging better information from suppliers of warranties. Any product that is covered by a full warranty is guaranteed a degree of protection, and consumers should know that they are not so well protected when the warranty is classed as “limited”.

Lemon Laws

- D.127 Every state in America now has a “lemon law” to protect the purchasers of new cars which are deemed to be irredeemably faulty. These laws differ from state to state, so we will focus on the common elements evident in most of the regimes.
- D.128 Each state imposes different conditions upon consumer redress, but the general scheme is quite uniform. The primary focus of many states’ lemon laws is new cars. However, a large number of states provide protection for at least some used-car purchases. Whether other consumer vehicles, such as motorcycles, are covered depends upon the individual state. Most lemon laws only apply if the purchaser is a consumer, and the vehicle is of a type normally used by consumers.

¹¹¹ Above, s 2304(a)(4).

¹¹² None is listed in the Code of Federal Regulations: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=3ad5b48a02eb1707974872e00175bbb5&c=ecfr&tpl=/ecfrbrowse/Title16/16cfrv1_02.tpl (last visited 10 June 2008).

¹¹³ See http://www.lemonlawamerica.com/state_laws/alabama.htm#mmwa (last visited 10 June 2008).

¹¹⁴ P C Ward, *Federal Trade Commission: Law, Practice and Procedure* (Release 35, 2005) p 10-42 (note 85) states that the Commission did propose a rule, but later declined to promulgate it. The refund, therefore, should be full.

¹¹⁵ Title 15 of the United States Code, Chapter 50, s 2304(d).

¹¹⁶ Above, s 2302(a).

- D.129 In some states the lemon law applies to all car purchases, and guarantees a remedy when things go wrong. Other states make lemon law rights contingent on there being a pre-existing warranty.¹¹⁷ This effectively means that purchasers in those states have no rights under the lemon laws if they do not also have a warranty.
- D.130 Generally, lemon laws cover faults which “significantly impair the use, market value or safety of the motor vehicle”. Some states are stricter, however, and require that the fault must both impair the value of the vehicle *and* fall within the warranty.¹¹⁸
- D.131 All lemon laws require the manufacturer to correct the fault where there is a qualifying fault. A range of remedies are triggered after “a reasonable number of attempts” at repairing a problem. Lemon laws specify what is deemed to be “reasonable”. The standard approach, with some variations, seems to be that after four attempts to fix the same defect, the consumer can seek a secondary remedy. Alternatively, a car that is off the road for 30 days will be deemed to have had a reasonable number of repairs, and the consumer can seek a remedy.
- D.132 Some of the variations to this scheme are notable. The lemon law of Arkansas, for example, provides that the manufacturer is only permitted one attempt to repair a fault which is likely to cause death or serious injury.
- D.133 For a consumer to rely on a lemon law they must show that the fault, and the lack of a remedy, arose within a particular timescale. These vary quite widely between states. At the lower end, a large number of lemon laws only apply for the first year after purchase, or the length of the manufacturer’s warranty, whichever is shorter. At the more generous end, some states allow for a period of 2 years or 24,000 miles, whichever comes sooner.
- D.134 Where the car has been shown to be a “lemon” with faults that cannot be fixed, other remedies become available. Generally speaking, these include: a replacement new car; a replacement car of a similar age; or a refund. The states vary as to whether the choice of remedy is the purchaser’s, the manufacturer’s or whether the lemon law is silent on this point.
- D.135 In all but two states any refund can be reduced to allow for the consumer’s use of the vehicle.¹¹⁹ This reduction is calculated in a number of different ways, though in all cases an additional allowance can be made for damage to the car not attributable to normal wear and tear. In ten states the law does not quantify the reduction, which is said to be “that amount directly attributable to use by the consumer”.¹²⁰

¹¹⁷ This appears to be the case, through a number of different mechanisms, in California, Iowa, Kentucky, Louisiana, Minnesota, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas and Wisconsin.

¹¹⁸ See, for example, South Dakota and Wisconsin.

¹¹⁹ The states without any allowance for the consumer’s use are Ohio and West Virginia.

¹²⁰ Taken from the Arizona lemon law.

D.136 In approximately half of the states a formula is set out in the legislation. The basic approach is set out below, although some states have more complicated formulae. Quite a few states opt for the sum of 120,000 in the fraction, rather than the 100,000 shown here.

$$\frac{\text{Number of miles travelled before the consumer first reported the problem}}{100,000} \times \text{Original purchase price}$$

D.137 In a number of states a fixed sum is awarded per mile travelled, for example 10 cents per mile. Alaska seems to be alone in allowing for the consumer's use by reference to time. Their lemon law discounts the value of the car on the basis of a seven year straight line depreciation.

D.138 A small number of states set limits on the amount which can be reduced for the consumer's use. These states do not allow a discount that is larger than 10% or 15% of the original purchase price.