THE INTERNATIONAL COMMERCE & LAW REVIEW Vol. 44 DEC. 2009 pp.31~55

Article submitted on 2009. 01. 24.
Examination completed on 2009. 12. 07.
Publication accepted on 2009. 12. 18.

The Liability System and the Legal Nature of the Seller's Liability for Defective Goods under Korean Law and the PELS

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I. Introduction

If a seller does not perform in accordance with either express or implied contractual terms, the failure to effect due performance may be due to his fault or some causes for which he cannot be blamed, but for which he nevertheless must bear the risk. It may be also sometimes caused rather by a buyer who is to receive due performance either by his fault or by other causes for which he bears the risk. Most legal systems empower the buyer

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to exercise certain remedies only where the seller is in fault or carries the risk.

While it is common in that most jurisdictions render the aggrieved buyer some remedies, it is to be noted that each jurisdiction takes different approaches in terms of its liability system to relieve the innocent buyer. This is particularly of distinctness when the seller delivers the goods which are defective in terms of quality, quantity or title. On the one hand, a typical example is found in some of civil law countries which advocates the dual liability system; the general liability for default and the seller's guarantee liability for defective goods.[1] The former applies to all kinds of contract including sales contract and distinguishes among three kinds of irregularity in accordance with the external aspect of irregularity; first, delay in performance, second, impossibility of performance and third, incomplete performance or positive breach of contract.[2] And it is based upon the principle of fault in a sense that the default party may be liable only where he is blameworthy for his default, namely where the default is caused by his fault. Contrary to this, the latter applies only to sales contracts and exists separately from the general liability because the seller's delivery of defective goods is not considered to fall within one of the above three irregularities.[3] And this seller's guarantee liability is known to be a strict liability which is imposed upon the seller regardless of his fault causing the delivery of defective goods.

On the other hand, the Unidroit Principles of International Commercial Contracts (here-in-after the PICC) and the Principles of European Contract Law (*here-in-after* the PECL) advocate a unitary concept of non-performance which covers failure to perform an obligation under the contract in any way, whether by a complete failure to do anything, late

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1) K. Zweigert and H. Kötz, (Eng. trans. by Weir), An Introduction to Comparative Law, 3rd ed., Oxford: Oxford Univ. Press (1998), at 494 ff.

2) Id.

3) Id.

performance or defective performance.[4] This explains they are based upon the unified liability system adopting the concept of non-performance which exists regardless of the external aspects of irregularity and the defaulting party's fault on non-performance. The liability system along with the unitary concept is also embraced by the United Nations Convention on International Sale of Goods (1980) (here-in-after the CISG) and is shared by many of the modern civil law and common law countries.[5] Among the international rules, what draws our particular attention at present is the Principles of European Law on Sales (*here-in-after* the PELS) because it is deemed to be one of the most modernized and elaborated rules till now.[6] In addition, as regards the liability system, it's importance can be found in that the PECL provides general and abstract rules of contract law which are applicable to all types of contracts, independent of their object of contract[7] or the status of the parties,[8] whereas the PELS has been drafted to reflect the necessity for sales specific rules and provides the specific rules which take precedence over the rules of the PECL.[9] This seems to interest us in that their relationship between the PECL and the PELS is a kind of general versus specific rules which leads us to associate it with the

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4) PICC Art. 7.1.1; PECL Art. 8:101.

5) For a comparative overview on this, see O. Lando, 'Non-performance (Breach of Contract) of Contracts', in A. Hartkamp et al (eds), Towards a European Civil Code, 3rd ed., London: Kluwer Law International (2004), at 505 ff.; K. Zweigert and H. Kötz, op cit., at 496; G. Treitel, Remedies for Breach of Contract, Oxford: Clarendon Press, (1988), at 129 ff.

6) The Working Team on Sales Law which is one of the study groups on a European Civil Code(http://www.sgecc.net/pages/en/home/index.htm) embarked on its projects of comparative research and drafting rules for sales contract in 1999 and introduced in public the completed set of rules with a detailed commentary and comparative notes in early last year. E. Hondius et al. (ed.), Principles of European Law on Sales, Oxford: Oxford University Press (2008).

7) For example, sales, construction, agency, franchise, finance and etc.

8) For example, consumer, merchant, small business, multinational and etc.

9) When one applies the PELS, it is to be noted that certain subjects of general application such as validity, formation or damages are not governed by the PELS but by the PECL. E. Hondius et al. (ed.), op cit., at 102.

relationship between the general liability versus the seller's guarantee liability under the dual liability system.

Having said that, the ensuing discussions are, first, to provide a comparative overview of liability systems Korean law and the PELS adopt for its own approach to deal with various irregularities of contractual performance, and second, to examine in a comparative way the matters of how the seller's liability when the goods delivered by him is defective in various aspects is unfolded under the chosen liability system and what is the legal nature of the seller's liability. The basic question for this discussion is placed on whether a solution from one jurisdiction may facilitate the systematic development and reform of another jurisdiction.

Ⅱ. Korean Law

1. Liability System

Korean law has developed a very complex liability system for dealing with what is called breach of contract in common law countries; Korean law has no comprehensive notion like 'breach of contract' in common law countries and it does not deal with default in a unitary manner. Korean law rather distinguishes three types of default; delay in performance,[10] impossibility of performance,[11] and incomplete performance.[12] Such types of default depend all upon what has happened to the goods rather than on whether any specific obligation has been broken. Once one finds a default to be fallen within one of those types of default, the aggrieved party may rely on the specific independent remedy rules applicable to each type of

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10) KCC Arts. 387-389, 392, 395, 544.

11) KCC Arts. 390, 546.

12) This category is not specified in KCC, but recognized by scholars' theory and cases. See the Korean Supreme Court Case, 28/1/1994, 93 Da 43590.

default.[13] Therefore, where the sales contract is not properly performed as agreed by the parties in their program, the first thing for the aggrieved party to do is to inquire the questions of what kind of default is committed, what remedies are available for that particular default and what requirements must be satisfied for a remedy he seeks to rely on. One of the unique features of Korean law compared to other civil law countries is that while the remedy of damages is specified in one provision which can be applied in any type of default,[14] other remedies are separately provided according to the types of default.[15]

This liability system explained so far is called the general liability and it is generally applicable to all kinds of contracts. In addition to that, Korean law provides special liability rules exclusively applicable to sales contracts; the seller is liable under the special regime when he delivers the goods which are defective in quality, quantity or title.[16] This sales specific liability is called the seller's guarantee liability for defective goods and its rationale is mainly to protect the aggrieved buyer where he may not be properly remedied by virtue of the general liability rules. This is because the seller's delivery of defective goods may not fall within any of the above three types of default under the general liability, or even if it does, it may

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13) Yun-jik Kwak, General Rules in Obligatory Law, Seoul: Pakyoungsa (2006), at 70ff. This is a majority view at present in Korea, which is mainly influenced by German law. For the German approach to non-performance, see generally, B. Markesinis, W. Lorenz, and G. Dannemann, The German Law of Obligations, Volume I: The Law of Contracts and Restitution: A Comparative Introduction, Oxford: Oxford Univ. Press (1997), at 398 ff., and see also K. Zweigert and H. Kötz, op cit., at 524 ff.; N. Horn, H. Kötz, and H. Leser, German Private and Commercial Law: An Introduction, Oxford: Oxford Univ. Press (1982), at 93 ff.

14) KCC Art. 390 (Non-performance of Obligations and Claim for Damages) "If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may claim damages; but this shall not...". Cf. Notwithstanding the overwhelming influence of German law, this provision is rather similar to French law (Code Civil Arts. 1142, 1146, 1147).

15) E.g., KCC Arts. 544 (Delay and Rescission), 546 (Impossibility and Rescission), 389 (Specific performance), and *etc.*

16) KCC Arts. 570 ff.

not always entitle the buyer to rely on any of the remedies under the general liability. That is, it seems unfair if there is no remedy available for the buyer where the seller's delivery of defective goods has caused the balance between price and value to be upset and thus here one needs to impose on the seller a special liability for defective goods to strike a proper balance between them.[17]

Having said that, the residual matter we are here concerned is about what differences between two distinctive liabilities could be found in terms of the requirements to raise each liability, its effects and limitation period. First of all, as regards the requirements to raise each liability, the seller's guarantee liability is a strict one in a sense that it does not require the seller's fault or intention,[18] whereas the general liability is a liability based on the principle of fault.[19] In addition, while it is crucial for the seller's guarantee liability that the buyer is at the time of contract unaware of the existence of a defect and (as the case may be) not negligent in failing to discover the existence of a defect,[20] it is unnecessary for the general liability.

As to the effects of each liability, the measure of damages is based on the buyer's expectation interests in the case of a claim under the general liability, whereas the seller's guarantee liability limits it to something narrower than that allowed in the general liability.[21] In addition, the

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17) KCC Arts. 580-584.

18) However, only one scholar insists that fault is required to raise the seller's guarantee liability. See Joo-soo Kim, Particulars in Obligatory Law, Seoul: Samyoungsa (1997), at 214.

19) KCC Arts. 390 f.

20) KCC Arts. 572(3), 580(1).

21) E.g., it is limited to the compensation based on the buyer's reliance interests or it is even understood to mean mere price reduction, which seem to exclude the buyer's consequential losses. This narrowing is due to the idea that the remedy of damages under the seller's guarantee liability which exists regardless of the fault principle cannot be treated in the same way as under the general liability which is governed by the fault principle.

buyer's right to rescind the contract under the seller's guarantee liability is depended upon the question of whether he is able to achieve the object of the contract in the presence of defects in quality,[22] or whether he would have entered into the contract had he known of defects in quantity at the time of contract,[23] whereas that right under the general liability does not necessarily rely on these questions.[24]

Finally, a short limitation period of six months in the case of difference in quality[25] and one year in the case of difference in quantity from the time when the buyer was aware of the defect[26] is respectively applicable in the seller's guarantee liability, whereas a limitation period of ten years is applied in the general liability.[27]

2. Legal Nature of the Seller's Guarantee Liability

While it is clear that the general liability under Korean law is a contractual one in its legal nature, there are unsettled two opposing views as to the legal nature of the seller's guarantee liability; the legal liability theory[28] and the contractual liability theory.[29] The former maintains the

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22) KCC Arts. 575(1), 580(1).

23) KCC Art. 572(2).

24) For instance, the buyer's right to rescind the contract for delay does not depend on the possibility to achieve the object of the contract even though the seller's failure to perform within the added time given by *nachfrist* may make it negative. KCC Art. 544 (Delay and rescission). On the other hand, the right to rescission for impossibility is closely related to the matter of the possibility in a sense that impossibility is in its essence a typical case of non-achievable object even though it is not expressly provided in KCC Art. 546 (Impossibility and rescission).

25) KCC Art. 582.

26) KCC Art. 573.

27) KCC Art. 162.

28) This theory is a prevailing view at present in Korea. The scholars in favour of this view are Profs. Yun-jik Kwak, Ki-sun Kim, Jeung-han Kim, Hyun-tae Kim, Tae-jae Lee, etc.

29) The scholars in favour of this theory are Profs. Joo-soo Kim, Hyung-bae Kim, Jeok-in Kim, Eun-young Lee, *etc.*

seller's guarantee liability is an effect of a non-juristic act[30] rather than a juristic act by the intention of a contractual party.[31] The liability is imposed on the seller by the law regardless of the contractual party's intention on the basis of the unique nature of contract made for a consideration.[32] This theory is based on its unique view of *impossibilium nulla obligatio* and *specific goods dogma* according to which as long as the specific goods sales are concerned and there existed an initial defect at the time of contract, the seller's contractual duty to deliver non-defective goods should be denied and it must be limited to deliver the goods in *status quo* at the time of contract. And thus, the law steps in to correct any unbalance caused to the buyer in terms of value for money due to the existence of defect. That is, it is the legal liability intended to protect the buyer who paid the price in reliance on the goods being free from defects.

Contrary to this, the contractual liability theory denies the theoretical basis of *impossibilium nulla obligatio* and *specific goods dogma* in the legal liability theory and contends that the seller's guarantee liability is 'in the nature of contractual liability' in a sense that the KCC presumes 'a

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30) A juristic act has its legal effects on the condition of a party's declaration of intention to do the act or the conduct, whereas non-juristic act lacks the intention.

31) For the historical, theoretical and positive law background for this theory, see Byung-mun. Lee, A Comparative Study on the Seller's Liability for Non-conforming Goods under CISG, English law, European Law and Korean Law, Doctoral thesis, Univ. of Warwick, (2001), at 31 ff.

32) For the scholars' view in favour of this theory, see Ki-sun Kim, Particulars in Korean Obligatory Law, Seoul: Bobmunsa (1988), at 133; Young-hwan Lee,"Re-examination of the Theories as to the Nature of the Seller's Guarantee Liability", (1989) 16(12) Ko-shi-yoen-koo 109; Jeung-han Kim, Particulars in Obligatory Law, Seoul: Pakyoungsa (2006), at 146; Won-lim Jee, "A Study as to the Categories of Non-performance", (1997) 15 Min-sa-bup-hak 374, at 400 ff.; Yeon-eoi Eo,"The Nature of the Guarantee Liability for Defective Goods", (1989) 226 Pan-rae-wol-bo 19, at 21 ff.; Yun-jik Kwak, Particulars in Obligatory Law, Seoul: Pakyoungsa (2003), at 137 ff. (He argues that the seller's guarantee liability is regulated under the name of legal liability due to its historical development, even though it is generally admitted that the nature of the seller's guarantee liability is a contractual one). For the cases in favour of this theory, see e.g., the Korean Supreme Court Cases, 30/10/1957, 4290 Min-Sang 552; 21/4/1960, 4292 Min-Sang 385.

contractual obligation' to deliver the goods free from defects.[33] The seller's guarantee liability is, thus, understood as a contractual one for the breach of the contractual obligation which may be categorized as incomplete performance. According to this theory, the rules on the seller's guarantee liability exist as the special rules within the rules for incomplete performance under the general liability.[34]

One must here note that such conceptual differences in their understanding as to the legal nature of the seller's guarantee liability may yield lots of practical differences in its application. For instance, different definitions by the above two theories on the concept of defect may end up with different results on the existence of the seller's guarantee liability; the legal liability theory sticks with the objective criterion for defect,[35] whereas the contractual liability theory contends it must be the subjective one.[36] This matter can be also found in their different understandings as to the

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33) For the scholars in favour of this theory, see Hyung-bae Kim, Particulars in Obligatory Law, Seoul: Pakyoungsa (1997), at 309 ff.; Hyung-bae Kim, Lectures on Civil Law, Seoul: Pakyoungsa (2008), at 1260 ff.; Eun-young Lee, Particulars in Obligatory Law, Seoul: Pakyoungsa (2005), at 307 ff.; Kyu-chang Cho, "The Guarantee Liability for Defective Goods", (1983) 21 Bup-hak-non-jip (The Institute of Legal Study of Korea University) 221, at 221 ff.; Joo-soo Kim, op cit., at 198 ff.; Dae-jeong Kim, "Reconstruction of the Guarantee Liability for Defective Goods by the Contractual Liability Theory", (1993) 9 Min-sa-bup-hak 242; Bup-young Ahn, "Damages for Defective Goods", (1995) 11, 12 Min-sa-bup-hak 194; Choon-soo Ahn, "Problems under the Guarantee Liability Law", (1995) 11 Min-sa-bup-hak 419; Sang-kwang Lee, "The Basic Matters in the Seller's Guarantee liability", (1998) 5(1) Bee-kyo-sa-bup 283, at 283 ff. For the cases in favour of this theory, see e.g., the Korean Supreme Court Cases, 14/11/1989, 89 DaKa 15298 14/4/1992, 91 Da 17146.17153 30/6/1995, 94 Da 23920.

34) For the historical, theoretical and positive law background for this theory, see Byung-mun Lee, op cit., at 38 ff.

35) This is so called 'the objective criterion theory'. According to this theory, if the goods delivered are not conformed to the general purpose of the concerned goods, there is a defect in the goods. Thus, there can exist a defect even if no defect is found by the contractual agreements.

36) This is so called 'the subjective criterion theory'. It maintains that a defect should be decided subjectively by the test of whether the goods delivered are conformed to the purposes purely agreed between the parties.

time when a defect must exist to raise the seller's guarantee liability; the legal liability theory insists that it is the time of contract,[37] whereas the contractual liability theory maintains that it is the time of transfer of risk which often coincides with the time of delivery. Further to those matters on the existence of the seller's guarantee liability, their different understandings as to the legal nature of the seller's guarantee liability may produce different results in the contents of remedy for the same defect; for instance, while the legal liability theory argues that the scope of damages is limited to the compensation for expenses or other losses incurred in reliance on the validity of the contract,[38] the contractual liability theory contends that, although arguable among the scholars in favor of this theory, it is in principle based on the compensation for the buyer's expectation loss.[39]

Ⅲ. PELS

1. Liability System

The PELS adopts the same unitary concept of non-performance as used in the PECL in order to deal with irregularities of contractual performance. It denotes any failure of a party to perform an obligation under the contract[40] and its underlying doctrine is in that all contracts are treated as

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37) This is applicable to the case of specific goods and based on the idea that the principle of *impossibilium nulla obligatio* and *specific goods dogma* is concerned only with the matter of the defect at that time.

38) Namely, the damages are for the buyer's reliance interest.

39) They tend to limit the scope of damages to something lesser than the buyer's expectation losses on the basis of their idea that the remedy of damages under the seller's guarantee liability which exists regardless of the fault principle cannot be treated in the same way as under the general liability which is governed by the fault principle. E.g., it is limited to the buyer's reliance loss or mere price reduction, which seem to exclude the buyer's consequential losses.

40) O. Lando, and H. Beale (ed.), Principles of European Contract Law, Part I and II,

promises leading to the remedies contained in either the PECL or the PELS in the event of non-performance. Here the concept of non-performance under the PECL and the PESL covers all the aspects of irregularities of contractual performance which include delay in performance, impossibility of performance, and incomplete performance.[41] Therefore, unlike Korean law, there is no need to categorize the various types of default in order for an aggrieved party to invoke remedies available for a non-performance. In addition, it does not matter whether a non-performed obligation in question is one of principal or ancillary contractual obligations;[42] insofar as a debtor fails to perform one of his contractual obligations, it may constitute a non-performance which may empower a creditor to rely on the remedies for the non-performance. Furthermore, the existence of a non-performance is not depended upon the question of whether or not it was attributable to the debtor's fault. All in all, once the agreed result has not been achieved in fact, it may constitute a non-performance and cause the debtor to be liable for his non-performance regardless of whether or not a non-performed obligation is of principal or ancillary nature and whether or not it was due to the debtor's fault.[43]

All these examinations on the concept of non-performance under the PELS seem to lead us to the conclusion that it adopts an unified liability system under the name of non-performance. However, before we have come to such firm conclusion, it should be pointed out that the PELS has made two kinds of deviations from the rules on remedies contained in the PECL. The first deviation can be found in the provisions of section 1, chapter 4 which are applicable to the cases of a breach of any obligation under the contract. They are, first of all, to restrict the possibility to terminate the sales contract under art. 8:103(a) PECL by modifying the

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London; Kluwer Law International (2000). at 359.

41) Id.

42) Id.

43) Cf. Id., at 359 ff.

notion of fundamental non-performance contained therein,[44] and second to set out the limits of derogation for consumer sales concerning the remedies for lack of conformity under the PELS.[45] The second deviation, which draws our particular attention as to its liability system, is found in section 2 and 3, chapter 4. It provides a special regime dealing with the buyer's remedies and the buyer's duty of examination and notification which are all applicable in the event of a particular type of non-performance on the part of the seller, that is, the seller's failure to deliver the goods in conformity with the contract as stipulated in art. 2:201.[46] In this regard, one may be likely to cast a doubt on our proposition that the PELS adopt an unified liability system under the name of non-performance and to conclude that, as in Korean law, the PELS is based on a dual liability system in that it has a special regime for the seller's liability for non-conforming goods which exists separately from the PECL. However, it can be hardly true for the following reasons. First, the reason for having such a special regime is different from Korean law in that the PELS is provided to supplement the general rules under the PECL which are deemed to be too general and thus often do not provide reasonable solutions for all the specific problems in the context of remedies under a sales contract;[47] contrary to this, the special regime of the seller's guarantee liability in Korean law is provided for the protection of the buyer who may face with no remedies under the general rules even if there is an unbalance in terms of value for money due to the seller's delivery of defective goods. Second, although the PELS may be distinguished from the PECL in its requirements for some of the individual remedies the buyer can rely on,[48] one should remember that, unlike Korean law, there is no

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44) The PELS Art. 4:102.

45) The PELS Art. 4:103.

46) The PELS Art. 4:201 ff.

47) E. Hondius et al. (ed.), op cit., at 249.

48) For instance, see the PELS Art. 4:102(Termination of the contract), Art. 4:203(Seller's

difference in the basic requirement for the buyer to rely as a whole on the general rules for remedies under the PECL and on the specific rules for remedies in the event of non-conformity under the PELS.[49] All these facts seem to explain that the special regime can not be isolated from the general rules and the existence of the sales-specific rules on remedies under the PESL does not affect the position that the PELS is based on the unified liability system under the name of non-performance.

2. Legal Nature of the Seller's Liability for Non-Conforming Goods

As explained above, the PELS uses the concept of non-performance which designates any failure of a party to perform an obligation under the contract and provides its contractual remedies available in the event of non-performance. And it is to be noted that the PELS imposes on the seller an obligation to deliver the goods in conformity with the contract and here the conformity obligation includes not only agreed conformity[50] but also implied conformity.[51] In addition, unlike Korean law, it is imposed on the seller regardless of the subject-matter of the sales contract, *i.e.*, specific goods or generic goods. The seller's breach of such obligation under the PELS may constitute a non-performance and entitle the buyer to resort to the specific remedies set out under the PELS.[52] All these seem to

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opportunity to remedy the lack of conformity), Art. 4:207(Limitation of liability for damages of non-professional sellers) and etc.

49) Contrary to this, Korean law distinguishes between the general liability and the seller's guarantee liability, for instance, in terms of the requirement of the seller's fault.

50) The PELS Art. 2:201. Here the seller is obliged to deliver the goods in conformity with the contract in terms of agreed quantity, quality, description, packaging, possible accessories and instructions.

51) The PELS Art. 2:202 ff. Here unless the parties have otherwise agreed, the seller is obliged to deliver the goods in implied conformity with the contract in terms of their fitness for purpose, quality, packaging, incorrect installation in consumer sale, and third party rights and claims.

52) The PELS Art. 4:201 ff. But subject to certain procedural requirements such as

indicate that the legal nature of the seller's liability for non-conforming goods is of the contractual one. And as explained above, it is non-fault-based liability in that the seller is strictly liable even though he was unaware of non-conformity and took all reasonable care for the delivery of defective goods.[53]

Ⅳ. Evaluation

1. Liability System

We have examined above the liability system and the legal nature of the seller's liability for non-conforming goods under Korean law and the PELS. It has been found that while Korean law adopts the dual liability system which is splitted into the general liability and the seller's guarantee liability for defective goods, the PELS does the unified liability system which assimilate the special regime for the seller's delivery of non-conforming goods into the paradigm of contractual liability by using the concept of non-performance. It is true that the dual liability system in Korean law has been appreciated in that it efficiently governs various legal problems arising from sales contracts. This is because the seller's guarantee liability rules have properly functioned to supplement the general liability rules which are applied to all the other contracts without infringing the other general liability rules not related to the seller's guarantee liability rules.

However, this dual liability system causes some complexities owing to the existence of two separate regimes, raising the problem of application as to which liability arises and the problem of co-existence of two liabilities

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examination and notification. See the PELS Art. 4:301 ff.

53) Cf. for a good comparative study on the concept of fault both in a international and domestic level, see B. Fauvarque-Cosson and D. Mazeaud (ed.), European Contract Law - Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules, Munich: Sellier European Law Publishers (2008), at 203 ff.

in one breach of contract. These problems arise basically from its artificial distinction between three types of default under the general liability and defective performance under the seller's guarantee liability. One of typical difficult cases can be found in a distinction between *aliud* and defective goods.[54] Once an instance of default is recognized as the *aliud*, the rules of the general liability are applicable. Thus, it may empower the buyer to demand either specific performance, or rescission and/or damages which are all subject to the fault principle and the limitation period of ten year s.[55] On the other hand, if it is regarded as a delivery of defective goods, it is governed by the rules of the seller's guarantee liability. This may allow the buyer to resort to the remedies of claiming a substitute good, or rescission and/or damages which can be exercised regardless of the fault principle and is subject to rather the shorter limitation period of six months or one year after the buyer's awareness of defect.[56] As long as there is no clear cut criterion to distinguish between them, such substantially different treatments in one instance of default in terms of the fault principle and the limitation period can be hardly justifiable in some borderline cases.[57]

Having recognized this problem in Korean law, the question is whether it may also arise in the PELS and, if it does, it is properly resolved by the PELS. It could be seen that the PELS may have the same problem as in Korean law because it has a special regime for the seller's delivery of

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54) For instance, in the case of a sales contract for a consignment of Auslese wine, the wine only tasted like Auslese because it contained certain prohibited additives. It was held that this was the delivery of an *aliud* and not of defective goods. See the German case, BGH(VIII) ZR 247/87, 23 November 1988 [1989] DB1513. Another borderline case is where a robot without an arm essential for its proper performance was delivered. It was held that it was a delivery of *aliud* not of defective goods. See BGH (VIII) ZR 72/89, 27June1990,DB2016. The delivery of winter wheat instead of spring wheat agreed in the contract was held to be an *aliud*. See BGH, NJW 68, 640.

55) The KCC Art. 162.

56) The KCC Arts. 573, 582.

57) Byung-mun Lee, op cit., at 65 ff.

non-conforming goods which is distinguished from the other types of non-performance. However, it is to be noted that the concept of non-conformity under the PELS includes not only the aspects of defective quality, quantity and title but also those of *aliud*.[58] In addition, one must also note that all the matters of non-performance including those of non-conformity are homogeneously dealt under the unitary concept of non-performance. In this light, there is no doubt in that the position in the PELS resolves the above problem as regards the borderline cases which may fall within either the regime of the general liability or the seller's guarantee liability.

In addition to the problem raised in some borderline case between the general liability and the seller's guarantee liability, another problem may also arise from the presumption of the dual liability system adopted by Korean law that, like in the other civil law countries, the general liability be distinguished from the seller's guarantee liability in terms of not only their legal nature but also their contents. The presumption may be plausible insofar as the distinguishment is properly reflected in the remedies avaliable for each liability; that is, it may make sense if the remedies available for the general liability are completely or at least substantially different from those for the seller's guarantee liability. This is because otherwise the distinguishment is devoid of purpose. However, this is unfortunately not the case in Korean law because, unlike the other civil law countries, the remedies of rescission and damages in the general liability are identically specified for the remedies in the seller's guarantee liability under the KCC. The identical specification has caused a confusion about what the true contents of the remedies of rescission and damages under the seller's guarantee liability are; this confusion is inherent in long arguments on the matter of whether the seller's guarantee liability is of the contractual or legal nature and of the fault or non-fault based liability. That is, the

58) E. Hondius et al. (ed.), op cit., at 183. The matter of aliud may be dealt with a non-conformity with description required by the contract. The PELS Art. 2:201(a).

confusion is in essence raised in the question of how the presumption made by the dual liability system would explain the remedies of damages and rescission in the seller's guarantee liability even though these are identical to those in the general liability.

Here the residual matter one needs to deal with is how one can resolve or at least lessen the confusion in Korean law as to the interpretation on the same remedies of rescission and damages under the seller's guarantee liability as those under the general liability. In this regard, it is submitted that it is time for us to consider that the same remedies of rescission and damages under the seller's guarantee liability as under the general liability were provided in the first place on the basis of the unified liability syste m.[59] That is, given that the unified liability system is superior to the dual liability system, it seems imperative for us to reexamine the liability system in Korean law from a different angle to unify its dual liability system.[60] This construction may not raise, at least, the confusion Korean law has experienced so far particularly in interpreting the scope of damages under the seller's guarantee liability and in finding its relationship with the remedy of damages under the general liability. Here one thing to be noted is that there is no doubt in that the remedies for the seller's guarantee liability are assimilated into those for the general liability for the purpose of achieving the dual liability system in present Korean law; this may result in that the seller's fault on his delivery of defective goods is necessary for the buyer to rely on any remedy under the seller's guarantee liability because the general liability is understood to be based on the fault principle. However, this result may be problematic in a sense that the buyer may have to leave with empty hands when the seller's delivery of defective goods is not caused by the seller's fault even if it is apparent that there is an unbalance in terms of value for money the buyer paid. In this light, it

59) This consideration may be in line with the position in the PELS which has also the same remedies as under the PECL.

60) Byung-mun Lee, op cit., at 72 ff.

is argued that one should get away with the preposition that the general liability is always based on the principle of fault, whereas the seller's guarantee liability is not, and thus in defiance of the artificial distinction of fault or non-fault based liability. the requirement of fault should be rather depended upon what remedy the buyer seeks to claim.[61] This argument may require us to re-examine in a individual basis every remedy rules for the general liability, particularly as to the requirement of fault for each remedy.[62] In this regard, it is noteworthy that, in influence of the unified modern laws like the CISG, the PICC and the PECL and the recent revision of German law, many scholars in Korean law are now getting doubted about the necessity of the requirement of fault for the remedy of rescission[63] and even for the remedy of damages.[64]

2. Legal Nature of the Seller's Liability for Non-conforming Goods

As regards the legal nature of the seller's liability for non-conforming goods, the PELS is undoubtedly of a contractual one, whereas Korean law is uncertain and scholars are divided into two groups; the legal liability theory group and the contractual liability theory group. The matter of evaluation on such legal nature is in essence closely connected with the matter of the above evaluation on the unified liability system and the dual liability system. As long as it revealed above the unified liability system is

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61) Byung-mun Lee, op cit., at 73 f.

62) Cf. Dae-jeong Kim, "A Grope for Integration of the Law of Non-performance and Warranty - Especially Laying Emphasis on Condition", (2004) 26 Min-sa-bup-hak 3, at 13 ff.; Dong-hoon Kim, "Ein Versuch zur Integration der Nichterfüllungs - und Sachmängelhaftung", (2003) 24 Min-sa-bup-hak 251, at 256 ff., 261 ff.

63) Eg., Hyungbae Kim, Particulars in Obligatory Law, op cit., at 209 f., 219 f., 221 f.; Dong-hoon Kim, op cit., at 256 f. Cf. June-sun Choi, "The Unidroit Principles of International Commercial Contracts and Korean Law", 2002 KCLA Summer Conference Proceedings, Korea Commercial Law Association (2002), at 97 ff.; Dae-jeong Kim, "A Grope for Integration of the Law of Non-performance and Warranty - Especially Laying Emphasis on Condition", op cit., at 15 f.

64) Eg., Dong-hoon Kim, op cit., at 262.

superior to the dual liability system, it proves itself that the nature of the seller's guarantee liability should be a contractual one rather than a legal one. This is because there is no doubt in that the only vehicle to unify the dual liability system is a contract; otherwise, the understanding that the seller's guarantee liability is a legal one in its nature may obstruct one's passage to the unification of the dual liability system.

V. Concluding Remarks

This study has attempted above to provide a comparative overview of the liability systems Korean law and the PELS adopt, that is, the approaches taken by Korean law and the PELS to deal with various irregularities of contractual performance. In addition, it has examined in a comparative way the matters of what is the position of the seller's liability for his delivery of defective goods under the liability system each jurisdiction adopts and what is the legal nature of the seller's liability.

As regards the matter of the liability system, it has found that Korean law adopts the dual liability system which comprises of the general liability and the seller's guarantee liability for defective goods. It could be argued that the position in the PELS is similar to that in Korean law insofar as one assume the seller's guarantee liability be of the contractual nature in Korean law and the relationship between the general liability and the seller's guarantee liability be that of general versus specific rules. This was based on that, similarly to the position taken by some of the contractual liability theorists in Korea, the special rules of the PELS are provided to supplement the general rules of the PECL and the former takes precedence over the latter. However, the study has clarified that the PELS undoubtedly adopts the unified liability system which assimilate the special regime for the seller's delivery of non-conforming goods into the paradigm of contractual liability by using the concept of non-performance. This is proved by that, unlike the PELS, the special regime for the seller's

guarantee liability is intended to protect the buyer in the case where he confronts no remedies under the general liability rules even if there is an unbalance in terms of value for money due to the seller's delivery of defective goods. In addition, it is proved by that, unlike the PELS, Korean law treats the general liability differently from the seller's guarantee liability in terms of the basic requirement of fault; the former is based on the principle of fault, whereas the latter is not.

In addition to that, the study has found that the dual liability system taken by Korean law has caused some complexities as to the matter of which liability is applicable in some borderline cases, particularly in the case of aliud. The complexities are inherent in its artificial distinction between three types of default under the general liability and defective performance under the seller's guarantee liability. Given that different categorization of one instance of default ends up with different treatments in terms of the remedies available and the limitation period, it is argued that this position in Korean law should be reexamined in light of the unified liability system under the PELS based on the concept of non-performance which embraces in a unitary manner all the aspects of default including defects in quality, quantity and title.

Furthermore, it has also found that the position in Korean law has been involved in endless and torturous debates on what are the true contents of the identical remedies of rescission and damages provided under the seller's guarantee liability to those under the general liability in an attempt to distinguish between them. This was ascribed to the traditional presumption among some of civil law jurisdictions that two liabilities are different in terms of not only their legal nature but also their contents of remedies. In this regard, the study argues that the only way to circumvent the unnecessary debates is another way of thinking that the unified liability in Korean law is inferred from the specification of the identical remedies for both the general liability and the seller's guarantee liability under the KCC. In addition, it submits that Korean law should also find its own way out of the artificial distinction of the fault or non-fault based liability in order

to circumvent the undesirable outcome of the possible unified liability system inferred from the above argument in which all the liabilities are based on the fault principle. This may be achieved by the preposition that the requirement of fault be depended upon what remedy the buyer seeks to claim rather than what liability he does to rely on.

Finally, the examination on the legal nature of the seller's liability for defective goods under Korean law and the PELS has found that the PELS is undoubtedly of a contractual one, whereas Korean law is uncertain. It argues that, given that the unified liability system is superior to the dual liability system, the seller's guarantee liability should be treated as a contractual one in order to unify the dual liabilities under Korean law.

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ABSTRACT

The Liability System and the Legal Nature of the Seller's Liability for Defective Goods under Korean Law and the PELS

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This study attempts to provide a comparative overview of the liability systems Korean law and the PELS adopt, that is, the approaches taken by Korean law and the PELS to deal with various irregularities of contractual performance. In addition, it examines in a comparative way the questions of what is the position of the seller's liability for his delivery of defective goods under the chosen liability system and what is the legal nature of the seller's liability.

The study finds that the dual liability system taken by Korean law has caused some complexities as to the matter of which liability is applicable in some borderline cases. The problem in such complexities is originated in that the remedies available and the limitation period applicable are differentiated in accordance with one's different categorization among three types of default under the general liability and defective performance under the seller's guarantee liability. In this light, the study argues that the unified liability system under the PELS is superior because its concept of non-performance embraces in a unitary manner all the aspects of default including defects in quality, quantity and title.

In addition, it finds that Korean law has suffered endless debates on the question of what are the true contents of the same remedies of rescission and damages provided under the seller's guarantee liability as under the general liability. The debates have been come along on the basis of the traditional presumption among some of civil law jurisdictions that two liabilities be different in terms of not only their legal nature but also their contents of remedies. The study argues that the problem may be circumvented, first, by another way of thinking that the unified liability in

Korean law is inferred from the specification of the identical remedies for both the general liability and the seller's guarantee liability under the KCC, second, by the preposition that the requirement of fault be depended upon what remedy the buyer seeks to claim rather than what liability he does to rely on.

Key Words: PELS, Lack of Conformity, European Law, Liability System, Guarantee Liability, Defective Goods, Korean Law