

# Comparative Study of the Requirements for the Buyer's Right to Require Delivery of Substitute Goods under the CISG and the Korean Civil Act

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## Abstract

**Purpose** – This study aims to compare the requirements under the United Nations Convention on Contract for the International Sales of Goods (CISG) and the Korean Civil Act (KCA) regarding the buyer's right to require the delivery of substitute goods. The buyer's right to demand substitute delivery not only protect them from the seller's breach of contract but also preserves the contractual bond between the parties by providing an opportunity for sellers to protect their goodwill and circumvent the extreme remedy of avoidance. However, as substitute delivery entails additional efforts and costs for return and re-shipment, this right should not be allowed in every case of defect. Additionally, unlike the CISG, the KCA contains no specific provision related to the requirements for claiming substitute delivery. Therefore, it would be meaningful to examine and compare what requirements should be fulfilled before the buyer exercises the right in relation to non-conforming goods under the CISG and the KCA.

**Design/methodology** – We conducted a comparative study of the requirements under the CISG and the KCA regarding the buyer's right to require delivery of substitute goods given a seller's delivery of non-conforming goods. Additionally, we referred to the opinions from the CISG Advisory Council, the draft of the KCA amendment, and related precedents, mainly focusing on the existence and severity of defects, reasonableness, and timely notice and requests as the major requirements for substitute delivery.

**Findings** – The results of this study can be summarized as follows: First, the CISG provides more detailed requirements about the right to require delivery of substitute goods; by contrast, the KCA does not stipulate any such requirement. Thus, specific requirements for substitute delivery should be included when amending the KCA. Second, the CISG attempts to minimize overlapping and conflict with other remedies by specifying detailed requirements for the delivery of substitutes. Third, both the CISG and KCA require reasonableness for substitute delivery.

**Originality/value** – Although there are no explicit legal requirements for substitute delivery under the KCA, there has been relatively little discussion of this issue to date. Therefore, the findings of our study can guide future revisions of the KCA to fill this loophole. Moreover, the recently released CISG Advisory Council opinion that clarifies the continuing confusion and debate, can help distinguish which remedy is suitable for a particular case. It may provide practical advice for businesspeople in international trade as well as legal implications for the future development of the KCA.

**Keywords:** Breach of Contract, CISG, Korean Civil Act, Right to Require Delivery of Substitute Goods  
**JEL Classifications:** K12, K40

## 1. Introduction

The most common type of seller breach of contract in the international sale of goods is the non-conformity of goods. Remedies for the non-conformity of such goods can be applied

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based on the contents of any prior agreement between the parties. If there is no agreement, the provisions of the applicable law prevail. According to Article 46(2) of the United Nations Convention on Contracts for the International Sale of Goods (CISG), in the event of the delivery of non-conforming goods, the buyer may require delivery of substitute goods as a remedy. The buyer's right to substitute delivery (the "Right") not only protects them from the seller's breach of contract but also preserves the contractual bond between the parties by providing a final opportunity for sellers to protect their goodwill and circumvent the extreme remedy of avoidance (Honold and Flechtner, 2009, 408). This remedy reflects the CISG's legislative principle of contract maintenance, which emphasizes preserving the contract as far as possible (UNCITRAL, 2016, 221).

In international trade, requiring substitute delivery brings about additional efforts and costs in relation to the re-shipment of conforming goods and the return of non-conforming first-delivered goods. Unconditional requests for substitute delivery even in the case of minor defects increase the burden on the seller and can impair their economic efficiency. If defects in delivered goods can be repaired, requesting a repair would save the seller the unnecessary cost of substitute delivery. Additionally, if the buyer can easily purchase substitute goods from the market, it would be better to claim damages for the repurchase. Therefore, the CISG limits the use of the Right by proposing certain requirements, such as a fundamental breach of the contract or timely request.

By contrast, in the case of the Korean Civil Act (KCA), Article 581(2) grants the buyer of generic goods the right to require delivery of substitute goods instead of avoiding contracts or claiming damages. As the seller has a duty to provide goods without defects, substitute delivery of conforming goods could be applied as a remedy in the event of a seller's non-performance. Although the Right only applies to generic goods, it is the only provision that acknowledges the buyer's right to request a cure for any defects in the delivered goods under Korean law.

However, the KCA contains no specific provisions related to the requirements for claiming substitute deliveries. As there is no explicit limitation to the Right, there has been relatively little discussion of this issue to date (Kim Jae-Hyung, 2015; Kang Hye-Lim, 2017). Although some scholars have even disagreed with the idea that the Right should be limited to certain circumstances owing to the lack of specific provisions in the KCA, the majority support the need to limit the Right (Kang Hye-Lim, 2017). The basis for limiting the Right is the principle of good faith or the doctrine of the abuse of rights, both of which are stated in Article 2 of the Code (Kim Jae-Hyung, 2015). If the defect can be eliminated with simple repair, along with the principle of good faith, the buyer's right to claim repair should be exercised first, and the right to request substitute delivery should be allowed only when the seller refuses the repair. In other words, if the seller's cost for substitute delivery is much greater than that of other remedies such as claiming damages, exercising the Right can be considered an abuse of rights and must be limited. In line with this discussion, the Korean Supreme Court has ruled that the Right may be limited in certain circumstances (judgment of 2012 Da72582, May 16, 2014).

If we agree with the opinion that the Right should be limited, we face another question: In which cases should it be restricted? To answer this question, this study examines, in particular, the requirements regarding the right to require delivery of substitute goods under the CISG, as well as related cases and literature. Furthermore, it attempts to compare these requirements to those under the KCA and to identify the legal implications for future revisions of the KCA. As a literature review and comparative study are the main methodolo-

gies of this study, we focused on the CISG, the KCA, the CISG Advisory Council opinion, and the draft KCA amendment as a basis for our research. Major requirements for substitute delivery, such as the existence and severity of defects, reasonableness, and timely notice and request, were examined and evaluated.

We expect the findings of our study to serve as a guide for future revisions of the KCA, which should fill the loophole regarding the right to require substitute delivery. Moreover, a suggestion from the recently released CISG Advisory Council opinion that clarifies the continuing confusion and debate, can help distinguish which remedy is suitable for a particular case. This comparative study may provide practical advice for businesspeople in international trade who are not certain about the right to request substitute delivery and elicit the legal implications for the future development of the KCA.

## 2. Non-conformity of the Goods

### 2.1. Existence of Non-conformity on Goods

#### 2.1.1. CISG

The first requirement regarding the buyer's right to require delivery of substitute goods is the existence of non-conformity on goods. The CISG uses a broad and largely unified concept of "non-conformity," which embraces the concept of defect. If the goods do not conform with the contract, the CISG considers it a breach of the contract and grants buyers the right to require suitable remedies. The non-conformity of a delivered good with the contract is judged by considering not only quality, but also quantity, identity, and packaging (Kröll et al., 2018, 487).<sup>1</sup>

The conformity determination in CISG starts from the requirements of the contract, including the characteristics of the goods agreed upon by the parties. As CISG adopts the concept of subjective defect (Schwenzer, 2016, 594), the quality, quantity, and packaging required by the contract are the primary standards for non-conformity. If there are no details or insufficient details regarding the requirements in the contract, to determine the conformity of the goods, the following subsidiary criteria are used: First, the goods must be fit for the purposes for which goods of the same description would ordinarily be used. Second, they must be fit for any particular purpose expressly or implicitly made known to the seller at the time of concluding the contract. Third, they must possess the qualities of goods that have been presented as a sample or model. Fourth, they must be contained and packaged in the usual manner for such goods, or if there is no usage to determine the usual manner, the packaging must be adequate to protect and preserve the goods (CISG Art. 35).

#### 2.1.2. Korean Law

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<sup>1</sup> According to CISG Advisory Council opinion, CISG also requires delivery of goods free from any right or claim of a third party based on industrial property or other intellectual property rights. Articles 46(2) and (3) CISG express a general principle in the CISG of balancing both parties' interests in case of a breach of contract by the seller. Delivery of substitute goods not subject to such third-party rights may cure the defective performance. Where the defects can be repaired by fulfillment or termination of the third party right or claim through the seller, it is appropriate to apply Article 46(3) CISG (Bridge et al., 2021, 12).

Under Korean law, the seller is liable when delivering goods that are defective. This sales-specific liability is called the seller's guarantee liability for defective goods and is mainly intended to protect the buyer in the event the latter may not be properly remedied by virtue of the general liability rules (Lee Byung-Mun, 2009, 35).<sup>2</sup> As the seller's guarantee liability comes into play if there is a defect in the object of sales (KCA Art. 580), the buyer could request the delivery of conforming goods when guarantee liability is imposed on the seller (Baek Kyung-Il, 2015). Therefore, the existence of a defect could be a basic requirement for the Right, as under the CISG.

However, unlike the CISG, the KCA fails to define a "defect." As a result, scholars have different views regarding the definition of a defect in Korean law. There are mainly two opposing views: the objective criterion theory and the subjective criterion theory. The difference of these views comes from the conflicting theories regarding the legal nature of the seller's guarantee liability: the legal liability theory and the contractual liability theory. As the disputes about the definition of a defect and the nature of the seller's guarantee liability are closely connected, it is necessary to understand the latter first.

The legal liability theory states that the seller's guarantee liability is especially imposed by the law regardless of the contractual parties' intention. In the case of the specific goods which have an initial defect at the time of contract, the seller's contractual duty must be limited to the delivery of the goods in status quo at the time of contract (Lee, Byung-Mun, 2010, 4). They consider the seller has fulfilled the contractual obligation, though the delivered goods have a defect. Therefore, the legal liability theory insists that the seller's guarantee liability is imposed in order to adjust the imbalance between the defective delivery and the payment.

On the contrary, contractual liability theory insists that there is a contractual duty for the seller to deliver the goods free from defects both in the sales of specific goods and in those of generic goods (Lee, Byung-Mun, 2010, 4). The seller's guarantee liability is imposed based on the contract, namely, the parties' intention, and it is a liability for the breach of the contractual obligation.

Due to different stands toward the legal nature of the seller's guarantee liability, the former supports the objective criterion theory, and the latter supports subjective criterion theory by insisting that parties' intentions should not be disregarded (Lee Byung-Mun, 2001, 100).

The objective criterion theory argues that the specific criteria for defects should be based on the general standards of quality and performance that are normal for goods of the same kind (Kwak Yun-Jik, 2003, 148; Yoon, Gil-Hong, 2015, 214). For example, in the case of a used automobile transaction, a buyer whose hobby is collecting classic cars could purchase an old used car even if the quality of the car does not meet the usual standards because of low power, slow speed, and excessive noise. Although the buyer fully recognized and agreed with the performance and quality of the car, the delivery of that car will be considered a defect from the perspective of the objective criterion theory. In this sense, the existence of defects is objectively judged only by ordinary standards, regardless of the intention of the parties, as indicated by the relevant circumstances in the contract (Lee Byung-Mun, 2001, 83).

By contrast, the subjective criterion theory insists that the primary test for whether the

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<sup>2</sup> Korean law imposes on the seller two kinds of liabilities: a general liability for default and the seller's guarantee liability for defective goods. The former is applied to three types of default: delay in performance, the impossibility of performance, and incomplete performance based on the fault principle. The latter is applied to a defect in quality, quantity, or title, and can be raised irrespective of the fault principle. (Lee, Byung-Mun, 2010, 4)

goods are defective is subjective; therefore, the intended use of the goods that both parties agreed on in the contract of sale becomes a criterion. Accordingly, there is a defect when the goods supplied do not reach the standard or purpose that the parties agreed on (Song, Deok-Soo, 2021, 200). In this case, the subjective criterion theory will not view the delivery of low-quality used cars to the buyer as a defect because the buyer fully recognized and agreed with the quality of the car. Therefore, the parties' intention is a critical factor in determining the existence of a defect from the perspective of the subjective criterion theory.

With regard to the two different views, more scholars have recently accepted the subjective theory as a more valid criterion for judging the existence of a defect.<sup>3</sup> By treating the parties' intention as the essence of the contract, the intended use of the goods should be considered first when testing the existence of a defect, regardless of the quality that is generally accepted. The concept of defect from objective theory is limited to supplementing the gap in the parties' agreement. (Song, Deok-Soo, 2021, 202) Thus, defects are primarily judged based on the agreement of the parties, but if the parties do not mention the purpose or essential nature of the goods at the time of the conclusion of the contract, it is appropriate to judge them based on the objective concept of defects (Lee, Eun-Young, 2007, 335). In conclusion, the existence of a defect in Korean law should be decided based on the parties' intentions first and then by ordinary standards.

## 2.2. Fundamental Breach and the Severity of the Defects

### 2.2.1. CISG

The buyer's right to demand the delivery of substitute goods also requires a fundamental breach of contract in addition to the existence of non-conformity on goods (CISG Art. 46). As the non-conforming goods previously delivered by the seller must be returned, the delivery of substitute goods necessitates additional transportation besides delivery of the substitute goods itself. The costs and risks associated with the re-shipment of conforming goods and return transport of non-conforming goods that have already been delivered to the buyer can be considerable (Schlechtriem, 2006, 95). In this sense, the delivery of substitute goods can be as expensive as avoidance of the contract (Schwenzer, 2016, 744). Therefore, the CISG imposes a higher requirement for requiring delivery of substitute goods to avoid the unnecessary transfer of goods (Huber and Mullis, 2009, 199).

According to CISG Art. 25, a fundamental breach of contract means a case in which a breach of contract by one of the parties causes damage to a degree that substantially deprives the other party of what it is entitled to expect under the contract. In general, parties can agree on what they expect from the contract, and these agreements can be inferred from the contract. If the contract does not clarify the essence of the contract, there could be an issue about what amounts of breach of contract are fundamental.

In this regard, the CISG Advisory Council emphasizes the importance of the purpose of the sale—that is, the purpose of use of the goods—as a decisive factor in determining fundamental breach. If nonconforming goods cannot be used for their intended purpose by the buyer, it constitutes a fundamental breach of contract (Bridge et al., 2021, 15). For example, a buyer in the resale business is interested in reselling goods, so the delivery of non-

<sup>3</sup> The objective theory has the limitation on ignoring the parties' agreements and intention on the purpose of the goods. Also, in a contractual relationship, the value of the goods for the seller and the buyer could not be objectively equivalent. Rather, it should be subjectively equivalent to make a transaction.

conforming goods that cannot be resold would be a fundamental breach.

Additionally, if non-conforming goods can be repaired without undue burden on the buyer, there is usually not yet a fundamental breach (Kröll et al., 2018, 684). In the case of motor vehicles, machinery, and technical equipment, it is often possible to achieve a complete cure of defects that seriously impair usability by conducting the relevant repairs (Schwenzer, 2016, 745). Except for some cases of reasonable refusal of repair, such as timely delivery or unacceptable disturbance to the buyer's business, repairs will reduce the seller's transportation cost for return. Therefore, if the nonconforming goods can be repaired, it does not constitute a fundamental breach of the contract, and the buyer can only use remedies such as requiring repair, claiming damages, or reducing the price.<sup>4</sup>

### 2.2.2. Korean Law

In addition to the existence of defects, though KCA does not include an explicit rule, the severity of defects appears to be one of the requirements for the Right. According to the Korean Supreme Court (May 16, 2014, 2012 Da72582), the Right could be limited when the defects of the goods are minor enough to achieve the purpose of the contract. This decision of the court is in line with provisions that the remedy of avoiding contracts is limited in similar circumstances (KCA 580(1), 575(1)). If the defect in the goods is minor, following general trade customs and the principle of good faith, it is sufficient for the seller to repair the defect or compensate for the damage. Thus, the Right would be allowed in the case of a severe defect in delivered goods, such that it is enough to prevent the purpose of the contract.

### 2.3. Comparison and Assessment

As discussed previously, the existence of defects is a basic requirement. Although the terminology used to deal with goods that do not conform with the parties' agreement is different—"defect" under Korean law and "non-conformity" under CISG—both are the basis of the seller's liability for the remedy. Without proving the existence of a defect, the buyer cannot rely on any right to remedy.

Furthermore, although the KCA does not include an explicit rule about the definition of a defect, the concept of a defect from the prevailing subjective criterion theory is similar to that of the CISG. The CISG adopts a subjective standard—the description of goods in the contract—which is considered the primary standard for conformity (Kröll et al., 2018, 487). Korean legal experts who support the subjective criterion theory also insist that a defect should be decided not only by ordinary standards but also by the parties' intentions. Thus, from a comparative law point of view, the objective criterion theory that emphasizes general standards loses its persuasive power.

Although there is not much practical difference between the two terminologies, the scope of the defects in the CISG is distinctively different from that under the KCA. In the CISG, the non-conformity of delivered goods embraces not only discrepancies in quality but also differences in quantity and defects in packaging. As these nonconformities are dealt with in a unitary manner, the buyer may rely on the same remedial scheme. By contrast, Korean law

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<sup>4</sup> If there is no fundamental breach of contract under Article 25 of the CISG, the buyer has the right to claim for repair (Art. 46 (3)), the right to claim damages (Art. 45 (1) (b)) and the right to reduce the price (Art. 50). However, in case of fundamental breach, the buyer has the right to avoid the contract (Art. 49) and the right to claim delivery of substitutes (Art. 46 (2)) in parallel with a claim for damages.

deals with defects in quality, quantity, and packaging separately. Differences in both quantity and quality are categorized as defects, whereas defects in packaging are treated as matters of nonperformance. The matter of defect is governed by the seller's guarantee liability regime, resulting in remedies being available, regardless of the fault principle. Conversely, non-performance is governed by the rules of general liability, and all remedies are subject to the fault principle. In addition, the requirements of the seller's guarantee liability for differences in quantity are quite different from those for discrepancies in quality, being governed by separate provisions of the KCA (Lee Byung-Mun, 2001, 91).

Compared with the CISG, the liability system of Korean law could cause some complexities as to which liability is applicable. The main reason for the complexity is the separate stipulation of the remedies and requirements based on the type of default. Thus, when the sales contract is not properly performed, as agreed upon by the parties, the first thing to do is to check what type of default applies (Lee Byung-Mun, 2009, 35). After confirming what has happened to the goods, the available remedies or requirements for these remedies become clear. However, as the distinction between the defaults is artificial, confusion and debate related to the dual liability system has continued. While the CISG's liability system and remedies appear to be simple and clear, separately stipulated remedies in the KCA could be a source of the problem. Our study therefore focuses on a particular type of defect, namely, differences in quality, to avoid contradictions between different liability systems.

In addition to the scope of the defect, the CISG and KCA adopt different approaches to the issue of which degree of defect is a requirement for the Right. The CISG stipulates a fundamental breach of contract as a condition for substitute delivery, and if non-conforming goods can be repaired, there is usually no fundamental breach. Thus, the right to require substitute delivery would be limited if the non-conformity of goods is repairable.<sup>5</sup> In other words, the applicable remedies for particular cases are determined based on the availability of repair. For example, if repair is possible, it does not constitute a fundamental breach of contract, so buyers can only rely on remedies such as requiring repair, claiming damages, or asking for a reduction of the price. By contrast, if the repair of goods is impossible, buyers could request delivery of a substitute. In addition, buyers do not need to be confused regarding which remedies to choose, between requiring the delivery of substitutes and claiming for repair (Lee Yoon and Lee Byung-Mun, 2021, 110).

However, as discussed previously, the KCA does not explicitly address the requirements for substitute delivery, which could have helped distinguish this particular remedy from other available remedies. Furthermore, the right to request repair, which is generally discussed and compared with substitute delivery under the CISG, is not stipulated in the KCA. Given this lack of legal affirmation, the severity of defect conditions derived from judicial precedents can be considered a requirement for substitute delivery, corresponding to a fundamental breach of the contract requirement under the CISG.<sup>6</sup>

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<sup>5</sup> As we will discuss at the later part of the paper, repairability is not the only condition that limit the right to request substitute delivery. For example, the buyer's right to require delivery of substitute goods is excluded if it is not available or only available at very high costs.

<sup>6</sup> However, unlike the CISG, it is not clear whether claiming for repair is always limited even when the defect in the delivered goods is severe, and it is impossible to achieve the purpose of the contract. Moreover, even the buyer's right to request repair is debatable as to whether this right should be accepted in the KCA. On the premise that it is possible to claim the repair of defects, even if the defect is significant, it is reasonable to resolve the dispute with the repair when the defect can be repaired at a low cost. Therefore, the significance of defects in delivered goods alone cannot prevent additional

Consequently, an additional guide regarding reparability, to determine whether there has been a fundamental breach, from the CISG Advisory Council can serve as a standard to determine when to use the right to request substitute delivery versus requesting repair. Accordingly, more specific requirements for remedies will also be needed in Korean law to clearly guide which remedy should be applied.

### 3. Reasonableness

#### 3.1. CISG

Unlike the buyer's right to request repair, which refers to reasonableness for balancing both parties' interests, there is no explicit reasonableness requirement regarding the buyer's right to claim the delivery of substitute goods. The drafters of the CISG did discuss whether to lower the threshold for substitute delivery by replacing fundamentality with mere reasonableness of substitution, but the proposal was dismissed considering the economic consequences of substitute delivery, that is, the costs for transportation (Bridge et al., 2021, 18). Therefore, it is unclear whether disproportionality also limits the claim for the delivery of substitute goods.

However, the prerequisite of reasonableness appears useful, and in line with the Convention's primary purpose of saving the seller's costs for substitute delivery when they outweigh the buyer's interest in receiving conforming goods. Also, the reasonableness requirement could be inferred from the observance of good faith under CISG Article 7(1) which demand two parties of the contract should exercise their rights and obligations with honesty so as not to betray the mutual trust (Powers, 1999, 351).<sup>7</sup> If it is physically impossible to replace the delivered goods or if it is possible only at a very high cost, the delivery of substitute goods is unreasonable. As the law should not encourage economically irrational behavior, balancing the interests of both parties is necessary when requesting the delivery of substitute goods. From this perspective, the CISG Advisory Council suggested that the buyer's right to require delivery of substitute goods is excluded if it is disproportionate with regard to all circumstances (Bridge et al., 2021, 18).

According to CISG Advisory Council opinion, to determine whether the claim for replacement is balanced, the following aspects should be considered: the position and ability of the seller to deliver substitute goods, the cost of substitution, the nature of the goods and their general substitutability, and the interests of the parties in the remedy (Bridge et al., 2021, 18). For example, if the buyer can easily purchase substitute goods from the market, the delivery of substitute goods would not be reasonable, as the cost of substitution would be considerable. Rather, it would be more efficient to compensate for the difference between the amount purchased in the market and the original sales amount based on the contract. In addition, if the parties have agreed on the upper limit of damages in the contract, requiring delivery of a substitute when the cost of doing so exceeds the limit of damage, could be unreasonable (Lee Yoon and Lee Byung-Mun, 2021, 99). The parties have arguably intended to limit costs for remedies by agreeing to a cap on damages; therefore, the cap could be a

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controversies over exceptional cases.

<sup>7</sup> The good faith principle could be a prerequisite to the exercise of other CISG rights. A party might lose the right to avoid or seek specific performance if exercised in bad faith (Spangnolo, 2007, 275).



criterion for reasonableness.

Such reasonableness requirements may guide the buyer to choose other remedies when the seller's cost of substitute delivery exceeds the buyer's expected benefit. In some cases, the breach of the contract is fundamental, and using the right to claim delivery of substitutes can result in more cost and inefficiency than avoiding the contract. Therefore, adding the reasonableness requirement is in line with the intention of the CISG Advisory Council to present a specific and practical baseline for the buyer's exercise of the right to claim delivery of substitutes.

### 3.2. Korean Law

Although the KCA is silent on the detailed requirements of the Right, we can infer its position from the argument that, in some cases, substitute delivery should be limited based on the principle of good faith and the principle of prohibiting the abuse of rights. The principle of good faith is a general presumption that a contracting party must perform their contractual duties honestly, fairly, and in good faith in order not to destroy the rights of the other party. Thus, if the seller trusts that the buyer will not request substitute delivery, and if such trust can be objectively considered to have been formed, it will not be possible to request substitute delivery based on the principle of good faith. In addition, if the buyer can achieve the same function and condition as a new and conforming good by repairing, then claiming substitute delivery that impose higher costs on the seller than the repair would, is clearly an abuse of rights, so the Right should be limited in this case. Here, comparing the costs and benefits of each remedy leads to reasonableness, which is a critical requirement for the Right.

In addition to the preceding principle, judgments of the Korean Supreme Court and the draft of the KCA amendment provide some clues for the additional requirements for the Right. In 2014, the Korean Supreme Court (the "Court") ruled that the Right may be limited in certain circumstances under the principle of fairness. This decision of the Court is the first related to the limitation of requesting substitute delivery. In this case, the buyer requested the seller to deliver a new car because the speedometer broke down after receiving the new car, but the Court did not accept this request. The Court ruled that if the seller's claim for the delivery of conforming goods is allowed unconditionally and entirely without considering the severity of the defect or the extent of the cost caused by the delivery of substitute goods, it can lead to disproportionate consequences for the seller (Song, Deok-Soo, 2021, 205). Therefore, the right to request substitute delivery may be restricted in such exceptional cases. The Court also stated that if the defect in the delivered goods is insignificant and remedies for the buyer, such as repair or compensation for damages, are possible at a low cost, the restriction on the Right should be allowed when the cost for substituting goods is much higher compared to repair or damages. Accordingly, the Court calculated the cost for substitute delivery by deducting the value of the defective vehicle returned to the seller from the cost of procuring new vehicles of the same kind, which includes transportation costs and registration fees, and compared it with the cost for repairing, which includes labor cost and parts.

The Court's decision implies that it necessary to compare the consequences of substitute delivery with other remedies. After weighing the costs of substitute delivery and alternative remedies, we can determine whether substitute delivery is reasonable in each case. For example, the Right is allowed when the cost of substitute delivery is equivalent to the cost of defect repair. If the cost of substitute delivery is far above the cost of repair, the Right is limited. Therefore, reasonableness in this circumstance means that substitute delivery is more

reasonable than other remedies.

Subsequently, we find some suggestions related to the right to request the delivery of substitutes in the draft of the KCA amendment announced in 2014. Although the draft KCA amendment was not ratified by the National Assembly, the discussion and logic of the draft will provide good insight into the current KCA. The 2014 draft suggested establishing a new clause that recognizes the right to request a cure in Art. 388 (2), and this clause also stipulates specific criteria for limiting the right to request a cure. As the right to request a cure includes the right to request repair and substitute delivery, the requirements stated in the draft could be inferred to apply to the Right. The drafters thought that if the buyer's request for a cure caused extra cost and burden to the seller, it was necessary to limit the buyer's right to request a cure. As a result, the draft limits the right to request a cure when the cure causes excessive costs or when it is not reasonable to expect a cure (Kim Jae-Hyung, 2015, 1660).

Here, reasonable expectations should be determined by balancing the interests of both parties (Kim Jae-Hyung 2016, 124). Comparing the cost of substitution imposed on the seller with the actual or prospective benefit to the buyer, if the cost of the seller significantly exceeds the buyer's benefit, substitute delivery is not reasonable. When comparing the parties' interests, all the circumstances should be considered, such as the degree of defect, ease of repair, possibility of repairing defects, reduction of the value after the repair, value of goods without defects, whether the purpose of the contract is achieved, nature of goods, and value of defective goods returned to sellers. As a result, reasonableness in this circumstance can be determined by comparing the seller's cost and the buyer's benefit.

### 3.3. Comparison and Assessment

Both the CISG and KCA do not stipulate that exercising the Right should be reasonable, but the opinions of scholars and decisions of the Court suggest requiring the reasonableness condition for delivery of substitutes. Comparing CISG and KCA, although their detailed contents and purpose show a considerable difference, the basic idea about the necessity of reasonableness is similar.

The purpose of reasonableness requirements under the CISG is to save the seller's costs for substitute delivery when they outweigh the buyer's interest in receiving conforming goods. It only compares the seller's cost and buyer's benefit in the case of substitute delivery. Under this condition, the buyer must choose other remedies when exercising the Right is unreasonable. As a result, unreasonable substitute delivery, which causes excessive costs, will be restricted, so the parties can avoid inefficient consequences. In addition, the reasonableness requirement plays a role in distinguishing suitable remedies, just as the fundamental breach does.

In Korean law, there are two slightly different approaches for determining reasonableness. The first compares the cost of substitute delivery with other remedies, so substitute delivery is reasonable when the cost of other remedies is equivalent to or exceeds that of substitute delivery. The second approach compares the cost of the seller and the benefits of the buyer. If the interests of both parties are balanced by substitute delivery, it can be seen as satisfying the reasonableness requirement.

Both approaches can mutually supplement each another. The former needs to compare not only the cost of each remedy, but also the benefits they provide. The benefit of each remedy to the buyer might be different, and the purpose of the contract may not be achieved by some remedies. For example, if the value of the goods decreases significantly after repair, substitute

delivery would be accepted even at a higher cost. However, the latter approach must compare the balancing of parties' interests in other remedies. Although substitute delivery is reasonable considering the costs and benefits of the parties, it is possible that other remedies could fulfill the purpose of the contract at a lower cost. Therefore, both approaches should be considered when determining whether substitute delivery is reasonable.

Although both the CISG and KCA take the position that substitute delivery should be allowed in case it is reasonable, the CISG explicitly states that a fundamental breach of contract is a requirement for the Right. As a fundamental breach of contract is required, substitute delivery is strictly limited under the CISG compared to the KCA, which mainly requires reasonableness. The main reason for this strictness is to save unnecessary costs from returning non-conforming goods and re-shipment of conforming goods, as discussed. In international trade, substitute delivery generally incurs higher expenses than repair does, because of additional transportation costs. Therefore, as the CISG deals with matters in international trade, it is understandable that not only reasonableness but also a fundamental breach of contract is required for the right to request substitute delivery.

Should the KCA announce a higher threshold for the right to require substitute delivery than for the right to request a repair? This question arises from the premise that a claim for the delivery of substitutes leads to higher costs compared to the repair of defects. However, as the KCA also applies to domestic transactions in some cases, the premise is not always true. For example, if the good is not expensive and is frequently used on a daily basis, or if it costs more to repair the defects due to the nature of the item, a repair cannot be said to be a remedy that benefits the seller. Thus, the opinion that the right to request repair should be preferred over substitute delivery in any case, is invalid. Accordingly, considering which remedy is reasonable, regardless of the type of remedy, is an essential step before choosing the remedy to claim, and reasonableness should be decided on a case-by-case basis by regarding diverse circumstances (Bridge et al., 2021, 15).

As a result, we find that the CISG imposes stricter requirements on substitute delivery than the KCA does, as the former is applied only to international trade. Still, it is not clear whether the KCA also needs a much higher level of requirement for the Right, considering possible exceptions in domestic transactions. As the KCA and CISG are located in different legal environments, different levels of requirements would not be an incorrect conclusion. Instead, specifying reasonableness as a requirement for the delivery of substitutes must be reflected in the KCA.

## 4. Timely Notice and Request

### 4.1. CISG

If the buyer detects a lack of conformity of the goods following an examination, they should give notice of the non-conformity to the seller within a reasonable time (CISG Art. 39(1)). The notice must specify the nature of this lack of conformity. A reasonable time for notice should be decided regarding all circumstances of a specific case (Honnold, 1989, 104). The notice of lack of conformity should be given to the seller within at least two years from the time the goods were delivered to the buyer, unless this time limit is inconsistent with a contractual period of guarantee (CISG Art. 39(2)). This applies to cases where a lack of

conformity cannot be discovered on a reasonable examination. As buyers' right to claim remedies for a lack of conformity depends upon proper notification to the seller, timely and specific notification are a duty for the buyer (Kröll et al., 2018, 587).

In determining what is a "reasonable time" for notice, all the circumstances, such as trade usage and practice between parties and the nature of the goods, must be taken into account (Bergsten, 2004, 165). For example, early notice of the lack of conformity is required for perishable goods, such as fresh fruit. The time available to give notice must be determined separately for each defect. In addition, the determination of reasonable time involves balancing the interests of both the seller and buyer. The seller would be interested in clarifying the legal relationship between parties as quickly as possible, and the buyer would want more time to not lose their right to remedy (Schlechtriem, 2006, 93).

After notification, if the buyer wants to claim the right to request the delivery of substitute goods, the buyer must request it in conjunction with giving notice of non-conformity or within a reasonable time thereafter (Lookofsky, 2017, 113). If the buyer fails to do so within the time limit for requiring delivery of substitute goods, the buyer loses the right to claim substitute delivery. In addition, when there is no notice about the lack of conformity to the seller, the period should begin when the buyer actually discovers the defect (Huber and Mullis, 2009, 200). If the seller cannot receive the declaration from the buyer, the buyer bears the burden of proof that their request for substitute delivery was dispatched on time (Schwenzer, 2016, 748). With this requirement, the CISG intended to prevent unreasonable delays in a buyer's decision concerning the remedy to pursue.

There has been some discussion as to whether the time limit for requiring delivery of substitute goods should have the meaning as in Article 49(2)(b) of the CISG for a declaration of avoidance or as in Article 39(1) for the notice. The latter view tends to keep the reasonable time period rather short, suggesting a limit of approximately two weeks (Kröll et al., 2018, 682). By contrast, the CISG Advisory Council advised that the length of the reasonable period for substitute delivery must be coordinated with the period for a declaration of avoidance, which is more generous. As it is the buyer who often has to choose the remedy, they will need more time to make a difficult decision than simply giving notice of a non-conformity.

#### 4.2. Korean Law

In cases where both parties are merchants and a transaction is commercial, Korean law imposes an express duty on the buyer to examine the goods and to notify the seller of any defects. The buyer's notice must be given to the seller immediately after discovering any defect in the goods (Korean Commercial Code, Art. 69(1)). The period of immediate notice should take into account all circumstances on the basis of reasonableness, especially regarding whether the buyer's delay in notice causes any economic harm to the seller (Lee Byung-Mun, 2001, 157).

If the defect is not immediately discovered on a reasonable examination, the buyer must give his notice of a defect at the latest within six months (Song, Deok-Soo, 2021, 205). The period begins from the date on which the buyer took the seller's delivery. If the buyer fails to notify the seller about the existence of defects within a period of six months, they may lose all their right to claim a remedy, including the right to require substitute delivery (Korean Commercial Code, Art.69(1)).

Furthermore, the buyer's rights conferred by the rules of the seller's guarantee liability must be exercised within six months from the time the buyer became aware of a defect in the quality

of the goods (KCA Art. 582). If the buyer wants a substitute delivery, he must request it within six months of discovering defects.

### 4.3. Comparison and Assessment

The primary objective of imposing on the buyer the duty to notify the seller of any defect in the goods is to protect the seller's interest and to prevent the seller from being subjected to claims by the buyer after a considerable time has elapsed after delivery (Kröll et al., 2018, 588). With this notice duty, the seller may consider the transaction complete after a certain time. In addition, notice duty may give the seller the opportunity to cure the defect in the goods by delivering the substitute or repairing the good, preparing for any possible disputes by securing necessary evidence, and taking the necessary steps for a claim against the supplier (Schwenzer, 2016, 638).

The rules to decide the notice period in the CISG and Korean law both take into account all the relevant circumstances of each case based on the principle of reasonableness. Although Korean law states that the notice must be given to the seller immediately after the buyer discovers any defect in the goods, the wording "immediately," which gives the impression of an inflexible rule of prompt notice, should be considered as a reasonable time in this context (Lee Byung-Mun, 2001, 156).

When a defect is not immediately discovered, Korean law gives the buyer a maximum of six months as a period of notice. Contrariwise, the buyer's notice of a lack of conformity in the CISG must be dispatched to the seller at least within two years from the time the goods were delivered to the buyer. Both periods begin when the goods are delivered to the buyer, but the maximum period of late notice is different, six months for the KCA and two years for the CISG. In Korean law, the buyer loses all right to claim a remedy if they fail to notice the defect within the specified period. However, under the CISG, the buyer might at least claim for a price reduction and claim damages, except for loss of profit, if there was a reasonable excuse for the failure of notice (CISG Art. 44).

Overall, the structure of notice duty in the CISG and Korean law shows similarity, and both deprive the buyer of the right to require substitute delivery when notice duty is not fulfilled. On the one hand, Korean law might be considered harsh to the buyer because they could lose all rights in respect of defects in goods without excuse. Compared with the CISG, which provides the last chance for buyers who are unfamiliar with the examination and notice requirement, depriving the whole right to claim the remedy seems quite strict. On the other hand, Korean law could be more generous when requesting substitute delivery, as it provides the buyer with six months from the time of becoming aware of a defect for exercising the Right. Therefore, it is difficult to say which law is better and which should be revised; instead, we would rather choose the suitable governing law considering the circumstances faced by each party. For example, traders can select or change the notice period and related duties as needed. If both parties need a longer period of notice, choosing the CISG as a governing law could be a solution. In addition, if both parties want a shorter duration for the notice, such as three months, they can change the period of notice duty by expressly adding that condition to the contract.

## 5. Others

### 5.1. Return of Non-conforming Goods

To exercise the buyer's right to require substitute delivery for non-conforming goods, the buyer must be able to return the goods originally delivered in substantially the same condition in which they were received (CISG Art. 82(1)). The costs related to restitution duty are borne by the seller, but the buyer will lose the right to request substitute delivery if they cannot fulfill the restitution duty (Schwenzer, 2016, 749). Although Article 82 of the CISG is part of the "Effects of Avoidance" section, this provision also applies to the delivery of substitute goods, as is clearly worded (Bridge et al., 2021, 18). This obligation is based on the idea that restitution is a natural consequence of the delivery of substitute goods. If there is no duty to return the originally delivered goods, some buyers could exploit the right to request substitute delivery as a tool for additional profit. In cross-border e-commerce, a similar situation occurs when the total transportation costs are comparatively high. Some unscrupulous consumers require substitute delivery without returning the originally delivered goods, which casts doubt on whether these goods even have serious defects to begin with. Therefore, the obligation of restitution is not only natural but also essential to minimize fraudulent claims for substitute delivery.

The buyer claiming a substitution need not return the non-conforming goods in exactly the same condition in which they were received, but a return of the goods in substantially the same condition is sufficient. The buyer does not lose the right to require substitute delivery due to mere usage of the returned goods, but if the goods are already processed, the buyer will lose the right. When the change in the condition of the goods makes it infeasible for the seller to accept the returned goods, the buyer fails to fulfill the restitution obligation (Bridge et al., 2021, 18). However, the buyer does not lose the right to claim substitute delivery in the following cases: if the reason why it is impossible to return the goods or to return the goods in substantially the same condition as at the time of the buyer's receipt is not due to the buyer's actions or omission; if all or part of the goods are lost or deteriorated as a result of the inspection; or if the goods or part of the goods have been sold, consumed, or transformed by the buyer before discovering the lack of conformity (CISG Art. 82(2)).

Another issue related to returning non-conforming goods is whether the seller's delivery of substitute goods and the buyer's restitution must be performed concurrently. In the case of avoidance of the contract, CISG Art. 81(2) explicitly states that restitution duties must be performed concurrently. However, there is no such provision to clarify the relationship between substitute delivery and restitution. Moreover, unlike an exchange of goods in return for payment, the concurrent exchange of goods in long-distance transactions would lead to considerable difficulties in practice (Schwenzer, 2016, 749). Therefore, considering both legal gaps and practical obstacles, it would be reasonable to allow the buyer to claim substitute delivery without having to offer restitution of the originally delivered goods at the same time (Kröll et al., 2018, 684).

Korean law does not mention returning non-conforming goods as a requirement for substitute delivery. Although the liability of restitution as a result of the avoidance of the contract is stipulated in KCA Art. 548, there is a lack of evidence to connect the restitution duty to substitute delivery. However, in practice, returning first-delivered goods is a common custom in trade even for consumers using e-commerce. If there is no obligation to return goods, the seller's cost of substitute delivery will increase excessively. In addition, without this requirement to restore the original state, there seems to be no way to limit malicious claims for substitute delivery. The KCA thus also must include returning the non-conforming goods

as a requirement for the Right.

## 5.2. Differentiation between Generic and Identified Goods

In Korean law, the delivery of substitute goods may only be considered in the case of defects in quality and where goods of a different kind have been delivered, and thus, almost exclusively in the case of generic goods (Yoon, Gil-Hong, 2015, 217). If the contract relates to an identified object, the delivery of substitute goods should not usually be expected from the seller (Bridge et al., 2021, 17). In short, the KCA distinguishes between generic and identified goods and excludes substitute delivery in the case of identified goods.

However, there is no such distinction between generic and identified goods in the CISG provisions. According to the CISG Advisory Council opinion, rather than distinguishing the nature of goods, the substitutability of the goods and the parties' interests in substitution should guide the application of the right for the delivery of substitute goods (Bridge et al., 2021, 16).<sup>8</sup>

Based on the preceding discussion, the KCA focuses on the types of goods; contrariwise, the CISG focuses on the characteristics of goods that are substitutable. Although substitutability is directly linked to the physical possibility of delivering new goods without defects, the substitutability of generic goods is derived from their general characteristics. Practically, there is not much difference in the result, but when we follow the guidelines of the CISG, we do not need to care about which goods are generic. Thus, the approach of the CISG seems to be much clearer and simpler than that of the KCA. Moreover, as the majority of trade concerns mass-produced generic goods, the importance of distinguishing generic and identified goods is diminishing. Accordingly, a more practical approach is to determine the substitutability of goods as a requirement for the Right rather than limiting it to generic goods.

## 5.3. The Buyer's Ignorance and the Absence of Negligence

Another requirement for substitute delivery in Korean law is the buyer's ignorance of the existence of a defect and the absence of negligence in failing to discover the defect (KCA Art. 580(1)). In other words, the Right is permitted if the buyer was unaware of the defect at the time of the contract, and defects in delivered goods were not found even though the buyer conducted an examination without a mistake. The underlying principle of this requirement is that in the case where the buyer purchases goods that show apparent defects, he is deemed to have agreed to the current state of the goods. Under this principle, the buyer cannot rely on remedies for the defects he already knows (Lee, Byung-Mun, 2001, 119).

The CISG also states that the seller is not liable for any lack of conformity if the buyer knew or could not have been unaware of the lack of conformity at the time of the contract (CISG Art. 35(3)). Thus, if the buyer did not know about the non-conformity, the seller's liability—which will lead to the right to require substitute delivery—arises. Both the CISG and KCA require the buyer's ignorance as to the existence of a defect.

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<sup>8</sup> The application of Article 46(2) CISG in case of identified goods is disputed. The traditional view in Germanic legal systems is that delivery of substitute goods may only be considered in cases of defects in quality and where goods of a different kind have been delivered, therefore, almost exclusively in case of generic goods. If the contract relates to an identified object, delivery of a substitute object usually should not be expected from the seller (Bridge et al., 2021, 17).

However, the wording of “could not have been unaware of” does not impose an obligation of examination, so there is not much difference between “knowledge” and “could not have been unaware of.” For example, if a buyer who is normally supposed to examine goods negligently fails to discover a defect that one ought to have discovered by due examination, the seller is not liable under the KCA (Yoon, Gil-Hong, 2015, 214). However, the CISG does not guarantee that the buyer in the above cases loses his rights. In this context, the CISG seems quite in favor of the buyer compared to the KCA, which requires the absence of negligence.

## 6. Conclusion

This study examined the requirements in relation to the buyer’s right to require the delivery of substitute goods through a comparative study based on the CISG and the KCA. The major findings of our study are as follows:

First, the CISG explicitly details the requirements for the Right, such as a fundamental breach of the contract and a timely request. By contrast, the KCA only recognizes the right to request substitute delivery but does not indicate any requirement for the Right. Although we could find requirements for the Right in the KCA, by analogy from articles related to the seller’s guarantee liability, judicial precedents, and the literature, such gaps in Korean law could become a source of controversy when practitioners designate and use the KCA as the governing law. Therefore, specific requirements for substitute delivery should be included when amending the KCA. Such revisions not only fill the legal gap in Korean law but also promote the right to require substitute delivery. In practice, exercising the Right without the stated regulation involves the risk of dispute with the counterpart. If the requirement for substitute delivery is specified, the right to claim the delivery of substitutes will be much more actively used; therefore, remedies for the delivery of defective goods could be diversified.

In addition, given that the revision of the KCA will take considerable time and effort, the buyer who wants the right to substitute delivery as a remedy needs to insert relevant provisions into the sales contract. Provisions regarding remedies added to the contract will help prevent future disputes.

Second, the CISG attempts to minimize overlapping and conflict with other remedies by specifying detailed requirements for requiring delivery of substitutes. The CISG stipulates a fundamental breach of contract as a condition for substitute delivery, and the Right would be limited if the non-conformity of goods is repairable. Given this requirement, buyers can easily determine which remedies are allowed in each case. By contrast, Korean law merely suggests some requirements that do not exactly consider the relationship with other remedies. Therefore, more specific requirements for the Right that distinguish the possible remedies will also be needed in Korean law, to clearly guide the choice of remedy.

Third, although not explicitly expressed in the Articles, both the CISG and the KCA similarly require reasonableness for substitute delivery. The basic reason for requiring reasonableness is to save unnecessary costs and prevent disproportionate requests for substitute deliveries. To achieve this goal, both the CISG and KCA compare the seller’s cost and buyer’s benefit, and the KCA additionally compares the cost of substitute delivery with other remedies. As both methods have their strengths, it would be better to consider both methods, allowing them to supplement each other when determining the reasonableness of substitute delivery.



Lastly, comparing the right to require delivery of substitute goods under the KCA and CISG, the CISG has set stricter requirements on substitute delivery than the KCA has. As the CISG is the law for international trade, strict requirements seem to be reasonable to minimize additional transportation and related costs. Considering the different legal environments, there is no need to strengthen the relevant requirements for the Right in the KCA.

As discussed thus far, the CISG provides more detailed requirements about the right to require the delivery of substitute goods than the KCA does. The results of this comparative study clearly suggest that revision of the KCA is necessary. In particular, the lack of explicit provisions about the requirement of substitute delivery in the KCA makes it difficult to apply the Right in practice. In a situation where most of the goods sold are mass-produced generic goods and the exchange of goods becomes a common custom for people who use e-commerce, the KCA needs to add a detailed requirement for the right to require substitute delivery. Although the KCA does not need to follow every provision of the CISG, some requirements compared in our paper would be worth considering when amending the KCA in the future. Also, in international trade practice, it is recommended for the buyer who might need to rely on the right to require substitute delivery in the future to choose CISG as a governing law rather than KCA. As CISG provides more detailed and clear provisions, it will protect the buyer from costly conflict with the seller.

Although the findings of this study allow us to elicit some implications for the development of the KCA, comparing only the CISG and KCA is a limitation of our study. In the future, if additional comparative studies of the recently revised laws of other jurisdictions are conducted, more meaningful results can be derived.

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