Is the Abolishment of Privity Necessary in Modern Warranty Law?

A Comparative Analysis of the System in the US, the CISG, the European Union, and Germany

Sabrina Salewski*

A. Introduction

The revised version of Article 2 of the Uniform Commercial Code (hereinafter UCC) comes up with a simpler way of handling warranty claims with regards to the requirement of privity: the remote consumer can under certain conditions directly take actions against the manufacturer. Looking at other systems, in particular the United Nations Convention on International Sales of Goods (hereinafter CISG), the European Union (hereinafter EU) and Germany, the American concept should be considered for incorporation in sales laws. However, the German system of pursuing the chain of distribution within the privity of a contract also brings advantages and should not be completely abolished. Therefore, this article will show that the two concepts should be amalgamated in a way that is most profitable and convenient for all the parties.

I will, first, set out a hypothesis to illustrate the problem discussed within the scope of this article. First-year law student Courtney, on her first day in the school, realizes that she needs a lap top. Therefore, she goes to 'Indianapolis Computer Services' (hereinafter ICS), a retailer that sells computers manufactured by different companies. Courtney emphasizes that she is particularly looking for a computer with the capacity to boot up and shut down within seconds, as she will have to set it up whenever she changes classrooms. Thereafter, the representative of ICS recommends an Electronic Solution computer, model 321, which Courtney had also learned about from the advertisements on TV. The commercial, particularly, had described the computer as having a long-lasting battery for cordless work of up to five hours. Courtney bought the lap top but is not satisfied at all. She discovers that her computer, comparatively, takes longer

* Law student, University of Trier, Germany; LL.M. Program in American Law for Foreign Lawyers at Indiana University School of Law - Indianapolis 2004/2005

European Journal of Law Reform, Vol. 7, no. 3/4, pp 367-427.

to boot up than her friends' computers and the batteries do not last longer than two hours. Also, whenever the lap top is working on batteries, the bottom gets so hot that, one day, it left a dark spot on Courtney's light-coloured wooden desk.

The next day, while Courtney works on an important document for her part-time job, the computer shuts down when she is just about to finish. This time the batteries lasted only for forty-five minutes. Upon restarting the computer, Courteny finds out that her document is lost because it has not been saved in temporary memory.

Because of these defects, Courtney takes the lap top back to ICS, and asks for another one that would be able to fulfil her needs. Furthermore, Courtney initiates a remedial claim against ICS and Electronic Solutions for breach of express and implied warranties under the UCC. This article will concentrate on all the relevant problems relating to a claim like Courtney's claim against the manufacturer and remote seller, under the old and the new version of the UCC. Also, the problems will be looked at as under the CISG, the law of the EU and German sales law. The article will concentrate on consumer sales contracts, i.e. contracts between a consumer and a merchant. Basically, two different approaches will be laid out: a direct claim against the remote seller, which is now promoted under the revision of the UCC, and a chain of claims against the respective direct seller, as foreseen, for example, in the German law.

First, after giving an outline of the concept of warranty in US case law and the UCC, I will look at the historic development of the requirement of privity in warranty claims. It is necessary to distinguish between vertical and horizontal privity. Vertical privity deals with the relationships in the distributive chain, i.e. between the manufacturer, any involved intermediary buyers/sellers, and the final customer[1] and will be the issue here. Horizontal privity, on the other hand, concerns the relation between the seller and the relatives or friends of the buyer who might be affected by the purchased good.[2] It is also necessary to draw a line between warranty claims arising out of contracts and damage claims under the tort law. The latter will be mentioned where necessary but will not form a part of this article.

Second, I will turn to a comparison of the UCC to international law, namely the CISG and the law in the European Union. In this context, we will particularly look at the 1999 Directive on certain aspects of the sale of consumer goods and associated guarantees. This directive and its application, later on, will be explained in more detail with the illustration of the German legal system.

Third, I will summarize the differences and similarities, disclosed after the comparison. Later, I will point out advantages and disadvantages of both the American and the European or German system.

---

1 *See e.g.* Official Comment 3 to UCC §2-318 (horizontal privity expands class of potential plaintiffs; vertical privity extends manufacturer's liability); Morrow *v.* New Moon Homes, Inc., 548 P.2d 279, 287 (Alaska 1976); Patty Precision Products Co. *v.* Brown & Sharpe Manufacturing Co., 846 F.2d 1247, 1254 (10th Cir. 1988).

2 Morrow *v.* New Moon Homes, Inc., *supra* note 1 at 287.

Finally, I will present the conclusion resulting from the fact that both approaches have advantages. Therefore, they should be combined in a uniform system according to the particular needs and expectations of the customer.

B. The Concept of Warranty and Privity in the US Legal System

I. Overview

If a buyer purchases a good, he will have certain expectations concerning the quality, quantity, and other characteristics of that good. Accordingly, he might inform the seller of his wishes and thus bring his expectations out in the bargain. Since the doctrine of *caveat emptor* does not apply to sales of goods,[3] a seller will have certain quality obligations vis-à-vis the buyer. Having been considered as a separate contract of warranty earlier in the history of sales law,[4] warranties are now part of the sales contract. A warranty is described in UCC §2-313 as promises or affirmations made by the seller. They can be either express, UCC §2-313, or implied, UCC §2-314, relate either to the quality of the goods or to performance. UCC §2-312 provides for the warranty of title which is not part of this discussion.

I shall give an overview of the principles involved in the course of this article, such as forms of warranties and their modifications, and remedies arising from breach of warranties. Thereafter, the historical development of warranties without privity in case law as well as the statutory reactions will be shown. The statutory revisions of the UCC will also be explained with regards to the principles set forth below. Finally, the discussion will turn to unresolved issues and my own thoughts on them will be presented.

1. Liability for Breach of Express Warranty

Before the existence of the UCC, courts developed the notion of express warranties in the case law. As early as in the 17th century, courts did not recognize written documents such as catalogues or bills as warranties. Rather, courts found that the rule of *caveat emptor* applied.[5] In *Jendwine v. Slade*, for example, the court ruled that "putting down the name of an artist in a catalogue as the painter of any picture," is not considered a warranty for which the one who printed the catalogue would be held liable "if it turns that he might be mistaken."[6] Similarly,

---

[3] M. W. Benfield, Jr. & W. D. Hawkland, Sales 238 (2004), *see infra* section B.I.1 *et seq*.

[4] D. F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 Wash. U. L.Q. 413, 430 (1997).

[5] Swett *v.* Colgate, 20 Johns., 196, 11 Am.Dec. 266 (N.Y. Sup. Ct. 1822); Welsh *v.* Carter 1 Wend, 185, 19 Am.Dec. 473 (N.Y.Sup. Ct. 1828): The rule of *caveat emptor* says that "where there is no fraud or agreement to the contrary, if the article turns out not to be that which was supposed, the purchaser sustains the loss."

[6] Jendwine *v.* Slade, 2 Espinasse, 572 (1797) (cited after Smith *v.* Zimbalist, 2. Cal. App. 2d 324,

in *Chandelor v. Lopus*[7] the court held that one who wrongfully sold a jewel as a bezoar stone would not be liable as long the seller knew that it was not a bezoar stone, or that he warranted it was such. However, in *Hawkins v. Pemberton* it was found with reference to *Chandelor v. Lopus* that this

> doctrine [laying down] that a mere affirmation or representation as to the character or quality of goods sold will not constitute a warranty … has long since been exploded, and the case itself is no longer regarded as good law in this country or in England.[8]

Finally, in *Henshaw v. Robins* it was held that

> when a bill of parcels is given, upon a sale of goods, describing the goods, or designating them by a name well understood, such bill is to be considered as a warranty that the goods are what they are thus described or designated to be.[9]

Today, this doctrine is laid down in UCC §2-313 which sets forth the statutory requirements for an express warranty:

> (1) Express warranties by the seller are created as follows:
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain, creates an express warranty that the goods shall conform to the affirmation or promise.
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Basically, an express warranty is an explicit inclusion of certain attributes of the good in the contract. It is not necessary, however, that the words "warranty" or "guarantee" be used, UCC §2-313(2). On the other side, as UCC §2-313(2) also makes clear, the particular statement cannot be mere trade talk or puffing that "express only the seller's opinion, belief, judgment, or estimate"; rather, it is important that there is a "direct, positive, and unequivocal affirmation or representation of fact with reference to the thing sold."[10] Furthermore, to

---

327, 38 P.2d 170, 171 (Cal. App. 1934)); *see also* Seixas *v.* Woods, 2 Caines 48, 2 Am.Dec. 215 (N.Y. Sup. Ct. 1804) (sale of woods of which both parties thought it was brazilletto, while, in fact, it was peachum). The court held that there was no express warranty by the seller even though he mentioned the wood as brazilletto wood in the bill of parcels and in advertisements prior to the sale.

7 Chandelor *v.* Lopus, 2 Cr.Rep. 4, 79 English Rep. 3 (1603).

8 Hawkins *v.* Pemberton, 51 N.Y. 198, 203, 10 Am.Rep. 595 (1872); *see also* Bradford *v.* Manly, 13 Mass. 139, 1816 WL 1003 (Mass. 1816); 7 Am.Dec. 122 (Mass. 1816); Dounce *v.* Dow, 64 N.Y. 411, 1876 WL 12148 (N.Y.) (N.Y. Sup. Ct. 1876); White *v.* Miller, 71 N.Y. 118, 129, 1877 WL 12100 (N.Y.), 27 Am.Rep. 13 (N.Y. Sup. Ct. 1877).

9 John Henshaw and others *v.* Henry Robins, 9 Metcalf 83, 50 Mass. 83, 1845 WL 5311 (Mass. 1845); *see also* Smith *v.* Zimbalist, *supra* note 6; Bradford *v.* Manly, *supra* note 8, holding that "a sale by sample is tantamount to a warranty, that the article sold is of the same kind as the sample."

10 Heil *v.* Standard Chemical Mfg. Co., 301 Minn. 315,320, 223 N.W.2d 37, 40 (Minn. 1974)

constitute a warranty, the affirmation or representation has to form part of the basis of the bargain,[11] but the buyer does not have to show reliance on it.[12] The seller, then, is obligated that the goods conform to the standard set out in the warranty. Otherwise, the buyer has the right to rescind from the contract and to claim remedies.[13]

2. Liability for Breach of Implied Warranty

Other than express warranties, there are also several implied warranties that may become part of the contract. There is the implied warranty of merchantability, UCC §2-314, the implied warranty of fitness for a particular purpose, UCC §2-315, and other implied warranties that can arise due to trade usage or prior course of dealing, UCC §2-314(3). All of these will be briefly explained in turn.

a) Implied warranty of merchantability

The development of warranty law began with the evolvement of an implied warranty in the area of sales of food and drinks in England in the 13th century when courts started imposing penalties for sales of bad food and drink for immediate consumption. In the course of the next two centuries, it turned into a general strict liability for sellers of food.[14] American courts set forth this civil responsibility, which they called "warranty," to establish consumer protection from unwholesome food.[15]

Originally, courts did not recognize implied warranties; they only found liability based on express warranties.[16] But, all the more, English courts developed new principles of liability for merchants because, as Chief Justice Best stated in *Jones v. Bright*,

> "if a man sells generally, he undertakes [warrants] that the article is fit for some purpose … that it is merchantable; and if he sells for a particular purpose, he undertakes [warrants] that it is fit for that particular purpose."[17]

---

quoting 77 C.J.S., Sales, §310; *see also* Doug Connor, Inc. *v.* Proto-Grind, Inc., 761 So.2d 426, 428-429 (Fla. Dist. Ct. App. 2000).

[11] This is the so-called "basis of the bargain test" as developed for example *in* Miles *v.* Kavanaugh, 350 So.2d 1090, 1093 (Fla. Dist. Ct. App. 1977); Doug Connor, Inc. *v.* Proto-Grind, Inc., *supra* note 10 at 429; Hauter *v.* Hogarts, 14 Cal.3d 104, 115-116, 120 Cal.Rptr. 681, 534 P.2d 377 (Cal. 1975). Now, the "basis of the bargain test" is part of UCC §2-313(1)(a).

[12] Official Comment 3 to UCC §2-313; Hauter *v.* Hogarts, *supra* note 11.

[13] These remedies will be discussed *infra* in section B.I.4.

[14] W. L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1099, 1104 (1960); *see* this article also for a detailed overview of these developments. Prosser refers to: Y.B. 9 Hen. VI, f. 53B, pl. 37 (1431); Y.B. 11 Edw. IV, f. 6B, pl. 10; Keilwey 91 note, 72 Eng. Rep. 254 note (K.B. 1507); Roswel *v.* Vaughan, Cro. Jac. 196, 76 Eng. Rep. 171 (1607).

[15] Van Bracklin *v.* Fonda, 12 Johns. 468, 7 Am. Dec. 339 (N.Y. 1815); Race *v.* Krum, 222 N.Y. 410, 118 N.E. 853 (N.Y. 1918); Heinemann *v.* Barfield, 136 Ark. 500, 502, 207 S.W. 62 (Ark. 1918); Jones *v.* Murray, 3 T.B. Mon. 83, 85.

[16] *See* Senator Tracy's overview in Wright *v.* Hart, 18 Wend. 449 (N.Y. 1837) quoting Lord Coke (*in* Dyer, 75); Moses *v.* Mead, 1 Denio 378, 387, 43 Am. Cec. 676 (N.Y. 1845).

[17] Jones *v.* Bright, 5. Bing., 533 (cited after Wright *v.* Hart, *supra* note 16); *see also* Bertha Chysky

Although a number of courts during the 19th century still held that where goods are sold "without any word," there should be no warranty, neither express nor implied,[18] this opinion became the exception. The Uniform Sales Act of 1906 provided in §15(2) for an implied warranty of merchantability "where goods are bought by description from a seller who deals in goods of that description."[19]

Today, UCC §2-314(1) provides that an implied warranty "that the goods shall be merchantable" arises where a merchant of goods of that kind is the seller in the contract. The purpose of the implied warranty of merchantability is to protect a buyer's reasonable expectations that the goods he purchased are of "fair, average quality" and "fit for the ordinary purpose of such goods."[20]

b) Implied warranty of fitness for a particular purpose

The implied warranty of fitness for a particular purpose according to UCC §2-315 differs from the warranty for merchantability in that the customer purchases the good for a specific, non-ordinary use.[21] In order for this warranty of fitness to be operative, the buyer must let the seller know how he intends to use the good, and the seller must know or at least should have known that the buyer is relying on the seller's skills and judgment in selling the goods for that particular purpose. Different from the warranty of merchantability, the warranty of fitness can arise whether or not the seller is a merchant with respect to the kind of the good sold.

c) Other implied warranties

According to UCC §2-314(3), other warranties may arise from a course of dealing or usage of trade. A usage of trade is defined as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question,"[22] and a course of dealing is described as a "sequence of previous conduct between the parties … which … (establishes) a common basis of understanding for interpreting their expressions and other conduct."[23]

---

v. Drake Brothers Company, Inc., 235 N.Y. 468, 471 *et seq*., 139 N.E. 576, 27 A.L.R. 1533 (N.Y. 1923); Hoe *v.* Sanborn, 21 N.Y. 552, 1816 WL (N.Y.) 7873; 78 Am.Cec. 163 (N.Y. 1860) ("Upon the sale of a chattel by the manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture."); *see also* Bailey *v.* Nickols, 2 Root 407, 1796 WL 478 (Conn. Super.), 1 Am.Dec. 83 (Conn. Super. Ct. 1796); Rinaldi *v.* Mohican Co., 225 N.Y. 70, 121 N.E. 471 (N.Y. 1918).

18 Wright *v.* Hart, *supra* note 16.

19 S. Williston, Williston on Sales §18-3, edited by J. R. Fonseca & P. F. Fonseca (1974).

20 L. F. Del Duca, et. al., Sales Under the Uniform Commercial Code and the Convention on International Sales of Goods, Volume 2, 229 (1993).

21 *See* Official Comment 2 to UCC §2-314.

22 UCC §1-205(2).

23 UCC §1-205(1).

3. Exclusion or Modification of Warranties

Since the code provisions of warranty are only default rules (to some extent), the parties are free to modify or even to exclude warranties in their particular contract. However, such disclaimers underlie certain limitations that are set forth in UCC §2-316 which is designed to "protect a buyer from unexpected and unbargained language of disclaimer"[24] and other state statutes.[25] For consumer products, the federal Magnuson-Moss Warranty Act[26] sets forth special rules on disclaimers of warranties. §108 (15 USC. §2308) provides that any implied warranty cannot be disclaimed if the seller gives a written warranty[27] to the consumer, or he enters into a service contract with the consumer until 90 days after the purchase.

4. Remedies

The remedies, that are available to a buyer who has not yet accepted the goods or has justifiably revoked acceptance, are set forth in general in UCC §2-711. Thereafter, the buyer has the right to, first of all, cancel the contract if the seller's breach affects the whole contract. Independent from cancellation, the buyer may recover the price he has paid so far and can additionally claim damages. The damages for breach of warranty are dealt with in UCC §§2-714 and 2-715. UCC §2-714. The measure for such damages is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted," UCC §2-714(2), as well as incidental and consequential damages if appropriate, UCC §2-714(3). Reimbursement for incidental damages comprises all reasonable expenses in connection with the goods, UCC §2-715(1). Consequential damages are granted for losses incurred because of particular needs that the seller should have been aware of and for personal injury and property damage resulting "proximately" from the breach of warranty, UCC §2-715(2). Those remedies can also be contractually modified or limited according to UCC §2-719. However, to guarantee that at least a "minimum of adequate remedies be available,"[28] consequential damages cannot be excluded if such exclusion would be unconscionable. Exclusion of damages for personal injures is prima facie unconscionable in the case of consumer goods (UCC §2-719(3)).

5. Distinction from Torts

The claim for breach of warranty is one in contracts and has to be contrasted to a claim in torts. However, this distinction is blurred and has not been followed

---

[24] Official Comment 1 to UCC §2-316.

[25] In the used car business, for example, a number of states have created so-called "lemon laws" that protect the buyer from informational asymmetry and uncertainty when buying a used car. For a detailed treatise, *see* B. Mann & Th. Holdych, *When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 Yale L. & Pol'y Rev. 1, 14 et seq. (1996).

[26] Adopted in 1975 and incorporated in 15 USC.A. §§2301-2312.

[27] Such written warranty has to comply with the requirements set forth in Magnuson-Moss Warranty Act §104(a)(1).

[28] Official Comment 1 to UCC §2-719.

strictly over the years. Rather, principles of torts, such as negligence and liability for dangerous products, are often intertwined with contractual liability for warranties, in particular with the implied warranty of merchantability. Warranty law is only a part of general product liability law; therefore, different causes of action can arise and overlap.[29] Where privity between buyer and seller was absent, some courts nevertheless allowed actions to lie in contracts besides torts. Since there is a high degree of overlapping between liability claims based in warranty and those based in torts, some courts have treated the two causes of action as being the same.[30]

This issue was discussed in *Denny v. Ford Motor Company*[31] under the question whether the action for strict products liability and the action for breach of implied warranty are coextensive. Although the tests of liability under both standards involves the notion of a defective product, the court found that this element of "'defect' is subtly different in the two causes of action."[32] Under the strict liability test, there is a weighing of the risk to use the product against its utility when properly used to determine defectiveness. This risk/utility test is opposed to a consumer expectation test of lack of defectiveness under the claim based on breach of an implied warranty. Because of these different standards, the court was "not free to merge the warranty cause of action with its tort-based sibling."[33] Thus, the court held that the strict liability claim and the implied warranty cause of action are not identical and that the former is not substantively broader.[34]

However, although the court in *Denny* clearly explained the difference between contract- and tort-based actions, many courts fall back into the analysis of negligence in the course of a warranty claim.[35] Even though the dissenting Judge Simons in *Denny* recognizes that the two causes of action are not identical, he uses the wording "tort cause of action grounded on breach of implied warranty,"[36] thereby again confusing those liability concepts.

Although these two approaches may seem identical, the customer will have to meet his responsibilities imposed by sales law in a recovery claim based on warranties, such as giving notice and complying with the statutes of limitations.[37] For example, the statute of limitation in a tort claim is usually shorter than the contractual limitation of four years according to UCC §2-725.[38] Furthermore, the

---

[29] T. M. Quinn, Quinn's Uniform Commercial Code Commentary and Law Digest, Volume 1 2-205 (1991).

[30] Mendel *v.* Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 345, 253 N.E.2d 207, 305 N.Y.S.2d 490 (N.Y. 1969); Victorson *v.* Bock Laundry Mach. Co., 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (N.Y. 1975).

[31] 87 N.Y.2d 248, 639 N.Y.2d 250, 662 N.E.2d 730 (N.Y. Ct. App. 1995).

[32] *Id*., 639 N.Y.2d 250, 256.

[33] *Id*., 639 N.Y.2d 250, 259.

[34] *Id.*, 639 N.Y.2d 250, 263.

[35] *See e.g.* Spence *v.* Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (Mich. 1958).

[36] Denny *v.* Ford Motor Co., 639 N.Y.2d 250, 271 (N.Y. 1995).

[37] These requirements will be addressed *infra* in section B.II.2.b.iii *et seq*.

[38] *See e.g.* Rosenau *v.* City of Brunswick, 51 N.J. 130, 143-144, 238 A.2d 169, 176 (N.J. 1968); Heavner *v.* Uniroyal, Inc., 63 N.J. 130, 149-150, 305 A.2d 412 (N.J. 1973); Bay State-Spray &

time period in a contract starts running upon delivery, whereas it starts in a tort claim when the cause of action occurred.[39] Furthermore, the seller can limit and disclaim the warranties according to the statutory provisions.[40] Also, courts have discussed whether tort liability comprises claims where recovery is sought for personal injury; whereas the remedy for economic loss should be claimed under contract law.

II. Development of Warranty Liability With Regards to Lack of Privity

Originally, liability for breach of warranty was only found in contracts between a seller and his direct buyer. This was based on the principle of privity of contract, i.e. the direct relation which has to exist between the parties in order to enforce contractual obligations. In sales law, this approach started from the premise that the manufacturer directly sold the goods to his consumer. In the case where the consumer dealt with a retailer, the two bargained personally and established an agreement between them.

However, these types of sales contract disappeared with time in the past few decades. In 1961, Judge Murphy provided language in his opinion in *Hamon v. Digliani* that clearly described the evolvement of the market situation, which was one of the reasons for the new statutory provisions:

> The supermarkets and other retail outlets of our day dispense with the need for clerks behind counters to wait on customers. The goods are displayed on shelves and counters lining the aisles, and the customer, as he searches for a product, is bewitched, bewildered and bedeviled by the glittering packaging in riotous colour and the alluring enticement of the product's qualities as depicted on labels. The item selected is apt to be the one which was so glowingly described by a glamorous television artist on the housewife's favourite program, just preceding the shopping trip. Or the media of advertising might have been radio, magazine, billboard or newspaper.[41]

Because of the changes, such as mass production, mass advertising, and mass merchandising, case law finally developed mainly two forms of warranties under which the manufacturer is directly liable to his ultimate buyer: a "pass-through warranty" arises when the manufacturer furnishes a record with the good that sets forth certain warranty terms and usually also disclaimers, and another type of warranty based on public statements that the manufacturer makes in advertisements and commercials that are directly addressed to the consumer.[42]

Provincetown S.S., Inc. *v.* Caterpillar Tractor Co., 404 Mass. 103, 104, 533 N.E.2d 1350, 1352 (Mass. 1989).

[39] Rosenau *v.* City of Brunswick, *supra* note 38; Heavner *v.* Uniroyal, Inc., *supra* note 38; Spring Motors Distributors *v.* Ford Motor Co., 98 N.J. 555, 582, 489 A.2d 660, 674 (N.J. 1985).

[40] Spring Motors Distributors *v.* Ford Motor Co., *supra* note 39, at 671.

[41] 148 Conn. 710, 717-718, 174 A.2d 294, 297 (Conn. 1961). Similarly D. F. Clifford, *Symposium: Consumer Protection and the Uniform Commercial Code: Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 Wash. U. L. Q. 413, 432 (1997).

[42] N. O. Akseli, *Advertising and "Pass-Through" Warranties under Revised Article 2*, 106 Com.

However, a long line of controversial case law had to be followed before these warranties could be accepted by a majority of the courts. While the courts recognized the need for a manufacturer's liability without privity, they often combined tort and contract principles. Over the course of some years, liability claims were mainly based on warranties. Later, the majority seemed to prefer tort principles for the basis of such claims. This back and forth in legal history will be explained in the following.

1. Historic Background of the Case Law and the Statutory Law

Since case law has always played a significant role in the US, the problem of warranty without privity arose there first. Chief Justice Cardozo stated in 1931, "[t]he assault upon the citadel of privity is proceeding in these days apace,"[43] and found the right words to describe the process that has been going on in the area of sales warranty without privity over centuries. A discussion between the judges, on the issue of liability in sales contracts, was already taking place centuries before the enactment of UCC. Over the years, a warranty liability has been formed that reflects the features of both, the contract and the torts law.

a) First developments of warranties without privity

i) Implied warranty

The implied warranty in the form of a strict liability that has been developed in sales of food and drinks[44] was originally only found in cases of direct sales from the food seller to the aggrieved consumer. However, in recent years, courts started to extend the liability to those who lacked horizontal privity, such as employees,[45] family members,[46] and finally also to subsequent purchasers lacking vertical privity,[47] most of them heavily relying on liability for negligence. Since horizontal privity is not part of this article, only the latter will be discussed here.

The first state[48] to recognize a warranty even without privity between the parties was Washington where the Supreme Court held in *Mazetti v. Armour & Co.* in 1913 that where a manufacturer sells his goods in a sealed package which

---

L.J. 65, 66 (2001). This has also been referred to as "card-in-the-box" problem, *see* H. D Gabriel & W. H. Henning, 2003 Amendments to Uniform Commercial Code Article 2 – Sales 5 (2003).

43 Ultramares Corp. *v.* Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (N.Y. 1931).

44 *See supra* section B.I.2.a. The following overview and the cited cases are based on Prosser's treatise, *supra* note 14; *see also* Comment, *Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages – Tort or Contract?*, 114 U. Pa. L. Rev. 539, 540 (1966).

45 Rosebrock *v.* General Electric Co., *supra* note 38; O'Donnell *v.* Geneva Metal Wheel Co., 183 F.2d 733 (6th Cir. 1950).

46 White Sewing Mach. Co. *v.* Feisel, 28 Ohio App. 152, 162 N.E. 633 (Ohio Ct. App. 1927); Baker *v.* Sears, Roebuck & Co., 16 F. Supp. 925 (S.D. Cal. 1936).

47 Beadles *v.* Servel, Inc., 344 Ill. App. 133, 100 N.E. 2d 405 (Ill. App. Ct. 1951); Quackenbush *v.* Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (N.Y. App. Div. 1915); State ex re. Wozell *v.* Garzell Plastics Indus., Inc., 152 F. Supp. 483 (D.C. Mich. 1957).

48 According to Prosser, *supra* note 14, at 1106, the Washington Supreme Court was the first one.

makes the impression that the product is ready for use, the manufacturer "in the absence of an express warranty of quality … impliedly warrants his goods when dispensed in original packages."[49] This holding developed to the finding of warranties running with the food from the manufacturer to the consumer[50], an idea that was generally promoted[51] until, by the middle of the 20th century, case law had developed a strict liability rule for sale of food and drink[52] which has been accepted in seventeen states[53] and rejected in fourteen.[54] At the same time, courts started to extend the liability from food cases to other products such as animal food[55] and products for bodily use.[56] This implied warranty was based on the assumption that when a supplier places goods on the market, he "represents to the public that they are suitable and safe for use."[57] Finally, presumably under tort law, strict liability was recognized for all kinds of goods on the premise that by that, product safety and consumer protection will be enhanced.[58]

However, although this development towards an acceptance of liability for implied warranties even without privity seemed to be the prevailing ruling in a large number of states, there were also voices in jurisprudence and literature that opposed the idea of liability without privity.[59] A complaint was that the strict

---

[49] Mazetti *v.* Armour & Co., 75 Wash. 622, 630, 135 Pac. 633, 636 (Wash. 1913). *See also* Patargais *v.* Coca-Cola Bottling Co. of Chicago, 332 Ill.App. 117, 74 N.E.2d 162, 169 (Ill. App.Ct. 1947); Parks *v.* C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (Kan. 1914); Jackson Coca Cola Bottling Co. *v.* Chapman, 106 Miss. 864, 869, 64 So. 791 (Miss. 1914).

[50] Prosser, *supra* note 14, at 1106 with reference to Coca-Cola Bottling Works *v.* Lyons, 145 Miss. 876, 111, So. 305 (1927).

[51] *See e.g.* Eisenbeiss *v.* Payne, 42 Ariz. 262, 270, 25 P.2d 162, 266 (Ariz. 1933); Klein *v.* Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 799 (Cal. 1939); Ward Baking Co. *v.* Trizzimo, 27 Ohio App. 475, 481-482, 161 N.E. 557, 559 (Ohio Ct. App. 1928); Nelso *v.* West Coast Dairy Co., 5 Wash. 2d 284, 289, 105 P. 2d 76, 79 (Wash. 1940).

[52] Crystal Coca-Cola Bottling Co. *v.* Cathey, 83 Ariz. 163, 167-168, 317 P.2d 1094, 1096-1097 (Ariz. 1957).

[53] Arizona, California, Florida, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Texas, Virginia, Washington (*see* Prosser, *supra* note 14, at 1107 *et seq.*).

[54] Alabama, Arkansas, the District of Columbia, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, South Dakota, Tennessee, Wisconsin (*see* Prosser, *supra* note 14, at 1108 *et seq.*).

[55] Midwest Game Co. *v.* M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959); McAfee *v.* Cargill, Inc. 121 F. Supp. 5 (D.C. Cal. 1954).

[56] Graham *v.* Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (Kan. 1954); Kruper *v.* Procter & Gamble Co., 113 N.E. 2d 605 (Ohio App. 1953); Markovich *v.* McKesson & Robbins, 106 Ohio App. 265, 149 N.E.2d 181 (Ohio Ct. App. 1958).

[57] Prosser, *supra* note 14, at 1123.

[58] Greenman *v.* Yuba Power Products, 59 Cal.2d 57, 62, 377 P.2d 897, 900, 27 Cal.Rptr. 697, 700 (Cal. 1963) with further citations. *See e.g.* Chapman Chem. Co. *v.* Taylor, 215 Ark. 630, 222 S.W.2d 820 (Ark. 1949) (cropdusting compound); Spence *v.* Three Rivers Builders & Masonry Supply, Inc., *supra* note 35 (cinder building blocks); Continental Copper & Steel Industries *v.* E. C. "Red" Cornelius, Inc. 104 So. 2d 40 (Fla. App. 1958) (electric cable); B. F. Goodrich Co. *v.* Hammond, 269 F.2d 501 (10th Cir. 1959) (automobile tire).

[59] *See e.g.* Ultramares Corp. *v.* Touche, *supra* note 43, 74 A.L.R. 1139 Ch. J. Cardozo: "The assault upon the citadel of privity is proceeding in these days apace." *See also* Chisky *v.* Drake Bros.

liability rule has more features of a liability in torts and that "there is no need to borrow a concept from the contract law of sale."[60] Rather, those critics alleged, the new concept of warranty was a commingling of principles from contracts and torts which raised essential difficulties and violated the well-established principle of privity.[61]

Considerable changes in the case law were made in the 1960s based on these arguments. In 1963, the California Supreme Court characterized the strict liability without privity between the parties as one in torts because the elements of liability, such as the imposition by law and the impossibility for the manufacturer to limit the scope of the liability, are arising from tort concepts.[62] Due to the warranty requirement of privity, the recovery under a claim for breach of warranty was often unsatisfactory. This fact led to the development of a new tort cause of action.[63]

ii) Express warranties

Besides this implied warranty, manufacturers have been held liable also for express statements to the public. The first major recognition of strict liability was in the judgment of the Supreme Court of Washington in *Baxter v. Ford Motor Co*.[64] where the court held that an automobile manufacturer is liable for breach of express warranty to the remote purchaser buying from a retailer because the manufacturer made representations in his sales literature. Following this holding evolved the liability of a manufacturer for express representations, such as labels on the goods,[65] advertisements[66] or distributed literature.[67]

Co. (N.Y. 1923), 235 N.Y. 468, 139 N.E. 576, 27 A.L.R. 1533; Turner *v.* Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (N.Y. 1928), both holding that there can be no warranty where there is no privity of contract; Prosser, *supra* note 14 at 1134, "No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract."

60 Prosser, *supra* note 14 at 1134.

61 Prosser, *supra* note 14 at 1127.

62 Greenman *v.* Yuba Products, Inc., *supra* note 58 at 701. To the same effect: Victorson *v.* Bock Laundry Mach. Co., *supra* note 30 under citation of further authorities; Martin *v.* Dierck Equipment Co., 43 N.Y. 2d 583, 589-590, 403 N.Y.2d 185, 374 N.E.2d 97 (N.Y. 1978).

63 Denny *v.* Ford Motors, *supra* note 36; *see infra,* section B.II.1.b.

64 168 Wash. 456, 12 P.2d 409 (Wash. 1932); same case after new trial, 179 Wash. 123, 35 P.2d 1090 (Wash. 1934) (affirmed); *see also* Henningsen *v.* Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

65 Simpson *v.* American Oil Co., 217 N.C. 542, 8 S.E.2d 813, 815 (N.C. 1940); Free *v.* Sluss, 87 Cal. App. Supp. 933, 936-937, 197 P.2d 854, 856 (Cal. App. Dep't Super. Ct. 1948); Worley *v.* Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 1122, 253 S.W.2d 532, 537 (Mo. App. 1952).

66 Laclede Steel Co. *v.* Silas Mason Co. 67 F. Supp. 751, 757 (D.C. La. 1946); Lane *v.* C. A. Swanson & Sons, 130 Cal. App. 2d 210, 215, 278 P.2d 723, 726 (Dist. Ct. App. 1955).

67 Bahlman *v.* Hudson Motor Car Co., 290 Mich. 683, 694-695, 288 N.W. 309, 312-313 (Mich. 1939); Studebaker Corp. *v.* Nail, 82 Ga. App. 779, 783, 62 S.E.2d 198, 202 (Ga. App. 1950); Hansen *v.* Firestone Tire & Rubber Co., 276 F. 2d 254 (6th Cir. 1960).

b) Statutory developments

The first uniform code in the law of sales was the Uniform Sales Act of 1906 which provided for express and implied warranties, but only between a direct seller and a buyer. Since the Act did not mention liability to third persons, a number of cases concluded that such liability was excluded from sales law.[68] The UCC, that replaced the Uniform Sales Act in the states after its promulgation in 1952, introduced three alternatives of warranty liability in UCC §2-318 for persons without horizontal privity to the contracting parties. That includes family members and friends of the buyer and people who would reasonably use the purchased good.[69] But again, there was no statutory provision for a liability without vertical privity, although there has been tremendous discussion on that issue in the case law of the last decades.[70]

This decision to neither codify the developed case law of the strict liability rule nor to exclude it, coincided with the promulgation of the new §402A of the Restatement (Second) of Torts in 1964. It provided that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Thereby, the latest line of case law was affirmed.[71] Thus, by the end of the 1960s, the general tendency of courts was not to accept warranty-based claims for strict liability as claims under the UCC or sales law, but rather as claims in torts.[72] The tort was one of the product liability of the manufacturer for potentially dangerous goods that he put in the market, and for which he would be held liable in case any person, be it the buyer or someone else, was injured by the product. Neither was a warranty required for the manufacturer to be held liable, nor was a disclaimer of his responsibility effective. With this development, the separation of contract law

---

[68] Hanback *v.* Dutch Baker Boy, Inc., 70 App. D.C. 398, 399, 107 F.2d 203, 304 (D.C. Cir. 1939); Smith *v.* Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125, 126, 127 (N.H. 1942); Hoback *v.* Coca Cola Bottling Works, 20 Tenn. App. 280, 98 S.W.2d 113, 114 (Tenn. App. 1936).

[69] UCC §2-318 has three alternatives that enlarge the protection for third party beneficiaries to different extents.

[70] *See supra* section B.II.1.a.i. *et seq*.

[71] *See supra* section B.II.1.a.i. *et seq*; W. K. Lewis, *Toward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations*, 47 Ohio St. L.J. 671, 675 (1986).

[72] *See* overview *in* C. R. Reitz, *Symposium: Consumer Protection and the Uniform Commercial Code: Manufacturers' Warranties of Consumer Goods*, 75 Wash. U. L. Q. 357, 371 *et seq*. (1997); J. F. Powers, *Expanded Liability and the Intent Requirement in Third Party Beneficiary Contracts*, 1993 Utah L. Rev. 67, 111 (1993).

and torts became a bit clearer: product liability on the one side belonged to the area of torts, and contractual liability for warranties on the other side existed only between direct parties according to the warranty terms of their contract.

c) Establishment of warranty liability without privity in case law

However, this rule did not prove to be adequate. In a modern world of mass sales, the advent of mass marketing allegedly led to unjust results in cases where a buyer is prevented from recovery for damages 'only' because he was not in privity with the manufacturer who is responsible for a breach of warranty.

i) Express warranties

A number of judges felt that there was a need for direct liability of a manufacturer in contract law, especially where a direct representation is made by the manufacturer to the buyer. Therefore, in *Randy Knitwear, Inc. v. American Cyanamid Co.*, the Court of Appeals of New York made the first step, in 1962, in holding that a manufacturer may be held liable for its express representations in newspapers and periodicals and on labels and tags attached to the goods.[73] In this case, American Cyanamid Company, a manufacturer of chemical resins guaranteed in advertisements appearing in trade journals, letters sent to clothing manufacturers, on labels and garment tags, that fabrics treated with its "Cyana" would not shrink or stretch out of fit. These labels were sold to manufacturers of fabrics that were authorized to treat their products with "Cyana", as Apex Knitted Fabrics and Fairtex Mills in the case. Randy Knitwear was a manufacturer of children's clothing and used "Cyana" treated fabrics for its products. It turned out that ordinary washing resulted in the clothes shrinking and losing their shape, which led to the action initiated by Randy Knitwear.

The court reasoned that,

> when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity.[74]

The court goes even further in stating that "the old court-made rule (that there can be no liability without privity in warranty claims) should be modified to dispense with the requirement of privity."[75] Similar cases followed, leading to a further weakening of the concept of privity.

---

[73] Randy Knitwear, Inc. *v.* American Cyanamid Co., 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (N.Y. 1962).

[74] *Id*. at 11 N.Y.2d 12.

[75] *Id*. at 11 N.Y.2d 16; this, however, is rejected by Judge Froessel, concurring, *id* at 11 N.Y.2d 16.

ii) Implied warranties

In the area of implied warranties, too, courts began to develop a liability of the manufacturer to the buyer with whom he was not in privity. The Supreme Court of Michigan initiated this movement in its case *Spence v. Three Rivers Builders & Masonry Supply, Inc*.[76] There, a manufacturer of defective cinder blocks was held liable for breach of implied warranty or under the theory of negligence where he failed to properly inspect the goods he sold. However, the court still relied heavily on principles of torts in that it was basing its reasoning on a "lack of due care."[77]

A major breakthrough came with *Henningsen v. Bloomfield Motors, Inc*.[78] where the wife of a car purchaser was injured in a car accident arising from a defect of the car manufactured by Chrysler, who was the defendant along with the dealer. The car dealer used a standard form which excluded all express and implied warranties except for those provided by the manufacturer in the form, which was furnished by Chrysler and was also the standard form used by members of the Automobile Manufacturers Association. Although the purchase form disclaimed every express and implied warranty other than the one set forth in the form, the court held that not only the car dealer, but also the manufacturer was liable for breach of implied warranty because the manufacturer impliedly warranted that the car was merchantable by putting it out in the market. Thus, the court found that there is an implied warranty running with the car.[79]

iii) Remedies

1) Personal injury and property damage

The first cases recognizing implied and express warranties without privity dealt with personal injuries due to unwholesome food or defective products.[80] Here, courts have been willing to neglect the necessity of privity because "the hazard to life and health is usually a personal disaster of major proportions to the individual both physically and financially."[81] However, with the evolving shift of strict liability to the area of torts, the recovery for personal injuries mostly found its basis in torts and not in warranties.[82] Also, §402A of the Restatement (Second) of Torts, provides for a liability for property damage caused by the defective product.

2) Economic Loss

With regards to economic loss, on the contrary, the public policy of protecting the most important human asset, health, was not found to apply. The courts, in

---

76 353 Mich. 120, 90 N.W.2d 873.
77 *Id*. at 353 Mich. 135, 90 N.W.2d 881.
78 32 N.J. 358, 161 A.2d 69 (N.J. 1960).
79 *Id*. 32 N.J. at 384, 161 A.2d at 84.
80 *See supra* section B.II.1.a.i.
81 Price *v.* Gatlin, 241 Or. 315, 405 P.2d 502, 504 (Or. 1965).
82 Reitz, *supra* note 72 at 372.

such a case, were reluctant to recognize recovery for a contract warranty without privity. This issue again involved the relation between torts and contracts, and the courts did not agree on which basis a claim for economic loss should be based. In 1965, two cases were decided reflecting the opposite views. In *Santor v. A. and M. Karagheusian*, the Supreme Court of New Jersey held that a buyer, suing the manufacturer for an implied warranty of merchantability of a carpet, can recover the "cost of injuries or damage, either to the goods sold or to other property, resulting from defective products" from the manufacturer who has "an enterprise liability … which should not depend on the intricacies of the law of sales."[83] Thus, recovery for economic loss was based on the strict liability rule of tort law and not on contractual liability.

In *Seely v. White Motor Co.*, on the other hand, the Supreme Court of California held that the manufacturer of a truck is liable to his buyer for the amount of the payments made plus the lost profits because of a breach of an express warranty to his remote customer.[84] The court reasoned that the "distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary," and that, based on that, the manufacturer should be held liable for personal injuries caused by defective products in torts. Concerning economic loss, however, the manufacturer can only be held liable if "he agrees that the product was designed to meet the consumer's demands,"[85] thus if he gave a contractual warranty. The view in *Seely* of holding the manufacturer liable for economic loss arising from a warranty in contract rather than under strict liability in torts was adopted by a vast majority over the following years.[86]

But based on a lack of "social and economic reasons which justify extending enterprise liability to the victims of personal injury or property damage … to a buyer suffering 'only' economic loss"[87] many courts denied abolishing the requirement of privity in warranty-based claims for recovery of economic loss. Courts found no reason to grant such relief to a buyer, who was not in direct transaction with his seller, because they feared that this would lead to a number of complicated claims by "every disappointed consumer."[88] Also, as one court stated, the UCC is based on the economic system that there is always a risk of purchasing a defective product which can only be dealt with in direct negotiations between buyer and seller.[89] Another great concern was that damages resulting

---

83 44 N.J. 52, 207 A.2d 305, 311-312 (N.J. 1965).

84 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (Cal. 1965).

85 *Id.,* 63 Cal 2d at 18.

86 Spring Motors Distributors, Inc. *v.* Ford Motor Co., *supra* note 39 at 672; Nobility Homes of Texas, Inc. *v.* Shivers, 557 S.W.2d 77 (Tex. 1977); Bright *v.* Goodyear Tire & Rubber Co., 463 F.2d 240, 242 (9th Cir. 1972); Eli Lilly & Co. *v.* Casey, 472 S.W.2d 598, 600 (Tex.Civ.App. 1971); Melody Home Mfg. Co. *v.* Morrison, 455 S.W.2d 825, 826-827 (Tex.Civ.App. 1970) .

87 Morrow *v.* New Moon Homes, Inc., *supra* note 1 at 290 (holding that buyer could recover economic loss from the manufacturer on a warranty-based claim).

88 State ex Rel. Western Seed Production Corp. *v.* Campbell, 250 Or. 262, 267, 442 P.2d 215, 217 (Or. 1968).

89 *Id.*

from economic loss were less predictable and would amount to greater damage values than in claims for recovery from personal injuries.[90]

On the other hand, several courts did not find reasonable justification for such a distinction between personal injuries and economic loss in claims for breach of warranty without privity. In rejecting the fear of unforeseeable damages, with the argument that the manufacturer can limit his liability with disclaimers, they agreed that "the law of contract should control actions for purely economic losses and … the law of tort should control actions for personal injuries."[91] Further, the exponents of this view explain that it would be unjust to grant an aggrieved party a recovery for personal injury or property damage under the developed warranty-liability-without-privity case but to deny "similar relief to the consumer 'fortunate' enough to suffer only direct economic loss"[92], for it is not less harm to suffer an economic loss instead of a personal injury.[93]

Over the years, more courts agreed with the first view.[94] However, it was proposed that courts should distinguish between direct and consequential economic loss, which they most of the time did not do and also to allow recovery for direct economic loss, but not for consequential economic loss from the manufacturer.[95]

iv) Disclaimers and limitations of warranties

Another issue that came up in the course of the development of warranties without privity was the question whether disclaimer and limitations imposed by the manufacturer to his immediate seller also extended to the remote purchaser.

Some courts held that warranty disclaimers that are effective against the immediate buyer are also effective against the remote buyer.[96] In *Wenner Petroleum Corp. v. Mitsui & Co.*, the manufacturer of seamless casing warranted to his buyer, the retailer, that the casing would withstand 55 pounds of pressure per square inch and excluded all other implied and express warranties. The remote buyer alleged a breach of implied warranty of merchantability and asserted that the warranty disclaimer could not be effective against him since he did not have the knowledge of it. The Colorado Court of Appeals held that the warranty disclaimer was effective both against the retailer and against the remote buyer on

---

90 *Id.*; J. J. White & R. S. Summers, Uniform Commercial Code §11-5, §11-6 (2000); Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum.L.Rev. 917, 964-65 (1966); Beyond The Garden Gate, Inc. *v.* Northstar Freeze-Dry Manufacturing, Inc. *v.* Copeland Corp., 526 N.W. 2d 305, 309-310 (Iowa 1995).

91 Morrow *v.* New Moon Homes, Inc., *supra* note 1 at 291; T. A. Terrace, *Comment, The Vexing Problem of Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 Seton Hall L.Rev. 145, 175 (1972); Comment, *supra* note 44 at 549.

92 Morrow *v.* New Moon Homes, Inc., *supra* note 1 at 291.

93 Justice Peter (concurring and dissenting) *in* Seely *v.* White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr.17, 22, 403 P.2d 145 (Cal. 1965).

94 White & Summers, supra note 90 at §§11-5, 11-6.

95 *Id.*; Beyond The Garden Gate, Inc. *v.* Northstar Freeze-Dry Manufacturing, Inc. *v.* Copeland Corp., *supra* note 90 at 309.

96 Wenner Petroleum Corp. *v.* Mitsui & Co. (USA.), Inc. 748 P.2d 356, 357 (Colo. Ct. App. 1987); Recold, S.A. de C.V. *v.* Monfort of Colorado, Inc., 893 F.2d 195, 198 (8th Cir. 1990).

the basis of UCC §2-318.[97] Since this section would extend warranties to third-party beneficiaries, it also could disclaim warranties on the same way.[98]
Other courts, however, rejected this result by holding that when a remote buyer does not have any knowledge because the disclaimer has never been furnished to him, the disclaimer is only effective against the immediate buyer.[99] The court in *Patty Precision Products Co. v. Brown & Sharpe Manufacturing Co*. did not rely on UCC §2-318, but on UCC §2-316 for its decision.[100] Furthermore, the concern was raised that a disclaimer that is not known to the buyer might be in conflict with the doctrine of unconscionability.[101]

2. Changes in the UCC with Regards to Warranty Liability Without Privity

Article 2 of the UCC, which shall be examined in this section, was first completed in 1951 and officially published in 1952 as a response to insufficiency and inadequacy of the preceding Uniform Sales Act of 1906.[102] It has been adopted in all the states,[103] and its Article 2 governs the law of sales of goods today. Article 2 has undergone a revision that was published in 2003 and also changed the provisions of a manufacturer's warranty to his remote buyer. These will be addressed after illustration of the existing version of the UCC.

a) The old version of the UCC

i) Express warranty

As already explained, supra, UCC §2-313 lays down the requirements for an express warranty by the seller. Since UCC §2-313 explicitly mentions affirmations or promises "made by the seller to the buyer," it is clear that there is no intent to include warranties to remote purchasers. Whether those warranties should exist without privity is left to the case law where the UCC shall merely serve as guidance.[104]

---

97 *Id.*
98 Wenner Petroleum Corp. *v.* Mitsui & Co. (USA.), Inc., *supra* note 96.
99 Patty Precision Products Co. *v.* Brown & Sharpe Manufacturing Co., *supra* note 1 at 1253-1255; Spagnol Enterprises *v.* Digital Equipment Corp., 390 Pa.Super. 372, 381, 568 A.2d 948 (Pa. Super. Ct. 1989).
100 Patty Precision Products Co. *v.* Brown & Sharpe Manufacturing Co., *supra* note 1 at 1253-1255.
101 Benfield & Hawkland, *supra* note 3 at 361.
102 W. D. Malcolm, *The Uniform Commercial Code in the United States*, 12 Inter. & Com.L.Q. 226, 229 (1963); W. D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U.Ill.L.Forum 291, 299 (1962).
103 The only state that has not adopted the UCC is Louisiana.
104 Comment 2 to UCC §2-313.

ii) Implied warranty

Neither UCC §2-314 (covering the implied warranty of merchantability) nor UC §2-315 (covering the implied warranty of fitness for a particular purpose), provide for a warranty without privity. Neither do the commentary for the sections discusses the requirement of privity, Therefore, it can be inferred that this also should be left to the case law.

iii) Warranties to third party beneficiaries

UCC §2-318 offers three alternatives. The old UCC §2-318, now UCC §2-318 Alternative A, dealt only with horizontal privity.[105] However, the new Alternatives B and C can be interpreted to also include vertical privity which shall be left to the case law of the state adopting these alternatives.[106] For example Massachusetts adopted a version of UCC §2-318 that reads:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer … to recover damages for breach of warranty, express or implied, … if the plaintiff was a person whom the manufacturer … might reasonably have expected to use, consume or be affected by the goods.[107]

Similarly, The 8th Circuit held in *Recold, S.A. de C.V. v. Monfort of Colorado, Inc.*, that UCC §2-318 "is intended to remove the defense of lack of privity between the plaintiff and the defendant in certain warranty actions."[108]

iv) Remedies

The UCC does not include any special remedy provisions for breach of warranty without privity. However, some states have interpreted UCC §2-318 B and C to extend to vertical as well as horizontal privity,[109] thus defining that the buyer can seek for damages for personal injury. Some courts went even further and held that UCC §2-318 C also covers economic loss because it merely states "injured by breach of warranty" and therewith omits the part "in person" contained in Alternatives A and B.[110]

b) The revision of the UCC

The discussions and the development in case law, together with a change of public policy, finally led to the proposed revision of the UCC that seeks to change a number of the provisions on warranty. One of the purposes of the revision was to seek to better harmonize tort and contractual claims for breach of warranty.[111]

---

[105] Benfield & Hawkland, *supra* note 3 at 361.
[106] Comment 3 to UCC §2-318; Lewis, *supra* note 71 at 678.
[107] Quoted *in* Bay State-Spray & Provincetown S.S., Inc. *v.* Caterpillar Tractor Co., *supra* note 38 at n. 2.
[108] 893 F.2d 195, 198 (8th Cir. 1990); *see generally* Williston, *supra* note 19 at §22:12 *et seq*.
[109] *See supra* section B.II.1.c.iv.
[110] Nelson *v.* International Harvester Corp., 394 N.W.2d 578 (Minn. Ct. App. 1986); Cundy *v.* International Trencher Service, Inc. 358 N.W.2d. 233 (S.D. 1984).; Hyundai Motor America, Inc. *v.* Goodin, 822 N.E.2d 947, 955-956, 2005 WL 407529 (Ind.) at 8 (Ind. 2005).
[111] Reitz, *supra* note 72 at 374.

i) Manufacturer's liability without privity

Revised UCC §2-313A follows the result that already evolved in case law under the name "pass-through" warranties[112] and describes the obligation of a seller to comply with affirmations of fact, promises or descriptions of the good made in a record packaged with or accompanying the goods to the remote seller if the record is intended to be furnished to the remote seller, UCC §2-313A (3). A remote seller is defined in UCC §2-313A (1) (b) as a person who buys goods from the immediate buyer or another seller in the normal chain of distribution. Interestingly, the section does not use the word "warranty," but rather speaks of the seller's "obligation." The reason for this is to avoid inferring the express warranty arising in a contract as a part of the basis of the bargain under UCC §2-313 with this newly created warranty of a seller to his remote buyer.[113] UCC §2-313A applies only to sales of new goods.

A second newly introduced "obligation" of the seller which is laid down in UCC §2-313B relates to communications to the public, for example in the form of an advertisement. If a remote buyer relies on an affirmation of a fact, a promise or a description, the seller has the obligation that the goods conform to it, UCC §2-313B (3). Basically, this obligation shall correspond with a warranty arising from a sales talk in a direct transaction.[114] However, existing UCC §2-313 does not require particular reliance on statements that the seller made during the bargain.[115] Therefore, the drafters included the test of the buyer's knowledge of the communication to the public and of the buyer's expectations that the goods would comply with it. Like UCC §2-313A, §2-313B does not apply to used goods.

Furthermore, the revision extends these obligations to third party beneficiaries in the household or family of the remote buyer, or who might reasonably be expected to use the good purchased by the remote purchaser under UCC §2-318.

ii) Implied warranties

The provisions of implied warranties of merchantability, usage of trade, and fitness for a particular purpose have not been modified with regards to privity.

iii) Disclaimers and limitations

The obligation to the remote seller under revised UCC §§2-313A, 2-313B can be modified or limited before or at the time of the purchase or through inclusion in the record furnished that contains the affirmation of a fact, a promise or a description, UCC §2-313A (5) (a), or through inclusion in the public communication, UCC

---

[112] Preliminary Official Comment 1 to UCC §2-313A; for the development in case law *see supra* section B.II.1.c. *et seq*.

[113] Preliminary Official Comment 1 to UCC §2-313A.

[114] Preliminary Official Comment 1 to UCC §2-313B.

[115] Official Comment 3 to UCC §2-313; S. Kwestel, *Freedom From Reliance: A Contract Approach to Express Warranty*, 26 Suffolk U. L. Rev. 959, 970 (1992).

§2-313B (5)(a), as well as in separate communication or record. Other than that, exclusions or limitations have to comply with UCC §2-316.

The new UCC §2-316(2) sets forth that in a consumer contract every exclusion of an implied warranty of merchantability has to be in a record and conspicuous. This is also the rule for any disclaimer of an implied warranty of fitness for a particular purpose. In any other contract, however, the implied warranty of merchantability can be excluded orally.

While UCC §2-316 deals with the total exclusion of warranties, UCC §2-719 deals with the contractual limitation of damages for the breach of warranty.[116]

Complying with revised UCC §§2-313A, 2-313B, the legislature also revised the statute of limitations. Generally, an action has to be commenced within four years after the right of action occurred, UCC §2-725(1).[117] Existing UCC §2-725(2) provides that a right of action for breach of warranty accrues when tender is made, or, if the warranty extends to future performance, when such is awaited. The revision added that in the case of an action for breach of a manufacturer's obligation under UCC §§2-313A, 2-313B, the four-year period begins when the remote purchaser receives the goods.

iv) Remedies

UCC §2-313A(5)(b) and UCC §2-313B(5)(b) clearly provide, as a default rule, that the seller can be held liable for incidental and consequential damages under UCC §2-715 but not for the loss of profits. By that, the revision adopts the view taken in part of the case law.[118] Furthermore, the remote buyer may also recover monetary damages measured under UCC §2-714.

v) Distinction from torts

Although the provisions on implied warranties did not substantially change with the revision, the drafters of the comments sought to deal with the problem of whether the cause of action for implied warranty of merchantability and for strict liability are coextensive or mutually exclusive.[119] In comment 7 to revised UCC §2-314, it is stated that claims for personal injury and property damage to the good should be considered under product liability law and not as implied warranties of merchantability. In the case of all other warranties, i.e. express warranties and the implied warranty of fitness for a particular purpose, the provisions of UCC Article 2 would be applicable.

---

[116] For an explanation of §2-719 *see supra* section B.I.4.

[117] Revised §2-725 does not change this four-year period. It does, however, prohibit reducing this period in consumer contracts.

[118] *See supra* section B.II.1. *et seq.*

[119] For this issue, *see supra* section B.I.5. *et seq*.

III. Remaining Issues and Own Thoughts

1. Is the Revision of the UCC Satisfactory?

Two years after the promulgation of the revision of the UCC, one can already see that there are still a number of problems that have not been dealt with in the statute. Most of them have been discussed in prior case law, and it may be inferred that the decision to not to codify those issues was to leave the law flexible and open to changes due to later experience. However, it still has to be determined how those issues have to be resolved, whether under statutory or under case law.

a) Notice

Under UCC §2-607(3)(a), a buyer has to notify the seller of a breach within a reasonable time after he discovered or should have discovered the breach. However, in the context of this article, the question arises as to who the buyer has to notify: his immediate seller or the manufacturer. Neither revised UCC §2-607 nor its comments really shed light on this problem. Comment 4 to existing and revised UCC §2-607 states that a "reasonable time" will be handled differently for notification of a retail consumer. It can be interpreted that the buyer will have to give notice to his immediate seller, the retailer, who then has to give notice to the manufacturer. But this interpretation cannot serve as help in this context since the comment was already the same for the existing UCC §2-607, and the existing version of Article 2 does not contain any obligation of a remote seller.

Furthermore, the comment explains that beneficiaries with rights arising under the UCC do not fall within UCC §2-607 in that they ought to give notice of a breach. Again, because the comment has not been revised, this can only be meant with regards to third party beneficiaries under UCC §2-318 and not a seller lacking vertical privity benefiting from an manufacturer's obligation established under new UCC §2-313A or §2-313B.

Also, UCC §2-607(5)(a) does not seem to resolve the issue. The existing version provides that a buyer who is sued for a breach of warranty may give the seller, who is responsible for the breach, a notice and request the seller to come in and defend. The revision changed "the seller" to "another party." First of all, the issue here is not that the seller is sued for a breach of warranty. Second, even if one could try to draw an analogy, the section does not require a notification, but rather says that the seller "may" give a notice.

As the statutory provisions do not help, case law has to be consulted to resolve the issue. A number of courts stated that the buyer does not have to notify a remote manufacturer.[120] This is based on the reasoning that it is inappropriate to require from a seller to give notice to a party he did not deal with because such notice will

[120] Greenman *v.* Yuba Power Products, Inc., *supra* note 58 at 700; La Hue *v.* Coca-Cola Bottling, 50 Wash.2d 645, 314 P.2d 421, 422 (Wash. 1957); Chapman *v.* Brown, D.C., 50 Wash.2d 645, 85 (Wash. 1957) (affirmed Brown *v.* Chapman, 304 F.2d 149 (9th Cir. 1962)); *see also* F. James Jr, *Product Liability (Continued),* 34 Texas L.Rev. 192, 197 (1963).

probably not "occur to him."[121] The courts have been supported by academics who found that especially when the buyer is a lay person, the representatives of this view fear that the notice requirements becomes "a booby-trap for the unwary,"[122] thus depriving the injured party from his remedy of damages for breach of warranty.

Although the arguments for requiring notifying the remote manufacturer seem well founded, they cannot withstand the changes in the modern economy that led to the revision of the UCC. If a buyer seeks recovery for a breach of warranty from a manufacturer, it is simply logical to have him notify the manufacturer of the breach. This is not a prima facie unconscionable requirement, as suggested in literature,[123] it rather follows the development of modern law and the decreasing importance of privity. Therefore, Prosser's argument that there is a well-known commercial rule to give notice to the immediate seller, but that it would not come to the buyer's mind to notify his remote seller,[124] cannot persuade any more under the new development of the revised sections. Notice should be given to the manufacturer in direct claims against him. Since the dealer is in most cases liable, too, unless he disclaimed all warranties, the buyer will need to notify him as well under the ordinary statutory requirement of UCC §2-607(3).

Also, if a buyer has to use the "old" way of going back the chain of distribution, for example because of breach of implied warranty of fitness for particular purpose, he will have to give notice to his retailer and seek recovery from him. Thereafter, the retailer has to take legal actions against the manufacturer, thereby giving notice to the latter. This very painful way might cause problems if the buyer does not give notice within a "reasonable time", notwithstanding the facilitation of comment 4 to UCC §2-607. The German system, which will be discussed later in this article, introduced a waiver for the notice requirement with its revision of the sales law in 2001 in such a case. This system and possible resulting advantages will be examined in Section D infra.

b) Disclaimers

Furthermore, the effect of disclaimers given by either the retailer or the manufacturer is unclear. The revision is silent on the issues of warranty disclaimers in a situation of liability claims according to revised UCC §§2-313A and 2-313B. Previous practice has shown that where a merchant directly warrants certain qualities of the goods to the remote purchaser, the retailer can completely disclaim his warranty liability. Even a retailer's exclusion of consequential damages for personal injury would not be considered unconscionable under UCC §2-719 since the buyer could request those from the liable manufacturer.

But there are also more difficult cases. Suppose the manufacturer (Electronic Solutions) in the initial hypothetical, limits his liability vis-à-vis his buyer (ICS),

---

[121] Prosser, *supra* note 14, at 1130. Affirming Greenman *v.* Yuba Power Products, Inc., *supra* note 58.

[122] Prosser, *supra* note 14, at 1130; James, *supra* note 120 at 197.

[123] Turner, *supra* note 91 at 175.

[124] Prosser, *supra* note 14, at 1130.

because the computer's battery is not lasting longer than three hours because of wrong storage and both Electronic Solutions and ICS know that. Courtney, the remote buyer, knows neither of the defect nor of the disclaimer. The computer now does not conform to the public statements made in the advertisements that Courtney relied on for the purchase. Can she take action against the manufacturer according to revised UCC §§2-313A or 2-313B?

On the one hand, it has been suggested that "as a matter of legal theory, it would seem that disclaimers effective against the immediate buyer should also be effective against remote purchasers" without naming further reasons.[125] One could think that since UCC §§2-313A and 2-313B open the way for a pass-through warranty of the manufacturer,[126] it could also, in form of a "mirror image application" be applicable to pass-through disclaimers. However, since the buyer must have knowledge of the public statement according to UCC §2-313B(3), he would also have to have notice of the disclaimer to be effective in a "mirror image application" of that section. Although the buyer does not need to learn of the record packaged with the good and its content, UCC §2-313A could still not be applied. The section clearly states that a manufacturer is liable for statements made in that record, and it would be against the purpose of consumer protection to reduce this obligation of the manufacturer through a disclaimer unknown to the buyer.

Furthermore, although the wording of UCC §2-316 does not requires the buyer's knowledge of a disclaimer, this knowledge is crucial to achieve the purpose of "(protecting) a buyer from unexpected and unbargained language of disclaimer."[127] Therefore, a buyer needs to have bargained for a disclaimer which cannot happen without his notice.

2. Implied Warranties

Since the revision of Article 2 of the UCC did not amend the provisions on implied warranties with respect to liability without privity, the question arises whether they should not exist between buyer and remote seller.

Concerning the implied warranty of merchantability, it would be easy to impose liability on the manufacturer for breach of such. Probably a large number of courts would recognize public statements in advertisements, the showing of the product on posters and on television, and the mere fact that the good is brought into the market as an implied representation, that the good is merchantable. On the other hand, comment 7 to revised UCC §2-314 suggests that a buyer should seek recovery for personal or property injury under a tort cause of action for product liability, while a claim for injury to a person or property for breach of an implied warranty of fitness under UCC §2-314 or of an obligation arising under UCC §§2-313A, 2-313B should be based on contractual remedies as set forth in the UCC. Since the overlap of warranty and tort liability led to confusion of what

[125] Benfield & Hawkland, *supra* note 3 at 366.
[126] Preliminary Official Comment 1 to revised §2-313A.
[127] Official Comment 1 to §2-316; basically the same: Preliminary Official Comment 1 to revised §2-316.

would be the appropriate basis for a claim, it is reasonable to assign such basis. Because the concept of an implied representation that a good be fit for ordinary use whenever it enters the market will very often also trigger tort liability for defectiveness of the good, resulting liability should generally arise on the basis of tort. On the other hand, the concept of an implied warranty of fitness for a particular purpose needs a bargained agreement and therefore can not be handled as a tort claim.

Comment 7 to revised UCC §2-314 includes liability for person and property injury. For contractual liability, it refers to the general UCC provisions, in particular UCC §2-715. Thus, economic loss is covered under contract if it arises out of a breach of an implied warranty of fitness for a particular purpose.

Concerning the warranty of fitness for a particular purpose, it will generally be difficult to introduce such between parties that did not deal with each other. However, if the computer manufacturer in the initial hypothesis would have known of Courtney's need to have a fast-booting laptop, and therefore would have recommended the retailer, ICS, to sell that particular model to her, there is no reason why the manufacturer should not be liable for a breach of such an implied warranty if he lets the retailer sell that laptop to Courtney.

3. Recovery for Lost Profits

Revised UCC §§2-313A(5)(b) and 2-313B(5)(b) exclude a buyer's recovery for lost profits, i.e. for consequential economic loss. This follows the development in case law which, if it allowed warranty-based claims against the manufacturer for economic loss at all, held that the buyer could only recover incidental, but no consequential economic loss.[128] However, it does not seem reasonable and equitable to exclude recovery for lost profits if it results proximately from the manufacturer's breach of an obligation under revised UCC §§2-313A, 2-313B.

Remember that Courtney from the initial hypothetical needs her computer every day for the law school, as well as in her part time job to complete the task given to her. Alternatively, if she does not rent another computer, for the time that the manufacturer takes to repair her laptop, she loses the income from the work she would have done. In case the retailer ICS goes bankrupt in the meantime, Courtney would be unable to recover her losses at all.

There is no logical explanation why Courtney should be able to claim reimbursement for the repair costs (or receive the repair free of costs by the manufacturer), but cannot claim further economic losses that she suffered only because the manufacturer did not comply with his obligation. The allegation that economic losses were less predictable and usually higher than damages for personal or property injury[129] is simply false. Especially in the US where courts grant tremendous punitive damages, economic losses , probably, will not be extremely higher. Furthermore, personal injury can be as unpredictable as economic loss.

---

[128] *See supra* section B.II.1.c.iii.2.

[129] *Id.*

Moreover, the manufacturer will be the person to best bear damages resulting from lost profits because he will have the most suitable methods to calculate such. In turn, he is able to ease the burden arising from damages for lost profits through insurances or shifting to his buyers in form of higher prices.[130] Although it might be questioned whether this is the desired result,[131] it is still more equitable to distribute the burden equally among all buyers by having slightly increased prices instead of having one single buyer who is not even responsible for the lost profits.

4. Recovery from the Manufacturer

Another issue related to the remedial rights of the buyer is the question whether the buyer can claim only damages from the manufacturer or also the recovery of the purchase price in exchange for the good. Revised UCC §§2-313A and 2-313B give the buyer the right to claim damages under UCC §2-715 with exception of lost profits. However, in some cases the buyer will rather be interested in avoiding a claim for damages and will merely want to give back the good in exchange for the purchase price. In a relation between the buyer and his direct seller, the buyer will have to revoke acceptance according to UCC §2-608 before he is able to recover the amount of the purchase price that has been paid under UCC §2-701(1). Since these provisions are not designed for application to a relation between a manufacturer and his remote buyer, a number of difficulties arise.[132] In particular, the problem is that the manufacturer will have to take back a good that he did not sell to the remote buyer, and that he will have to pay back the money that not he, but the retailer received from the buyer.

Flechtner examined this issue and pointed out several approaches that have been taken in case law and suggested by academics: in some cases, the retailer will have disclaimed all warranties so that there is no substantial nonconformity according to UCC §2-608 which is required for revocation of acceptance. Nevertheless, some courts held that the buyer can revoke acceptance against the direct seller, by either using a failure-of-essential-purpose approach based on UCC §2-719(2),[133] by construing a nonconformity,[134] or by disposing with the requirement of nonconformity.[135] Other courts, on the contrary, held that the buyer is allowed to revoke against the third-party warrantor on the premise that,

---

[130] Comment, *supra* note 44 with further references in n. 6.

[131] Prosser, *supra* note 14 at 1121.

[132] *See* for a detailed treatise of this problem H. M. Flechtner, *Enforcing Manufacturer's Warranties, "Pass Through" Warranties, and the Like: Can the Buyer Get a Refund?*, 50 Rutgers L. Rev. 397 (1998). This problem has also been recognized by Quinn, *supra* note 29 at 2-214.

[133] Roberts *v.* Morgensen Motors, 659 P.2d 1307, 1312 (Ariz. Ct. App. 1982); *see also* buyer's argument *in* Crume *v.* Ford Motor Co., 653 P.2d 564, 566 (Or. Ct. App. 1982).

[134] *See e.g.* Seekings *v.* Jimmy GMC, Inc., 638 P.2d 210, 216 (Ariz. 1981); Page *v.* Dobbs Mobile Bay, Inc. 599 So. 2d 38, 42 (Ala. Civ. App. 1992).

[135] *See e.g.* Durfee *v.* Rod Baxter Imports, Inc., 262 N.W, 2d 349, 357 (Minn. 1977); Blankenship *v.* Northtown Ford, Inc., 420 N.E.2d 167, 170 (Ill. App. Ct. 1981); Jensen *v.* Seigel Mobile Homes Group, 668 P.2d 65, 68-69 (Idaho 1983); Henry *v.* Don Wood Volkswagen, Inc., 526 S.W.2d 483, 487 (Tenn. App. 1975).

since privity requirements have been abolished with regards to the manufacturer's liability for his warranty, privity should also not be necessary for the revocation of acceptance.[136]

Flechtner opposes both approaches: a revocation against the direct seller who disclaimed all warranties would permit revocation against a seller who breached no warranty and would thus not conform at all to the statutory requirement of UCC §2-608(1).[137] On the other hand, the position that a direct revocation against the manufacturer would merely be a "continuation of the process of removing outmoded privity" is not based on "firm theoretical foundation"[138] because this position overlooks the problem that the manufacturer would have to pay back a purchase price the buyer has paid to the retailer, while he would have to take back a good that the buyer would have received by the retailer.[139]

Because of these dogmatic inconsistencies, Flechtner suggests a refund model within the warranty contract that exists between them which allows the buyer to turn the goods over to the third-party warrantor, i.e. the manufacturer. The manufacturer would be free to resell the good and has to pay the buyer a refund that reflects the buyer's expectation damages, thus the difference between the value of the goods had they been warranted and the actual value because of the nonconformity.[140]

This approach seems logical, but it is based on the existence of a contract between the manufacturer and the seller. Flechtner's law review article dates from 1998, before the promulgation of the revision of the UCC. The revision, however, introduced an extra-contractual obligation between the manufacturer and the remote seller. Comment 1 to revised UCC §2-313A makes clear that "no direct contract exists between the seller and the remote purchaser, and thus the seller's obligation under this section is not referred to as an 'express warranty'." Therefore, there can be neither a sales contract nor a warranty contract between the manufacturer and the remote purchaser under revised UCC §§2-313A and 2-313B. However, Flechtner was correct in finding that the previously proposed approaches do not satisfy because of their conceptual inconsistencies. Therefore, this issue should not be left without a solution, which will be illustrated in section E infra.

5. "The Assault on the Citadel of Privity"

The final issue here is the often bemoaned "assault on the citadel of privity."[141] Privity is a principle that is deeply rooted in contract law. The development,

---

[136] Gasque *v.* Mooers Motor Car Co., Inc. 227 Va. 154, 313 S.E.2d 384 (Va. 1984); G. L. Monserud, *Rounding Out the Remedial Structure of Article 2: The Case for a Forced Exchange between a Buyer and a Remote Seller*, 19 U. Dayton L. Rev. 353, 365-372 (1994).

[137] Flechtner, *supra* note 132 at 414, 433-434.

[138] *Id.* at 438, 451.

[139] *See* similarly Flechtner, *supra* note 132 at 445-446.

[140] Flechtner, *supra* note 132 at 451-468. *See infra* section E.III.3. for more detailed explanations of these arguments.

[141] This expression comes from Chief Justice Cardozo in his opinion in Ultramares Corp. *v.* Touche, *supra* note 43 at 445.

in particular, the revision of the UCC dispose this principle more and more. Therefore, the question arises how far the abolition of the principle of privity should go.

Contract law is the law of special agreements usually between two persons.[142] The contracting parties bargain more or less hard on the terms of their agreements in order to shape them according to their particular needs and wishes. Only what has been bargained for should be owed, and a party should not be liable for something he or she was not obligated to do. This is assured by the principle of privity. Liability without privity originally falls under tort liability.

However, the above described, hard bargained-for contract has, in many respects, been replaced by mass sales of consumer goods. In almost all everyday purchases, a consumer merely chooses a good from the shelf of a retailer store, goes to the cash registrar, and pays for it. The choice in such case is oftentimes made according to advertisements of the manufacturer of the product. Therefore, case law and statutory law changed to provide for a direct liability of the manufacturer vis-à-vis the remote seller.

The law has to go with the flow of life and develop according to the needs of the consumers. These changes in the market situation arose all over the world; however, countries like Germany, for example, chose not to impose a direct liability on the manufacturer to the consumer. Rather, claims for breach of warranties have to be made within the respective contractual relationship along the chain of distribution.[143] Although there are advantages of a direct liability, such as a more effective recourse because the number of claims is reduced,[144] the German example shows that such is not necessary.

On the other hand, such direct liability and the accompanying abolition of privity in that regard are reasonable, even though it might not be necessary. The manufacturer makes public statements or packages records with the goods that are directly addressed to the remote consumer. In such a case, it would even be possible to speak of a contractual relationship between the merchant and the consumer arising from a warranty contract.[145]

In conclusion, the principle of privity is an essential basis of contract law and a major distinction from torts. Although it is reasonable to disregard this principle for direct quality representations made by the manufacturer to the remote consumer, the abolition of privity should not go further. Additional direct liability of a manufacturer should be sought under tort law. Otherwise, contract law would not be anymore what it actually is: the law governing agreements between parties who chose to bargain only with each other and not with any third party.

---

[142] *See* UCC §1-201(3) and (11).

[143] The German system of warranties and privity will be explained in detail in section D *infra.*

[144] The advantages and disadvantages of both a direct liability of the manufacturer to his remote buyer and a liability only within the respective contractual relationship will be illustrated in section E *infra*.

[145] This is the opinion of Flechtner, *supra* note 132 at 452. Flechtner argues that the "lack of privity argument" is misleading because there is privity between the manufacturer and the consumer which is not a buyer-seller relationship, but a relationship between a buyer and a third-party warrantor.

C. Warranties and Consumer Protection in the CISG and in the European Union

Globalization, coalescence and opening up of national markets to international exchanges of goods not only led to various issues of international trade, but also to international codifications and agreements on harmonized legislation. Today, the most important international legislation in the area of sales law is the United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG). The European Union tries to follow a uniform European contract law and provides so far several harmonizing directives in the area of consumer sales contracts and consumer protection. Both the legal situation in the European Union and the international sales law according to the CISG, shall be illustrated with regards to their provisions on warranties and privity in the following.

I. Comparison to the CISG

Already in the late 1920s, requests for a unification of the law of international sales of goods have been made by Ernst Rabel.[146] The International Institute for the Unification of Private Law (UNIDROIT) followed with several drafts of uniform laws, such as the Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) in 1964. These have been revised constantly until, in 1978, the United Nations Commission on International Trade Law (UNCITRAL) submitted another draft to the General Assembly of the United Nation which, in turn, authorized to convene a diplomatic conference. At this conference, held from March 10 to April 11, 1980 in Vienna, the draft was approved unanimously and came into force on January 1, 1988 as "United Nations Convention on Contracts for the International Sale of Goods (CISG)."[147] Currently, the CISG is in force in 47 countries.[148]

1. The System of the CISG

The CISG is not merely a harmonization of rules governing transnational transactions of good; it is rather a supranational legislation that applies as a primary source of law to international sales.[149] Art. 1 CISG determines its scope of application in requiring that the contracting parties have to be established in two different states, and those states have both signed the Convention, Art. 1(1)(a) CISG, or if International Private Law determines the application of the CISG, Art. 1(1)(b) CISG. According to Art. 6 CISG, parties are allowed to exclude or modify

---

[146] F. Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Georgia Journal of International and Comparative Law 183, 189 (1994); P. Schlechtriem, Internationales UN Kaufrecht (International UN Sales Law) rec. 1 (1996); B. Grossfeld & P. Winship, *The Law Professor Refugee,* 18 Syracuse J. Int'l L. & Com., 3, 11-12 (1992).

[147] Ferrari, *supra* note 146 at 189; J Loofkofsky, Understanding the CISG in the USA 3 (2004).

[148] D. Frisch & R. Bhala, Global Business Law – Principles and Practice 6 (1999).

[149] Schlechtriem, *supra* note 146 at rec. 8; Frisch & Bhala, *supra* note 148 at 12.

the terms of the Convention. Absent provisions concerning matters governed by the Convention, Art. 7(1) CISG primarily refers to an interpretation according to the principles that the Convention is based on. As a second step, the countries can, according to Art. 7(2) CISG resort to the national law that applies according to International Private Law.

If the CISG does not deal with a certain issue. Art. 7(2) provides that the matter "governed," but "not expressly settled" shall be settled according to basic general principles or the law that is applicable under the rules of private international law. Such general principles are the obligation of good faith, reasonableness, and estoppel.[150] If, however, the general principles are not appropriate to resolve the issue, but the matter falls under the scope of the Convention as laid down in Art. 4 and 5 CISG, the parties will have to supplement the Convention and fill in the gap with the domestic law that is applicable according to the rules of private international law.[151]

2. The System of Warranty and Privity in the CISG

a) Defect as to the quality of the good

The CISG differs from the American system in that it is not based on warranties given by the seller, but on an agreement on the quality of the good. If the good does not have this quality, it has a defect as to its quality which constitutes a breach of the seller's obligations. Art. 35(1) CISG provides that the good conforms to the contract if it accords to the quantity, quality, and kind of good agreed on, Art. 35(2)(a) CISG. In case there has been no such explicit agreement, the good conforms to the contract under Art. 35(2)(b) CISG if it is suitable for an ordinary or a particularly determined purpose. Conformity can also be determined according to samples of that kind of the good, Art. 35(2)(c) CISG.

For the seller to be liable for a defect as to the quality of the good, it is crucial that the good does not conform to the contract at the point of time when the risk of loss passes from the seller to the buyer, Art. 36(1) CISG. The seller can only be held liable for a later arising defect under Art. 36(2) CISG if he warranted that the good would have the agreed upon quality for a certain period of time. Such guarantee only relieves the buyer of the burden to prove when the defect of the good arose.[152] The seller can, ofcourse, give other warranties for which he might be liable independent of any fault on his side.[153]

---

[150] Loofkofksy, *supra* note 147 at 36.

[151] *Id*. at 38-39 with references to different views for supplementary provisions; A. H. Kritzer, Guide to Practical Applications of the UN Convention of Contracts for the International Sale of Goods 119 (1990).

[152] Schlechtriem, *supra* note 146 at rec. 146; *see also* J. Honnold, Uniform Law for International Sales rec. 243 (1982).

[153] Schlechtriem, *supra* note 146 at rec. 146; *see also* Kritzer, *supra* note 151 at 291-292.

b) Buyer's remedy in case of defect

The CISG contains provisions on the buyer's remedies for defective products in Art. 45 to 52. On the other hand, Art. 5 CISG excludes liability for a death or personal injury due to a defective good, thereby making clear that the CISG does not govern product liability in torts.

Primarily, Art. 46 CISG gives the buyer a right to ask for performance of the contract. If such is impossible then he has a right to a supplementary performance in the form of a supplementary delivery or repair. The request for supplementary delivery is only allowed, however, if the defect as to the quality is substantial, and the request for a repair will only be followed if the costs are not unreasonable.[154] When claiming all these remedies, the buyer can set forth a fixed period of time for the seller to comply according to Art. 47 CISG. During this period, the buyer is not allowed to claim any other remedies. There is no obligation to set a time-period. However, to do so gives the buyer a right to terminate the contract even without a substantial breach.[155]

The buyer has, however, the duty to notify the seller of a nonconformity according to Art. 39 CISG. Otherwise, he will be barred from any remedy. Such notice must be given within reasonable time after the buyer should have discovered the lack of conformity, Art. 39(1) CISG, or, at the latest, after two years, Art. 39(2) CISG. Furthermore, the notice must meet the substantial requirement of specifying the nonconformity.[156]

If the breach of the contract is substantial and the seller fails to (supplementary) perform within the time-period set by the buyer, the buyer has the right to terminate the contract according to Art. 49 CISG. As long as the buyer does not claim this remedy, the seller has a right to secondary performance under Art. 48 CISG and can correct the defect if this does not cause an unreasonable burden on the buyer. Also, the buyer is entitled to ask for a price reduction according to Art. 50 CISG as long as the seller does not correct the defect.

Finally, Art. 45(2) CISG gives the buyer the right to claim compensation for damages, either by itself or in addition to other remedial rights. This claim is independent from a fault in the person of the seller.[157] The amount of damages, though, is influenced by the buyer's duty to minimize the damage according to Art. 77 CISG and the seller's opportunity to be excused in case the damages have been caused by fault of the buyer, Art. 80 CISG, or by an incident beyond the seller's influence, Art. 79 CISG.

c) The requirement of privity with regards to buyer's remedies

The CISG does not contain any reference to the requirement of privity of contract. This might open the floor for argument that there could be a direct recourse

---

[154] *See* Art. 46(2) and (3) CISG.

[155] Schlechtriem, *supra* note 146 at rec. 182.

[156] *See* F. Ferrari, International Sale of Goods – Applicability and Applications of the United Nations Convention on Contracts for the International Sale of Goods, in Law and International Commerce, Vol. 2, at 197 *et seq.* (1999) with further explanations.

[157] Schlechtriem, *supra* note 146 at rec. 201 & 286.

against the manufacturer in case of breach of a warranty/ defect as to quality of good. However, an interpretation of this lack, in light of the other provisions of the CISG, "strongly suggests that the Convention applies only to the two-person sale between commercial parties."[158] First, Art. 4 CISG makes clear that the CISG "governs only the formation of the contract of sale and the obligation of the seller and the buyer arising from such a contract." Second, Art. 35(1) "limits quality disputes to what the contract requires."[159]

Thus, in absence of relevant provisions in the CISG, national law applies to a dispute of breach of warranty without privity. Suppose that a German bought a good from an American manufacturer who has a subsidiary branch in Germany. If the parties agreed on the applicability of US law, the German buyer will be able to claim breach of warranty according to the UCC as explained in Section B supra. If, however, the parties determined that German law should apply, the claim is governed by the provisions of the German Civil Code (*Bürgerliches Gesetzbuch*) that will be illustrated in more detailed in section D infra.

II. Comparison to the European Union

The drafters of the Treaty of Rome, that formed the European Community in 1957, had thought that consumer protection should be regulated at a national level because they did not feel the need for a harmonized consumer law. This perception has changed since the early 1970s.[160] The Community developed a sense that "consumer protection is a social goal which transcends purely economic issues" and which goes beyond national borders.[161] Thus, the European Union strives today for a harmonization of the consumer protection laws of the Member States. Although there is still a long way to go before the European Union will have a uniform contract law, the previous efforts led to a series of directives and to a collection of so-called European principles of contract law.

1. European Principles of Contract Law

The "European Principles of Contract Law" have been drafted by the members of the so-called Commission of European Contract Law which mainly has been brought into being by Ole Lando, now the chairman of the Commission. As early as 1974, Ole Lando and others had the idea of creating a European law of obligations or a "European Uniform Commercial Code."[162] After raising the necessary funds and finding the members for the Commission, the work began

[158] Frisch & Bhala, *supra* note 148 at 88.
[159] *Id.*
[160] Th. M. Bourgoignie, Integration Through Law – Europe and the American Federal Experience, Vol. 3, 98 (1987); C. Quigley, European Community Contract Law, Vol 1: The Effect of EC Legislation on Contractual Rights, Obligations and Remedies 255 (1997).
[161] Bourgoignie, *supra* note 160 at 98-98. *See also* Communication from the Commission to the Council and the European Parliament on European Contract Law (COM(2001) 398 final); Communication from the Commission to the European Parliament and the Council: A more Coherent European Contract Law – An Action Plan (COM(2003) 68 final).
[162] O. Lando & H. Beale, Principles of European Contract Law, Parts I and II, at xi (2000).

in 1980 and led to the existing collection of "European Principles of Contract Law."[163] So far, the collection comprises performance and non-performance, as well as remedies.[164]

The Commission on European Contract Law was not the only one to feel the need for a uniform European contract law. In 1989 and 1994, the European Parliament encouraged action in the area of harmonizing private law and drafting a European Code of Private Law.[165] Also, other academics, the so-called "Pavia Group," have developed a draft of a "European Contract Code."[166] Finally, the European Commission has published several communications in which it made clear that the ultimate goal is to have EU-wide accepted contract terms, if not a uniform contract law.[167]

The European Principles of Contract Law are a set of rules that shall serve; as a foundation for a future European Code of Contracts, for adoption by present contracting parties from different states, and as a guideline for national courts and legislatures in their decisions.[168] The principles have been drawn from the existing legal systems of all the Member States in order to achieve a system that offers the best possible solution for contracting in Europe.
The principles contain only one explicit rule with regards to privity, which is the stipulation in favor of a third party in Art. 6:110.

Art. 8:101(1) of the Principles sets forth that "whenever a party does not perform an obligation under the contract …, the aggrieved party may resort to any remedies set out in Chapter 9." These remedies are: the right to performance, withholding performance, termination of the contract, price reduction, and damages and interests. The language of "aggrieved party," however, suggests that the remedial rights should only be claimed within the relation of the direct contracting parties.

3. Directives on European Consumer Law

a) Consumer protection (product liability)

Consumer protection had been a concern in the European Community for a long time, even before the communication titled, "A new impetus for consumer protection policy" by the Council of Ministers in 1985.[169] Following this communication, the Council adopted two directives on product liability and product safety.[170]

---

[163] *Id*.
[164] *Id* at xiv.
[165] Resolution on action to bring into line the private laws of the Member States, OJ C 158, 26 June 1989, at 400; Resolution, OJ C 205, 25 July 1994, at 518 (cited after COM(2001) 398 final, 4).
[166] The draft is published by University Di Pavia, 2001 and is based on the work of the Academy of European Private Lawyers; *see* COM(2001) 398 final, 5 at n. 7.
[167] Communication from the Commission to the Council and the European Parliament on European Contract Law (COM(2001) 398 final); Communication from the Commission to the European Parliament and the Council: A more Coherent European Contract Law – An Action Plan (COM(2003) 68 final).
[168] Lando & Beale, *supra* note 162 at xxiii.
[169] COM(85) 314.
[170] Council Directive (EEC) 85/374 of 25 July 1985 on the approximation of the laws, regulations

Furthermore, the European Community regulated safety standards in several other areas, such as agricultural products, food, water, cosmetics, etc.[171]

These directives did not set forth specific regulations for product liability, but instead "[laid] down essential and broad safety and other mandatory requirements" as well as technical harmonizing standards which functioned as a framework that had to be filled out by European standardization bodies.[172]

b) Consumer (sales) contracts

i) Introduction

Consumer protection was not only a concern in the area of product liability, but also in the area of contractual liability. As already explained supra, there is no uniform contract law in the European Union yet.[173] Therefore, the Council adopted several directives for consumer protection by regulating doorstep selling,[174] distance selling contract,[175] consumer credits,[176] as well as by prohibiting unfair terms in consumer contracts.[177] One of the most discussed directives[178] was the Council and Parliament Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees (hereinafter Directive on Sales of Consumer Goods).[179] Due to these numerous directives, some even talk about an existing European consumer protection law.[180]

A crucial question with regards to these harmonizing directives is the competence of the European Community to enact such directives. According to Art. 2, 3(1)(h) ECT, the Community shall "(establish) a common market and an economic and monetary union" *inter alia* by "approximation of the laws of Member States to the extent required for the functioning of the common market."

---

and administrative provisions of Member States concerning liability for defective products, OJ 1985 L210/29, and Parliament and Council Directive (EC) 2001/95 on general product safety, OJ 2002 L11/4, which replace Council Directive (EEC) 92/59, OJ 1992 L 228/24.

171 For a detailed illustration of the European legislation governing consumer law, *see* P. Nebbia & T. Askham, EU Consumer Law (2004).

172 *Id*. at 61.

173 *See supra* section C.II.

174 Council Directive (EEC) 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

175 Council and Parliament Directive (EC) 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts OJ 1997 L 144/19; amended by Parliament and Council Directive (EC) 2002/65 concerning the distance marketing of consumer financial services and amending Council Directive (EEC) 90/619 and Directives (EC) 97/7 and (EC) 98/27, OJ 2002 L 271/16.

176 Council Directive 87/102 of 22 December 1986 on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ 2987 L 42/48.

177 Council Directive (EEC) 93/13 of 5 April 1993 on unfair terms in consumer contracts OJ 1993 L 95/26.

178 Nebbia & Askham, *supra* note 171 at 262.

179 OJ 1999 L171/12.

180 *See* K. A. von Sachsen-Gessaphe, *Der Rückgriff des Letztverkäufers – neues europäisches und deutsches Kaufrecht (The Recourse of the Ultimate Seller - New European and German Sales Law)*, RIW 2001 721, 722 with reference to agreeing and dissenting authors in n. 25.

The European Court of Justice has emphasized that this task must actually pursue the creation and functioning of the common market; a mere diversion of the national laws without actual harm is not sufficient to trigger the authority to enact legislation.[181] In particular, with regards to the Directive on Sales of Consumer Goods that was enacted based on Art. 95 ECT, this competence has been doubted.[182] However, even though the European Community might have exceeded its powers, the Member States have the duty to transpose the directive in national law according to Art. 249(3) ECT.[183]

(2) The directive on sales of consumer goods

With the Directive on Sales of Consumer Goods, the European legislature intended to fulfill the obligation "to promote the interests of consumers and to ensure a high level of consumer protection" as laid down in Art. 153 ECT[184] In particular, when consumers want to use the common market for cross-border purchases or for mere price comparisons, they should be awarded protection in case a good does not conform to the contract.[185] To promote even more harmonization, the European Community oriented the Directive towards a parallelization with the CISG.[186] Therefore, the Directive provides for a similar system of defects as to quality of good instead of the American system of warranties. Also, the remedies are similar to the ones established in the CISG.

According to Art. 2 of the Directive, goods have to conform to the terms of the sales contract at the time of the delivery: if they comply with the explicit agreement of the parties, or if they are fit for an ordinary or specifically agreed-upon purpose, or if they comply with public statements made by the seller, the manufacturer or a representative and the seller was aware of them. A nonconformity must exist at the time of delivery in order for the buyer to be able to invoke remedies, Art. 3(1). Furthermore, Art. 5(3) contains a presumption that a nonconformity existed before the delivery if it becomes apparent within the first six months.

Besides for the defects as to the quality of the good, the seller will also be liable for breach of a guarantee given to the consumer. Art. 6 determines that a guarantee shall be legally binding and has to conform with special form and information requirements.

The buyer's remedies in case the good does not conform to the contract are set out in Art. 3 of the Directive. In the first place, the consumer has the right to claim repair or replacement of the nonconforming good, unless this is impossible

---

[181] ECJ, Judgment of 5 October 2000 in Case C-376/98, Germany *v.* European Parliament and Council of the European Union, [2000] ECR I-8419 at rec. 84; von Sachsen-Gessaphe, *supra* note 180 at 723.

[182] *See* references *in* von Sachsen-Gessaphe, *supra* note 180 at 723, n. 44; S. Lorenz, *in* K. Rebmann (Ed.) Münchner Kommentar zum BGB (Munich Commentary on the German Civil Code), vor §474 at rec. 1 (2004).

[183] von Sachsen-Gessaphe, *supra* note 180 at 724, also points out that a possible action against an act of the Community would be barred because the time-period has already passed, Art. 230(5), (2) ECT.

[184] *See* Directive 1999/44/EC, rec. 1.

[185] Directive 1999/44/EC, rec. 2, 4f.

[186] Lorenz, *supra* note 182 at vor §474 at rec. 2; von Sachsen-Gessaphe, *supra* note 180 at 725.

or disproportionate. The costs incurred will have to be borne by the seller. Furthermore, if the seller has not complied with a request for repair or replacement within a reasonable time and without inconvenience for the consumer, the buyer can ask for a price reduction according to the actual value of the good or rescind the contract. Art. 5 of the Directive sets forth that the statute of limitations shall not be less than two years.

Because the seller "should be free … to pursue remedies against the producer … or any other intermediary,"[187] Art. 4 gives the final seller, who has been held liable by the consumer for the lack of conformity, the right of redress against the producer or another previous seller in the same chain of contracts. The directive provides that it is for the national law to determine the "person or persons liable against whom the final seller may pursue remedies," thus leaving it to the national legislature to decide whether or not to have direct recourse against the producer. The producer is defined as the manufacturer or the importer of consumer goods into the market of the European Community, Art. 1(2)(d).

The decision for this form of Art. 6 of the Directive was not undisputed. The first intention was to introduce a right to a direct action against the manufacturer if he is liable for the lack of conformity, with the French *action directe* serving as a model for this proposition.[188] However, since the legislative competence of the Community did not include such a provision, the Community decided to leave the choice of addressee for the seller's remedy to them.[189] This also eased the implementation of the Directive into the national laws since the Member States have differing regulations on such a recourse.

The Directive had to be incorporated into the national law by January 1, 2002. The provisions of the Directive, the arising issues and the impacts on legal practice shall be illustrated in more detail with the example of the German transposition in section D infra.

D. The Concept of Warranty Claims in the German Legal System

As many other legal systems, German sales law provides for some forms of warranties to protect consumers from unpleasant surprises after the purchase of a good. Additionally and more importantly, German sales law requires a good to be in conformity with the contract; otherwise, the seller will be held liable. Also,

---

[187] Directive 1999/44/EC, rec. 9 of the Directive.

[188] von Sachsen-Gessaphe, *supra* note 180 at 729; A. Matusche-Beckmann, *Unternehmerregress im neuen Kaufrecht: Rechtsprobleme in der Praxis*, BB 2002, 2561 at n. 5 (2002) with reference to the Green Paper of 1993 and the preliminary draft of 1996. For a short explanation of *action directe see* H. Kötz & A. Flessner, European Contract Law, Vol. 1. Formation, Validity, and Contracts; Contrct and Third Parties 254-255 (1997).

[189] von Sachsen-Gessaphe, *supra* note 180 at 726.

German contract law recognizes and uses the doctrine of privity i.e. a contract usually only affects the parties participating in the bargain.[190]

Unlike the US, Germany is governed by civil law and thus has the relevant provisions laid down in the German Civil Code, the *Bürgerliches Gesetzbuch* (hereinafter BGB). The BGB has undergone some changes with the revision of its second book on the law of obligations that became effective on 1 January 2002[191] and also amended the law of sales and related doctrines. This being laid out, the relationship of nonconformity and privity in the German system shall be explained in this chapter. First, this chapter will depict the system and cooperation of nonconformity and privity in the German law. Next, the liabilities for warranties will be explained. Thereafter, these contract-based liabilities will briefly be opposed to the tort-rooting product liability. Finally, the chapter ends with a discussion of problems arising under the revision of the BGB.

I. Overview of Warranties and Privity in German Law

There is no liability for the breach of warranty to a remote party of the contract, either in a consumer or in a merchant contract, unless the remote manufacturer had given a warranty that makes him liable to the final consumer of that good. The warranties that have been dealt under the name of "pass-through warranties" in section B[192] have become increasingly common in the course of the last decades. As already explained in the context of warranties in the US system, manufacturers tend to warrant certain qualities with a direct effect to the consumer, thereby circumventing the doctrine of privity and avoiding the legal issues that will show up infra.

However, on the one hand, manufacturers do not always give warranties directly to their consumers. On the other hand, many manufacturers also limit those warranties to a certain extent, thereby disclaiming further claims by the customer. If a consumer in such a case wants to seek recovery for the breach of a warranty, he has to address his claim to his direct seller. Hence, there is and never was a way under the BGB to recover from a remote manufacturer. Thus, the customer has to take actions against his immediate seller who in turn has to seek recovery from his immediate seller until the chain of distribution is followed back to the manufacturer.

This short introduction only reveals half of the German system dealing with warranties and privity. In fact, the German system of today does not deal with warranties like the US system, and it also does not allow an immediate claim for damages. This section shall explain how the German sales law works with regards to defective, non-conforming goods. First, dealing with warranties and privity under the old version of the BGB will be explained. Thereafter, I will turn

---

[190] Exceptions from the doctrine of privity, such as third party beneficiaries, are not of interest here and will not be dealt with.

[191] Gesetz zur Modernisierung des Schuldrechts of 26 November 2001 *(Act to Modernize the Law of Obligations)*, BGBl. I 2001, 3138.

[192] *See supra* at section B.II. & B.III.1.

to an illustration of the changes that came with the revision and the impact of privity on consumer claims.

1. Former Version of the BGB

The version of the BGB, which existed until 2002, did not use the concept of conformity of the good as it does today. Although it contained a provision dealing with defects as to the quality of goods, there was no clear case law interpreting this provision.
§459 BGB o.v. describes two different forms of a defect as to the quality of a good, for which the seller might be liable. Under subsection (1), a good could either have a defect that reduces the ability of the good to fulfill the purpose such a good is usually used for, or a specific purpose that was agreed on in the contract. Under subsection (2), the seller would be held liable if the good does not have the guaranteed characteristics. These two defects as to the good's quality triggered the buyer's right to terminate the contract or reduce the contract price according to §462 BGB o.v.[193]Additionally, if a good was lacking a guaranteed characteristic according to §459(2) BGB o.v., the buyer had a right to claim damages under §463 BGB o.v.

a) Defect according to §459(1) BGB o.v.

A constant issue arising around the application of §459(1) BGB o.v. was the determination of a defect that would impair the good's use for general or particular use. One view argued that the defect has to be determined in an objective way, i.e. a good has a defect if it departs from the quality that a good of that kind usually has.[194] Another view was that the defect had to be found out by looking at the particular terms of the contract and the purpose of use that was agreed on between the parties.[195] Others were of the view to combine the objective and the subjective standard.[196] However, the application of a subjective standard has been the prevailing view over the years.[197] Only if there is no such agreement that would allow determining a defect, should the objective standard apply.[198]

b) Lacking guaranteed characteristic according to §459(2) BGB o.v.

A characteristic of a good was guaranteed in the contractual agreement if it had become part of the bargain. This did not have to be explicitly confirmed, for example in writing, unless the contract itself needed to be in writing.[199] However,

---

193 O.v. stands for old version and shall be used to avoid confusion with the existing BGB.
194 RGZ 67, 87 f.; 97, 351 f. (cited after H. Brox, Besonderes Schuldrecht (Special Law of Obligations) §5 at rec. 61 (1998)).
195 H. Putzo, *in* O. Palandt (Ed.), Bürgerliches Gesetzbuch (German Civil Code) §459 o.v. at rec. 8 (1991); Brox, *supra* note 194 at §5 at rec. 61.
196 *See* further remarks *in* Brox, *supra* note 194.
197 Putzo, *supra* note 195 at §459 o.v. at rec. 8; Brox, *supra* note 194 at §5 at rec. 61.
198 Putzo, *supra* note 195 at §459 o.v. at rec. 8.
199 *Id.*

tacit agreements on characteristics could only become part of the bargain if this was clear for both sides, e.g. if the good was guaranteed to be fit for the purpose particularly agreed on in the contract.[200]

3. The Revision of the BGB

Two coinciding events led to the revision of the BGB: on the one hand, as early as 1978, German Minister of Justice, Hans-Jochen Vogel, initiated a revision of the law of obligations that resulted in a draft for a revision of the second book of the BGB proposed by the "Commission for the Law of Obligations" in early 1990s.[201] On the other hand, the European Union enacted several directives that still had to be incorporated in German law. The most important of all was the Directive on Sales of Consumer Goods that had to be transposed by January 1, 2002.[202] After controversial discussion whether the German legislature should pursue the so-called "small solution," i.e. only the implementation of the EU Directives, or the "big solution," Germany decided for the latter and combined the transformation of the Directives with the proposition of the Commission to revise the law of obligations.[203] The result was an extensive revision of not only the sales law, but of the complete second book of the BGB containing the law of obligations.

With the revision of the BGB, the drafters included a new concept, the "defects as to the quality of the good" (*Sachmangel*), which arises if a good does not conform to the quality terms of the contract. Thus, the BGB adopted the system of conformity of the good laid down in the CISG and the EU Directive on Sales of Consumer Goods.[204] This defect is not a warranty. The warranty exists only if explicitly laid down in the bargain. The difference between those two concepts will be explained in the following.

a) Defects as to the quality of goods

According to §433(1) sentence 2 BGB, the seller has the duty to deliver the goods to the buyer without any defects as to their quality. §434 BGB defines a defect as to the quality of goods and sets forth under which conditions a good is free of such defect and codifies the previously preferred subjective approach.[205] Thus, §434 BGB adopts the requirement of defining the conformity of a good according to Art. 2 of the Directive on Sales of Consumer Goods in providing:

---

[200] 59 BGH 158, 160-161; U. Hüffer, *Zusicherung von Eigenschaften der Kaufsache durch schlüssiges Verhalten und Haftung für Entwicklungsschäden* – 59 BGHZ 158, 1973 JuS 607, 608-609 (1973); Putzo, *supra* note 195 at §459 o.v. at rec. 17.

[201] von Sachsen-Gessaphe, *supra* note 180; L. Haas, *Entwurf eines Schuldrechtsmodernisierungsgesetzes: Kauf- und Werkvertragsrecht*, 2001 BB 1313 (2001).

[202] Art. 11(1) of Directive 1999/44/EC.

[203] H. P. Westermann, *Das neue Kaufrecht einschließlich des Verbrauchsgüterkaufs*, 2001 JZ 530, 530-531 (2001); B. Heß, *Die Übergangsregelungen zum Schuldrechtsmodernisierungs-gesetz*, 2002 DStR 455 (2002); B. Heß, *Das neue Schuldrecht – In-Kraf-Treten und Übergangsregelungen*, 2002 NJW 253, 253-254 (2002).

[204] *See supra* section C.I.1. & C.II.2.b.i. *et seq*.

[205] S. Jorden & M. Lehmann, *Verbrauchsgüterkauf und Schuldrechtsmodernisierung*, 2001 JZ 952,

§434 Defects as to quality[206]

(1) The good is free from defects as to quality if, upon the passing of the risk, the good is in the agreed quality. If the quality has not been agreed on, the good is free from defects as to the quality
   1. if it is fit for the use specified in the contract, and otherwise
   2. if it is fit for the ordinary use and its quality is such as is usual in goods of the same kind and can be expected by the buyer by virtue of its nature.

   For the purposes of sentence 2, No. 2 the quality includes features which the buyer may expect by virtue of public statements concerning the good's features that are made by the seller, the producer (§4 (1) and (2) of the Product Liability Act) or persons assisting him, in particular in advertisements or in connection with labeling, unless the seller was not aware of the statement nor ought to have been aware of it, or at the time of the conclusion of the contract it had been corrected by equivalent means, or it could not influence the decision to purchase the good.

(2) There is a defect as to quality also where the agreed assembly of the good has not been properly performed by the seller or persons employed by him for that purpose. Moreover, there is a defect as to the quality of a good intended to be assembled if the assembly instructions are defective, unless the good has been assembled correctly.

(3) Delivery by the seller of a different good or of a lesser amount of the good is equivalent to a defect as to quality.

§434 BGB includes express agreed quality ("if the quality has not been agreed on," §434(1) sentence 1 and 2 BGB), as well as an implied agreement of fitness for a particular purpose ("fit for the use specified in the contract," §434(1) sentence 2, No. 1 BGB) and of merchantability ("fit for the ordinary use," §434(1) sentence 2, No. 1 BGB).

For a defect as to the quality to exist, the contract terms on which the parties agreed on should be taken into consideration, i.e. the subjective standard. If the agreement does not give any information as to the quality of the good, it can be inferred for new goods that they shall be without defect. The same result can be reached under §434(1) sentence 2, No. 2 BGB with a look at the ordinary purpose for which the good is used. Hereto, the parties have to compare the good with other goods of its kind and see what qualities they can reasonably expect.[207] If the seller knew of the particular purpose the good was intended to be used for, it is implied that the good shall be fit for that purpose and does not have any defects that would impair that particular purpose, §434(1) sentence 2, No. 1 BGB.

Furthermore, §434 BGB makes clear that the defect has to exist before, or upon, the passing of the risk. Thus, the buyer bears the burden to show that the defect did not arise after the delivery of the good. However, in consumer

953 (2001); for the dispute under the former version of the BGB *see supra* section D.I.

[206] The translations of the German BGB in this article partly follow the suggestions of the "German Law Archive" http://www.iuscomp.org/gla/ for which I am very thankful.

[207] H. Putzo, *in* O. Palandt (Ed.) Bürgerliches Gesetzbuch (German Civil Code) §434 Rn 29 (2004); J. Schmidt-Ränsch, Das neue Schuldrecht – Anwendung und Auswirkung in der Praxis (The New Law of Obligations – Application and Effects in Practice) rec. 717 (2002); P. Schlechtriem, *Kaufrechtsangleichung in Europa: Licht und Schatten in der Verbrauchsgüterkaufrichtlinie (Approximation of Sales Law in Europe: Light and Shadow of the Directive on Sales of Consumer Goods)*, *in* H. Schack (Ed.), Gedenkschrift für Alexander Lüderitz 675, 683 (2002).

contracts, §476 BGB provides in accordance with Art. 5(3) of the Directive on Sales of Consumer Goods for the presumption that a defect that arises during the first six months after delivery of the good already existed before the passing of the risk, thereby shifting the burden of proof from the buyer to the seller.

b) Remedial rights arising under §437 BGB

In the event of any defects, §437 BGB enumerates the buyer's rights and, prescribes the order of the steps the buyer has to take. The buyer , first of all, has to demand a supplementary performance which can be the repair of the good or delivery of a new exemplary of the good under §439 BGB. Only if the supplementary performance is refused by the seller, fails twice, or constitutes an unconscionable burden on the seller, can the buyer terminate the contract (according to §§440, 323 and 326(5) BGB) or reduce the purchase price (according to §441 BGB). This tiered construction of remedial rights gives the seller a right to second delivery[208] and transposes Art. 3 of the Directive on Sales of Consumer Goods.

Finally, the buyer has a right to claim compensation damages under §§440, 280, 281, 283 and 311a BGB or reimbursement for vain expenses under §284 BGB. Concerning the compensation damages, the buyer can choose whether to give back the defective good and claim compensation for the whole value or whether to keep the defective good and only receive the difference between the actual and the contracted value. Those damages include incidental damages for property damage or personal injury. They can further be awarded for lost profits under §252 BGB if there is sufficient evidence that those profits would have been made and for consequential personal injury under §253 BGB. However, for the buyer to be able to claim damages, the seller generally must be responsible for the nonconformity. Contrary to the other remedies, damages are not regulated in the European Directive.

All those provisions, however, are construed to be applicable only between the buyer and his immediate seller. For this reason, and because Germany does not have a common law system which could be developed besides the code, the rights described in §437 BGB can only be invoked in a relationship with privity between the parties.

c) Merchant's right of recourse

The foregoing explanation of the German sales law shows that there can be no liability of a merchant to his remote buyer unless he explicitly warranted so. That means that the buyer has to take actions against his direct seller (the ultimate seller), who in turn has to pursue actions against his seller (his supplier). The ultimate seller had, in the case of a defective purchased good, all remedial rights a buyer has against his supplier that are now enlisted in §437 BGB. However, if, for example, the requirements to invoke the ultimate seller's rights against his

---

[208] Jorden & Lehmann, *supra* note 205 at 957 *et seq.*; S. Ernst, *Gewährleistungsrecht – Ersatzansprüche des Verkäufers gegen den Hersteller auf Grund von Mangelfolgeschäden*, 2003 MDR 4 (2003).

seller are not fulfilled[209] or if the rights are already time-barred under the statute of limitations, the seller will lose his rights.[210] The new version of the BGB equips the consumer-buyer with very strong remedial rights, the enforcement of which might cause a financial burden on the ultimate seller without appropriate remedy. To avoid this unfair result, the European Directive on Sales of Consumer Goods prescribed that the Member States should introduce an "effective possibility" for the ultimate seller to shift his responsibilities to the party responsible for the defect in the chain of distribution (Art 4). This has been often referred to as "recourse trap" for the ultimate seller.[211] This gives the Member States discretion whether or not to include a direct recourse of the merchant.[212]

The drafters of the revised BGB did not want to introduce a direct recourse against the manufacturer, but rather preferred to have recourse within the relationships of the several sales contracts.[213] Thus, the ultimate buyer has to claim his rights against his immediate seller, e.g. the retailer, who then has to take an action against his seller, e.g. the wholesaler, to finally hold the manufacturer liable. The §478 BGB eases a merchant's recourse against his seller[214] where the ultimate buyer is the consumer and the ultimate seller is the merchant. The same applies where the ultimate seller is not the merchant but the wholesaler/ manufacturer is responsible for the defect.

§478 BGB contains two different rights available to the merchant, both of which are independent from culpability in the person of his supplier:[215] if the buyer asserts his primary claim for repair or replacement of the defective good in the course of a supplementary performance under §439 BGB, the seller has a right to direct a claim against his immediate seller for reimbursements of the expenses arising from the supplementary performance (§478(2) BGB). §478(1) BGB waives an otherwise required setting of a fixed time.

i) Reimbursement of expenses after supplementary performance

In case a good does not conform to the contractual quality terms, the buyer first of all has to assert his right for a supplementary performance according to §439(1) BGB. The seller has to bear the costs (§439(2) BGB), although the manufacturer is actually responsible for the defect. To avoid an inequitable burden especially on small businessmen, §478(2) BGB gives the merchant a reimbursement claim

---

209 Putzo, *supra* note 207 at §478 at rec. 2; Lorenz, *supra* note 182 at §478 at rec. 3; Ch. Berger, *in* O. Jauernig (Ed.), Bürgerliches Gesetzbuch - Kommentar (German Civil Code - Commentary) §478 at rec. 1 (2004).

210 W. G. Elb, Schuldrechtsmodernisierung: ein Leitfaden für die Rechtspraxis (Modernization of the Law of Obligations: A Guide for Legal Practice) 97 (2002).

211 *See e.g.* Westermann, *supra* note 203 at 542; von Sachsen-Gessaphe, *supra* note 180 at 726; Matusche-Beckmann, *supra* note 188 at 2561.

212 Directive 1999/44/EC, rec. 9; von Sachsen Gessaphe, *supra* note 180 at 729.

213 Bundestagsdrucksache 14/6040, 247; M. Schwab & Ch. Witt, Einführung in das neue Schuldrecht (Introduction in the New Law of Obligations) 16 (2002).

214 Bundestagsdrucksache 14/6040, *id.*; *see also* Schwab & Witt, *id*.

215 Ch. Schubel, *Mysterium Lieferkette (Mystery Chain of Distribution)*, 2002 ZIP 2061 (2002).

against his supplier that he would otherwise only have if the supplier acted with fault.[216] §478(2) BGB sets forth:

> (2) In the case of the purchase of a newly manufactured good the merchant may demand that his supplier reimburse the expenses which the merchant had to bear in relation to the consumer under §439(2) if the defect asserted by the consumer already existed upon the passing of the risk to the merchant.

This recourse against the supplier, i.e. the person who sold the goods to the seller,[217] is independent from the rights arising from §437 BGB.[218] For this right of reimbursement to be claimed by the merchant, it is necessary that the good is defective as to its quality according to the terms of the contract between the merchant and the supplier.[219] If these two parties agreed on quality features of the good different from what the merchant and the consumer agreed on, the situation might arise that there is a defect in the consumer-merchant contract, but not in the merchant-supplier contract.[220] This would render §478(2) BGB inapplicable. Also, the merchant is not allowed to invoke §478(2) BGB in order to claim reimbursement for unreasonable expenses or expenses that he made in goodwill although he was not required to.[221]

ii) Waiver of the requirement to set a fixed time

For a buyer to be able to claim his rights listed in §437 BGB, he will usually have to set a fixed time for the seller to comply with the contract terms before he can invoke his right. This means, in order to terminate the contract, ask for reduction of the purchase price, or claim damages, the buyer under §§281(1), 323(1), or 441(1) BGB has to inform the seller that he intends to invoke his remedial rights other than the supplementary performance if the seller does not repair or replace the good according to his duty under §§437 No. 1, 439 BGB.[222] Since the ultimate seller is the buyer in the contract with his supplier, he generally would have to comply with the requirement of setting a fixed time, too. New §478(1) BGB, however, waives this requirement for consumer contracts in order to easily shift the burden on the supplier who in turn can do the same with his seller. According to Art. 4 of the Directive on Sales of Consumer Goods, §478(1) BGB therefore provides:

---

[216] Bundestagsdrucksache 14/6040, 248-249; von Sachsen Gessaphe, *supra* note 180 at 730.

[217] *See* legal definition *in* §478(1) BGB, *infra* section D.I.2.c.ii.

[218] Lorenz, *supra* note 182 at §478 at rec. 5; U. Büdenbender, *in* B. Dauner-Lieb *et al*. (Eds.), Anwaltskommentar Schuldrecht (Lawyer's Commentary on the Law of Obligations) §478 para 5 (2002); Putzo, *supra* note 207 at §478 at rec. 14. For an explanation of §437 BGB *see supra* sectionD.I.2.a. *et seq*.

[219] Putzo, *supra* note 207 at §478 at rec. 12.

[220] S. Lorenz & Th. Riehm, Lehrbuch zum neuen Schuldrecht (Textbook on the New Law of Obligations) rec. 591 (2002); Lorenz, *supra* note 182 at §478 at rec. 23.

[221] Putzo, *supra* note 207 at §478 at rec. 14; Büdenbender, *supra* note 218 at §478 at rec. 8; Berger, *supra* note 209 at §478 at rec. 8. It is at issue which of the merchant's expenses are imbursable, for example, whether the merchant can also claim reimbursement for costs he would incur anyway, such as electricity and wages. For a detailed discussion of this issue *see* C. Marx, *Handlingskosten im Unternehmerrückgriff (Handling Costs of a Merchant's Recourse)*, 2002 BB 2561, 2566 (2002).

[222] *See supra* section D.I.2.a.

> (1) If the merchant had to take back a newly manufactured good because of a defect as to its quality, or if the consumer has for this reason reduced the price, it is not necessary for the businessperson to fix the period of time which would otherwise be necessary in order to enforce, against a third party merchant who had sold him the goods (supplier), his rights under §437 on account of the defect asserted by the consumer.

Contrary to §478(2) BGB, subsection (1) does not give the merchant an independent claim against his supplier.[223] Rather, the waiver goes along with the merchant's rights of §437 BGB that he has as the buyer in the merchant-supplier relation and merely modifies them.[224] That means the requirements of the rights enlisted in §437 BGB, in particular the existence of a defect as to the quality of the good in the merchant-supplier contract,[225] still have to be fulfilled.

iii) Other provisions of §478 BGB

The recourse as foreseen in §478(1) and (2) BGB applies mutatis mutandis to claims of the supplier against his sellers in the chain of distribution, §478(5) BGB. The requirement is that the contract in question is a so-called "B2B"contract, i.e. a contract between two merchants or businesspersons.[226] Also, the merchant-buyer benefits from the shift of burden of proof as seen in §476 BGB (§478(3) BGB).

Furthermore, §478(6) BGB reinforces that §377 of the Commercial Code (*Handelsgesetzbuch*, hereinafter HGB), which imposes a duty on the buyer to examine the goods and notify the seller of any non-conformity within a reasonable time in order not to lose remedial rights, is not affected from the new right of recourse. §377 HGB only applies to contracts between businessmen in the sense of the HGB, which usually exist between parties of a recourse under §478 BGB.[227]

d) Disclaimers, modifications and limitations

Generally, German contract law is governed by the principle of freedom of contract. Thus, the parties can modify the provisions of the contract according to their needs. However, for consumer contracts, §475 BGB follows the demand of the Art. 7 of the Directive on Sales of Consumer Goods and limits this freedom in order to protect consumers from unconscionable exclusions of their remedial rights. According to §475(1) BGB, contractual modifications of the buyer's rights listed in §437 BGB[228] are not effective if made before a nonconformity of the good is brought to the seller's attention. Under section (2), the statute of limitations cannot be limited to a period of less than two years for new goods and one year for used goods.

---

[223] Berger, *supra* note 209 at §478 at rec. 3; Büdenbender, *supra* note 218 at §478 at rec. 6.
[224] Putzo, *supra* note 207 at §478 at rec. 10; Lorenz, *supra* note 182 at §478 at rec. 4.
[225] M. Bohne, *in* Th. Hoeren & M. Martinek (Eds.), Systematischer Kommentar zum Kaufrecht (Systematic Commentary on the Law of Obligations) §478 at rec. 3 (2002). Regarding the potential exclusion of a claim because this requirement is not fulfilled *see supra* section D.I.2 *et seq.*
[226] Lorenz, *supra* note 182 at §478 at rec. 1.
[227] Putzo, *supra* note 207 at §478 at rec. 19.
[228] *See supra* section D.I.2.a *et seq*.

A similar provision applies for the merchant's right of recourse. §478(4) BGB clearly states that the modification of the merchant's rights arising from §437 BGB[229] will only be enforceable if it grants another equivalent remedy to the merchant.

e) Statute of limitations

With the revision of the law of obligations, the statute of limitations has been divided into a general limitation and one that is applicable to sales contracts. Deviant from the regular statute of limitations of three years, §195 BGB, §438(3) BGB follows Art. 5 of the Directive on Sales of Consumer Goods and provides that the general limitation is for two years.[230] This usual limitation for sales also applies to a merchant's rights under §478(1) BGB because here, the merchant simply invokes his remedial rights of §437 BGB.[231]

In case of a remedial claim by the consumer, though, the merchant has thereafter two months to take actions against his supplier. This is to avoid the situation where the merchant's recourse is barred for goods that stayed with him for a long time, so-called "shelf warmers,"[232] because the two-years time period (prescribed by the statute of limitation) [233] has already passed when the merchant is held liable by his seller. However, the ultimate statute of limitations is five years after which the merchant cannot claim remedies against his seller any more. The purpose of this final limitation is to create legal certainty for the manufacturer.[234]

For the independent claim of reimbursement of expenses for supplementary performance according to §478(2) BGB, §479(1) BGB provides that they fall under a limitation of two years.

II. Liability for Breach of Warranties

Besides holding the seller liable for nonconformity of the purchased goods, German sales law also deals with warranties. As already explained supra, there can be either a warranty given directly from the manufacturer to the ultimate buyer or one from the retailer to the buyer. The principle of privity does not apply in the first case because the manufacturer directly addressed the remote buyer.

Furthermore, German law recognizes two different kinds of warranties: a dependent warranty merely enlarges the remedial rights that the buyer already has according to §437 BGB, for example by extending the statute of limitations,

---

[229] *Id.*

[230] The statute of limitations is thirty years if the defect consists in a third party right or in a right registered in the land register, and it is five years if the good is a building or has been used for a building.

[231] *See* §479(2) BGB.

[232] The German literature colloquially refers to these goods as „shelf warmers"; *see e.g.* Lorenz & Riehm, *supra* note 220 at rec. 593.

[233] Before the revision of the BGB, this statute of limitation was, according to §477 BGB o.v., only six months so that the problem arose even more quickly and more often.

[234] Lorenz, *supra* note 182 at §479 at rec. 10; von Sachsen-Gessaphe, *supra* note 180 at 732.

whereas an independent warranty grants rights that exceed the statutory remedies, such as a liability without a fault.[235]

1. Former Version of the BGB

Until 2002, the BGB did not include a statutory provision on warranties in the section on sales of goods. Therefore, case law developed principles governing mainly express warranties. An express warranty arose under the former version of the BGB when the dealer or the manufacturer guaranteed the buyer certain quality attributes or a certain durability of the good which could be linked to a specific time or for example to a fixed mileage of a car.[236] Since there was no statutory provision, disputes as to the exact content of the warranty could arise. In that situation the courts had to do a case-by-case examination.[237] Generally, a warranty was interpreted as triggering liability in the case where nonconformity arose after delivery.[238] In the case of nonconformity, it was, however, disputed whether or not there was a rebuttable presumption that the good was conforming at the time of delivery.[239]

Another issue concerned as to who bears the burden of proof. [240] The German Supreme Court held that the buyer would have to prove that the defect of the good arose after delivery. But others supported the view that the buyer would also have to prove that he did not effectuate the defect by faulty behavior or false usage. A third view argued that the burden of proof was on the seller to show that the good was conforming on delivery.

Furthermore, it was unclear what kind of remedies a warranty would trigger and whether they coexisted with the statutory rights of the buyer. In particular, when a manufacturer gave an express warranty to a remote buyer, courts had difficulties in examining the relationship between the buyer's rights against the manufacturer and those against the dealer.[241]

Finally, the statute of limitations that governed express warranties had to be determined. The German Supreme Court held that, if a warranty provided for a longer statute of limitations than the BGB, the limitation period should not start until the defect came to the buyer's knowledge. If the warranty, however, did not exceed the statute of limitation laid down in the BGB, the period should start running in accordance with the statutory provision upon delivery.[242] This was heavily criticized in academic literature because it was considered inequitable that a small difference in the warranted time could lead to huge factual differences although the involved interests did not change.[243]

---

[235] D. Reinicke & K. Tiedtke, Kaufrecht (Sales Law) rec. 902 (2004); Bundestagsdrucksache 14/6040, 237.
[236] Bundestagsdrucksache 14/6040, 239.
[237] Bundestagsdrucksache 14/6040, 237.
[238] Bundestagsdrucksache 14/6040, 237.
[239] Bundestagsdrucksache 14/6040, 237.
[240] *See* overview in Bundestagsdrucksache 14/6040, 237-238.
[241] Bundestagsdrucksache 14/6040, 237-238.
[242] RGZ 65, 119, 121; BGH BB 1961,228; BB 1962, 234.
[243] H. Honsell, *in* J. von Staudinger (Ed.) Kommentar zum Bürgerlichen Gesetzbuch (Commentary

The warranty given by a manufacturer faced basically the same issues. It reduced the remedial rights available to the buyer because the termination of the contract and the reduction of the purchase price require a direct relationship between the parties.

An implied warranty, in particular an implied warranty of merchantability, did not exist under the former version of the BGB. The German Supreme Court did not recognize that the labeling of goods and public statements in advertisements would implement a will of the manufacturer to be bound, whether in form of an express warranty or an implied warranty of merchantablity.[244]

2. Revision of the BGB

Because of the numerous issues that case law had to solve due to lack of a statutory provision on warranties, the legislature decided to include §443 BGB. Additionally, Art.6 of European Directive on Sales of Consumer Goods required the Member States to make sure that the guarantees are legally binding according to their content and that they fulfill certain formal requirements.

a) Express warranties for quality and durability of the goods

Under the new sales law, a seller is liable for express warranties that he gives under §443 BGB as to the quality and durability of the goods. This warranty can be given by the seller or a third person who could be the manufacturer, and only the person who explicitly warrants is liable. This means that, if the manufacturer gave the express warranty, there will be a separate warranty contract between the manufacturer and the consumer.[245] In the case of such a warranty, the buyer has both his rights under §437 BGB and the rights arising from the warranty.

For the warranty to be effective, it must have been explicitly agreed on in the contract. Thereto, the parties must have included the warranty in their agreement, and it must be clear that the seller had the intention to be bound by the warranty.[246] A guaranteed quality or durability can be created either by express words in the course of dealing or by public statements in advertisements, §443(1) BGB. Only if the strict condition of explicit inclusion of the guaranty terms in the agreement is fulfilled, the one who gave the warranty can be held liable. This liability will incur even without the warrantor being responsible for the breach of warranty.[247] For consumer contracts §477 BGB transposes Art. 6 of the Directive on Sales of Consumer Goods and sets forth the requirements that the warranty must be in

---

on the German Civil Code) §459 at rec. 91 (1978); U. Huber, *in* W. Siebert & J. F. Baur (Eds.), Soergel Bürgerliches Gesetzbuch (Soergel's Commentary on the German Civil Code) §459 at rec. 215 (1991).

244 Reinicke & Tiedtke, *supra* note 235 at rec. 901.

245 Haas, *supra* note 201 at 1319.

246 S. Lorenz, *Rücktritt, Minderung und Schadensersatz wegen Sachmängeln im neuen Kaufrecht: Was hat der Verkäufer zu vertreten? (Rescission, Reduction of the Purchase Price, and Damages for Defects as to th Quality of the Good in the New Sales Law: What is the Seller Liable for?)*, 2002 NJW 2497, 2502 (2002).

247 Lorenz, *supra* note 246 at 2502.

simple and understandable language and that it has to include the buyer's rights arising under the warranty and other statutory provisions. In case the requirement of explicit language is not reached, the seller can still pursue his rights under §437 BGB if there is a defect as to the quality of the good according to §434 BGB.[248]

b) Express warranties by the manufacturer

As already pointed out several times, it is very common today that manufacturers give express warranties to their remote consumers. Usually, this happens by including a written warranty in the box of the purchased good or by giving it to the intermediary seller who hands it on to the consumer. Additionally, the manufacturers also make statements in advertisements which can lead the buyer to believe that there is an express warranty. In case the manufacturer warrants certain qualities or the durability of the good, such a guarantee falls under the provision of §443 BGB if it is explicit enough.[249]

c) Other express warranties

Express guarantees in advertisements that do not qualify as a warranty under §443 BGB cannot be enforced by the consumer against the manufacturer. In such a case, the public statement of the manufacturer about the quality is considered as the quality that has been implicitly agreed. This is based on the sentence 3 BGB of §434(1) which provides that the quality usually expected of goods includes features shown in the advertisements, labeling or other public statements of the manufacturer on which the buyer relied. As long as the manufacturer does not revoke the statement by the same public means and if the intermediary seller knows of that statement, the ultimate buyer can hold his seller liable for the defect as to the quality. The seller, then, has again to pursue the chain of distribution and invoke his rights against his immediate seller.

d) Liability for implied warranties

The BGB does not provide for an implied warranty. However, the concept of defects as to the quality of the good includes an implied agreement on merchantability and on fitness for a particular purpose in §434(1) sentence 2, No. 1 and 2 BGB.[250] In case of the absence of such an implied quality, the buyer can take action against his immediate seller to enforce his rights under §437 BGB and thus start the chain of claims along the chain of distribution.

IV. Product Liability

Besides contractual liability for defects as to the quality of the good, the German BGB allows an action in torts against the manufacturer which will not be described

---

248 *See supra* section D.I.2 *et seq.*
249 *See supra* section D.II.1.
250 *See supra* section D.I.2 *et seq.*

further here.[251] Additionally, the Product Liability Act of 1990 allows a direct claim against the manufacturer if the good does not comply with general safety measures and if its defect caused personal injury or property damage. The Product Liability Act is based on the European Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products.[252]

V. Remedies

As already indicated supra, German law provides a number of remedies for the aggrieved party. Some of them arise without a fault on the seller's side, however, some of them require that the seller acted culpably or at least negligently.

1. Remedies Without Seller's Culpability

Under the Product Liability Act, the injured party can claim damages, which will not further be illustrated here. Under §437 BGB[253] the buyer in a sales contract has a list of remedies available to him.

First, the buyer has to request supplementary performance which gives the seller a right to second delivery. Only if the supplementary performance failed twice does the buyer have a right to terminate the contract or reduce the purchase price. These three remedies are independent from any fault in the person of the seller.

2. Remedies Requiring Seller's Fault

In case the buyer wants to claim damages for the defect of the good, be it additional to or independent from other remedies, §280 BGB demands that the seller be culpable for the breach of contract. The wording used in §280(1) sentence 2 BGB shows that there is a presumption of the seller's fault which the seller has to rebut by showing that he acted without fault.

VI. Issues as to the Recourse Within the Chain of Distribution

The European Union's motivation to include Art. 4 in the Directive on Sales of Consumer Goods, and thus the German intention to include §478 BGB, was similar to the one that led the drafters of the revision of the American UCC i-e to include an obligation arising from public statements and advertisements that would hold the manufacturer liable to his remote purchaser. In today's market situation, the consumer's immediate seller is only a part in the chain of distribution that does not have any impact on the quality of the good. Since the seller usually is not responsible for that defect, §478 BGB tries to relieve his burden.[254] However, it is

---

[251] For a detailed treatise *see* Reinicke & Tiedtke, *supra* note 235 at rec. 900 *et seq.*
[252] OJ L 307/54 [1988].
[253] *See supra* section D.II.2.b. *et seq.*
[254] *See supra* section D.II.2.c. *et seq.*

questionable whether this relief is completely successful. After only three years of experience with the new provision on the merchant's right of recourse, a great number of issues have arisen already. Three of the most interesting ones will be discussed in the following.

1. Relationship Between §478(1) and §478(2) BGB

One question evolved around the relationship between subsection (1) and subsection (2) of §478 BGB. The question was as to which of the two the seller's has a duty of supplementary performance. The wording of §478 I BGB says that the seller can benefit from the waiver of setting a fixed time only if the buyer asked for a price reduction or if the seller "had to take back" the goods because of a defect as to their quality. Although the plain meaning of the words "had to take back" seems to be clear, it is disputed what actions of taking back fall under §478 I BGB. The seller will have to take back the good under §346(1) BGB if the buyer terminates the contract or under §§280 (1), (2), 281 BGB if the buyer gave the good back in exchange for damages. But also, the seller has the right to take the good back if it had a defect and the seller replaced it under his duty of supplementary performance, §439(4) BGB.

The official comment of the drafting committee shows that the legislature intended to include the taking back in all three cases.[255] Although the comment does not give any reason for this decision, a large majority in literature followed the plain meaning of the wording "had to take back."[256] If these voices give reasons at all as to why the taking back after replacing the good according to §439 BGB should fall under §478(1) BGB, too, they reason that the ultimate seller who had to exchange the good is not interested in asking his seller in turn to replace the good within their contractual relation because this remedy would not be able to compensate him for the incurred losses.[257] Rather, the seller would be interested in immediately claiming his remedial rights as listed in §437 BGB.[258] Since, according to this view, §478(1) BGB excludes the supplier's right of second delivery that he would usually have,[259] the waiver of setting a fixed time should also apply in the case where the merchant had to take back the good because of a replacement.

---

[255] *See* Bundestagsdrucksache 14/6040, 247.

[256] H. Ehmann & H. Sutschet, Modernisiertes Schuldrecht – Lehrbuch der Grundsätze des neuen Rechts und seiner Besonderheiten (Modernized Law of Obligations – Textbook on the Principles of the New llaw and its Particularities) 233 (2002); von Sachsen-Gessaphe, *supra* note 180 at 731; H. Brox & W.-D. Walker, Besonderes Schuldrecht (Special Law of Obligations) §7 para 14 (2002); Westermann, *supra* note 203 at 540; Bohne, *supra* note 225 at §478 at rec. 12; Lorenz & Riehm, *supra* note 220 at rec. 589.

[257] L. Haas, *in* L. Haas *et. al*. (Eds.), Das neue Schuldrecht (The New Law of Obligations) rec. 482 (2002); *see also* Bundestagsdrucksache 14/6040, 248; Schmidt-Ränsch, *supra* note 207 at rec. 952.

[258] *See supra* section D.I.2.a *et seq*.

[259] Putzo, *supra* note 207 at §478 at rec. 10; Haas, *supra* note 257 at rec. 482; Lorenz & Riehm, *supra* note 220 at rec. 590 & 597. For the right of second delivery *see supra* section D.I.2.b.

The opposing view argues that §478 subsection (1) and subsection (2) BGB are in an exclusive relationship, and since §478(2) BGB covers the costs incurred through supplementary performance, the taking back on the grounds of a replacement falls under §478(2) BGB.[260] This view argues that the supplier's right of secondary delivery[261] shall not be excluded because such exclusion is not necessary to protect the merchant's right.[262] To require the seller to ask his supplier for supplementary performance, when the consumer-buyer did the same, is proper because the seller will have the possibility to claim reimbursement for the costs incurred under §478(2) BGB.[263] Furthermore, this way would still give the merchant the opportunity to shift the burden to the supplier in requesting him to exchange the good according to §439 BGB.[264] Thus, all costs incurred within the scope of a supplementary performance, whether they are costs of repairing the good or of exchanging the good, should fall under §478(2) BGB.[265]

The primary difference between the views is their disagreement on whether the supplier has a right to second delivery that every seller usually has or whether this right is excluded through §478(1) BGB. First of all, it has to be kept in mind that the merchant and the supplier also formed a sales contract that is governed by the general remedial rights of §437 BGB. Thus, the seller's, i.e. the supplier's, right to second delivery generally still exist. In view of an interpretation according to the purpose of §478(1) BGB, this right must only be excluded if the merchant's interests are harmed. Thus, if the consumer requests the merchant to exchange the good, the consumer will usually be able to ask his supplier in turn to exchange the good for him. By this, the second view protects the interests of all involved parties which harmonizes with the German general principle of utmost good faith[266] and is therefore preferable.

The argument of the first opinion, that the supplier's right to supplementary performance would seem senseless in the interest of the merchant,[267] is not reasonably explainable with regards to the replacement of the good according to §439 BGB. The first view argues that the merchant usually has ample supply of the good in his own stock so that he does not need to ask the supplier for a supplementary delivery.[268] This is the wrong way to look at it because a supplementary delivery through the supplier would put the merchant in as good a position as he would have been had the good not been defective: the merchant will have two items less in his stock, although he sold only one. The second view

---

[260] Büdenbender, *supra* note 218 at §478 at rec. 23 *et seq*.; U. Büdenbender*, in* B. Dauner-Lieb *et al*. (Eds.), Das neue Schuldrecht in der anwältichen Praxis (The New Law of Obligations in Legal Practice) 220 at rec. 87 (2002); Reinicke & Tiedtke, *supra* note 235 at rec. 770.

[261] *See supra* section D.I.2.b.

[262] Büdenbender, *supra* note 218 at §478 at rec. 25; Büdenbender, *supra* note 260 at 221.

[263] Büdenbender, *supra* note 218 at §478 at rec. 26-27.

[264] Reinicke & Tiedtke, *supra* note 235 at rec. 770.

[265] Haas, *supra* note 257 at rec. 488.

[266] H. Brox, Allgemeiner Teil des BGB (General Part of the German Civil Code) rec. 2 (2001); D. Medicus, Schuldrecht I – Allgemeiner Teil (Law of Obligations I - General Part) rec. 133 (2002); H. Brox, Allgemeines Schuldrecht (General Law of Obligations) rec. 73 (1996).

[267] *See supra* section D.VI.1.

[268] Schubel, *supra* note 215 at 2067-2068.

corrects this; furthermore, the merchant will not have the defective good in his deposition because he gave it back to the supplier,[269] and he will even be able to keep his profit.[270] Thus the purpose of §478(1), to protect the merchant from standing for a defect caused by the manufacturer by fulfilling the strong remedial rights of the buyer, is still achieved.

However, the second view still overlooks the situation if the merchant's rights are not protected through this model. Therefore, a further clarification of the relationship between §478(1) BGB and §478(2) BGB seems to be necessary: in case the consumer asks for repair of the good according to §439 BGB, the merchant will be able to claim reimbursement of the reasonably incurred expenses under §478(2) BGB. Thus, §478(1) BGB does not apply in this case.[271]

In case the consumer requests a replacement of the defective good according to §439 BGB, the merchant will always have to claim supplementary performance from his supplier and set an adequate fixed time. This is because the supplier still has the right of second delivery as explained above. Now, two possible outcomes can occur. On the one hand, if the supplier is able to perform within that time, §478(1) BGB will not apply and the supplier's right to second delivery remains. If, on the contrary, the supplier will not be able to perform within that time period, the time will be regarded as not adequate. In such a case, German law provides that a fixing of an adequate time period will automatically be presumed.[272] However, this would impair the merchant's interests. §478(1) BGB will have to apply in order to fulfill the purpose of §478 BGB and Art. 4 of the Directive on Sales of Consumer Goods. Then, the merchant is able to claim any of his remedial rights[273] without the requirement to set forth a fixed time.

This answers the concern raised by the second view. This view argued that, since §478(5) BGB determines that the provisions of §478(1), (2) BGB also apply in the rest of the distribution chain, the maintenance of the supplier's right to second delivery would lead to a complicated sequence of intertwined time-periods.[274] Under the concept developed here, this sequence, sooner or later, will

---

[269] It has to be admitted that the seller would also not have the defective good had he terminated the contract because termination also triggers the duty to give back the good, §346 BGB. However, there is no need to apply §478(1) BGB excessively when there is no need to protect the merchant.

[270] W. Ernst & B. Gsell, *Kritisches zum Stand der Schuldrechtsmodernisierung (Beispiele fragwürdiger Richtlinienumsetzung) (Criticisms of the State of the Modernization of the Law of Obligations (Examples of Questionable Transposition of the Directive))*, 2001 ZIP 1389, 1395-1396 (2001).

[271] Felix Maultzsch also says this in his, *Schuldrechtsmodernisierung 2001/2002: Der Regress des Unternehmers beim Verbrauchsgüterkauf (Modernization of the Law of Obligations 2001/2002: The Resourse of the Merchant in the Sale of Consumer Goods)*, 2002 JuS 1171, 1172 (2002). Different view: B. Jud, *Regressrecht des Letztverkäufers (Right of Recourse of the Ultimate Seller)*, 2001 ZfRV 201, 210 (2001), who wants to apply §478(1) BGB additionally to §478(2) BGB in that case. However, neither does the wording of §478(1) BGB allow such an interpretation, nor is there a need for it since the merchant's rights are already fully protected with the reimbursement claim.

[272] BGH, NJW 1985, 2640; BGH, NJW 1996, 1814; H. Heinrichs, Palandt Kommentar zum BGB §281 at rec. 10 (2004); Ch. Grüneberg, Bamberger & Roth Kommentar zum BGB §281 at rec. 16 (Heinz Georg Bamberger & Herbert Roth eds., 2003).

[273] *See infra* section D.VI.3 for an issue arising here.

[274] Schubel, *supra* note 215 at 2067.

stop and lead to the application of §478(1) BGB because a fixed time-period has to be appropriate.

This interpretation serves several aspects. First of all, it applies the modification of the general remedial rights contained in §478(1) BGB only in those cases where it is necessary to comply with the intention of the legislature. On this premise, it protects the interests of all involved parties. The consumer will always be protected to the maximum, regardless of the dispute with the merchant's recourse. The merchant will be able to shift the burden because of the buyer's remedial rights to the supplier to an extent that will put him in as good as a condition as if the good had been conforming to the contract. The supplier, finally, can keep his right to second delivery and can, thus, save a contract that may be terminated under the first view.

It has to be made clear, though, that this model is only to apply in cases where the consumer himself asked for supplementary performance. In case the consumer terminated the contract or asked for a reduction of the purchase price, §478(1) BGB applies as usual.

2. Scope of §478(1) BGB

Another problem also arises in the scope of §478(1) BGB which deals with the question whether the application of this subsection has to be reduced by the merchant's so-called recourse interest.

One the one hand, it is argued that §478(1) BGB should only apply to the extent that the merchant has to be protected.[275] This means that the merchant should only profit from the waiver of the requirement to set a fixed time, if he claims the same remedial right against his supplier that the consumer claimed against the merchant. An example of an exceeding use of §478(1) BGB would be a situation where the consumer requests reduction of the price, but the merchant wants to terminate his contract with the supplier without setting a fixed time. In such a case, those voices claim, the merchant's demand is more than necessary because it asks more than merely shifting the burden to the supplier.[276]

The majority, however, seems to argue against this reduction of the applicability of §478(1) BGB.[277] They correctly explain that there is no exceeding use of the waiver contained in §478(1) BGB, even if the merchant claims another right against his supplier than the consumer did against the merchant: if the consumer terminated the contract and the merchant only asked his supplier for a reduction of the contract price because of the defect of the good, he claims even less than he could.[278] Vice versa, if the consumer asked for a price reduction and the merchant wants to terminate his contract with the supplier, it seems at first sight that the merchant exceeds what is necessary to shift the burden to the supplier. However, the factual outcome will be the same whether the merchant also requests a price

---

[275] Maultzsch, *supra* note 271 at 1173.

[276] *Id.*

[277] Lorenz, *supra* note 182 at §478 at rec. 22; Jud, *supra* note 271 at 210; Reinicke & Tiedtke, *supra* note 235 at rec. 775 *et seq*.

[278] This is also the opinion of Reinicke & Tiedtke, *supra* note 235 at rec. 776.

reduction or a contract termination. Usually, the merchant will have to give back the good after terminating the contract, §346(1) BGB. This is not possible if the consumer still has the possession of the good. §346(2), sentence 2 BGB provides that, in case the return of the good is impossible, the merchant will have to pay its value to the supplier. This value, however, is the same as the reduced price. Therefore, the merchant will only have to pay this reduced amount to the supplier which equals a price reduction.[279] Thus, there is no need to reduce the scope of §478(1) BGB to the same remedy that the consumer asked for.

3. Restriction of §478(1) BGB to Faultless Recourses

Another reduction of the scope of §478(1) BGB, that has been argued for, is the reduction of the applicability in the cases where the merchant has not been responsible for the recourse. This means that the merchant should not have the right to a recourse against his supplier according to §478(1) BGB if he could have avoided the situation by correctly fulfilling the consumer's request for supplementary performance.[280] One could imagine a situation in which the merchant fails to fulfill the supplementary performance, even though he could have performed it. Although it has been claimed that such a reduction would be impracticable because the merchant will have to show the reason for not performing his duty of supplementary performance,[281] this reduction is reasonable according to my view. The merchant should not be allowed to neglect his obligation and then shift the burden to the supplier because this would open the floodgate to misuse the merchant's right of recourse.

4. Definition of Consumer Contracts

The merchant's recourse is linked to the existence of a consumer contract. Like the revision of the UCC, such a consumer contract (which in Europe, including Germany, is misleadingly called a "contract for the sale of consumer goods") requires that a good be sold by a merchant to a consumer.

A substantial difference, on the contrary, is the definition of a consumer contract and the question as to what is the connecting factor for the definition as found in the American Magnuson-Moss Warranty Act (containing special rules for warranty disclaimers for consumer products). It provides in §101(1) that "the term 'consumer product' means tangible personal property which is distributed in commerce and which is normally used for personal, family or household purposes …" Thus, a good that in a particular case is not bought by a consumer, but that is commonly also used by consumers, e.g. a car or a typewriter, would also fall under the Act.[282]

---

[279] *See* Reinicke & Tiedtke, *supra* note 235 at rec. 776; Jud, *supra* note 271 at 210.

[280] Büdenbender, *supra* note 218 §478 at rec. 33; Matusche-Beckmann, *supra* note 178 at 2561, n. 11.

[281] Reinicke & Tiedtke, *supra* note 235 at rec. 778.

[282] §700.1 Federal Trade Commission Rules, Regulations, Statements and Interpretations Under the Magnuson-Moss Warranty Act.

In Germany, academic writers raised concerns that the mere consumer attribute of the buyer can substantially change the rules applicable to recourse of the merchant.[283] Generally, it should not make a difference for the retailer whether he sold the goods to a consumer or a merchant since both will trigger remedial rights for the buyer. Under §478 BGB, however, the retailer will be able to easily shift the burden arising if a consumer claims his remedial rights to the manufacturer. But if the merchant-buyer takes remedial actions, the retailer will have to seek remedies from the manufacturer without the privileges laid down in §478 BGB. Thus, there is a probability that the retailer is left with the burden merely because he sold one and the same good to a merchant instead of a consumer.[284]

Furthermore, the retailer will not always be able to tell whether his buyer is a merchant or a consumer.[285] Thus, it might seem more logical to link the existence of a consumer contract to the sale of consumer products as done in the Magnuson-Moss Warranty Act.[286] Otherwise, the retailer can decide on the applicable law of the existing contracts between the retailer, maybe a wholesaler, and the merchant a posteriori with the choice of his buyer.[287]

On the other hand, it might not always be reasonable to take the sale of a consumer product as a requirement for the applicability of provisions as §478 BGB. (Imagine a manufacturer and a retailer of office furniture who usually sell to merchants one day sell a desk to a consumer.[288] But, since office furniture is not normally used by consumers, the manufacturer is not prepared to stand in for liability in the course of a merchant's recourse according to §478 BGB. Therefore, he will have disclaimed a number of liabilities that suddenly will not be effective any more because of the restriction of disclaimers in consumer contracts according to §§475, 478(4) BGB. This is a major inconsistency that should be avoided. Because there will only be a few consumers who will buy goods that are designed for purchase by merchants, there will also only be a few cases of insufficient protection of the retailer. Thus, it is more reasonable to link the definition of consumer contracts to the sale of consumer products.)

5. Summary

All these issues show that the wording of §478(1) BGB tends to overprotect the merchant which contradicts the purpose of the merchant's right of recourse. Generally, lawyers will have to find a balance between the protection of the merchant as intended by the legislature and the interests of the supplier that should not be exploited unnecessarily. The above described and suggested solutions try to follow this idea of public policy.

---

[283] *See supra* section D.I.2.c. for the application of §478 BGB to a merchant's recourse in consumer contracts.
[284] *See* Matusche-Beckmann, *supra* note 178 at 2563.
[285] *Id.*
[286] *See also id* at n. 27.
[287] *Id*.
[288] Schubel, *supra* note 216 at 2061.

E. Comparison and Consideration of the Different Systems

As seen before, all the systems namely, United States of America, the international law on sales of goods codified in the CISG, the European Union and Germany, give remedies to an aggrieved consumer if a warranty has been breached or if the good does not conform to the contract. They all have their advantages and disadvantages that shall be examined here.

I. Summary of Differences and Similarities of the Systems

Although the diverse systems illustrated in this discussion govern the same substance, to some extent they use substantially varying approaches and concepts of liability.

1. Warranties Versus Nonconformity of the Good

The American system is based on the concept of warranties given by the (remote) seller to the (remote) buyer. The good has to conform to the terms of an express or implied warranty; otherwise, the seller will be liable for breach of a warranty.

The CISG and the thereafter drafted systems in the European Union and in Germany, on the contrary, require that the good conform to the terms of the contract. Besides, these systems also have guarantees, but they do not play as significant a role as the American warranties. A good is generally presumed to be conforming if it complies with the agreement or if it is fit for the ordinary or a particularly agreed purpose at the time of delivery.

The system of conformity has been compared to the "perfect tender rule" set forth in UCC §2-601 which gives the buyer the right to decide whether he wants to accept the delivery, reject the whole or accept in part and reject the rest if the tender fails to conform with the contract in any respect.[289] However, although the US system does not know the requirement of setting a fixed time,[290] the concept of nonconformity of the good can also be compared with giving warranties. In comparison with the UCC system, the conformity with the agreement can be set equal to an express warranty, whereas the conformity for use for an ordinary or particular purpose is equivalent to an implied warranty for merchantability or fitness for a particular purpose. Thus, it can be said that several express and implied warranties of the UCC[291] are combined in one article in the CISG and German conformity concept. The conformity at the time of the delivery is similar

[289] D. N. Goldsweig & J. Lee, *The United Nations Convention on Contracts for the International Sale of Goods, in* M. R. Sandstrom & D. N. Goldsweig (Eds.) Negotiating and Structuring International Commercial Transactions, 54 (2003) with explanation of possible resulting problems under the CISG.

[290] Kritzer, *supra* note 151 at 23.

[291] D. B. Magraw & R. R. Kathrein, The Convention for the International Sale of Goods: A Handbook of Basic Materials 20 (1990).

to the fact that the warranty has to be made at the time of an agreement. So, both systems require an agreement on the warranty or conformity before delivery. Thus, the apparent difference is not a substantial one. Both, the nonconformity as well as the breach of a warranty or an obligation under the revision of the UCC will trigger remedial rights for the buyer.

2. Direct Recourse Versus Recourse Within the Chain of Distribution

The revision of the UCC chose a direct recourse against the manufacturer who made representations towards the remote buyer. In the German system, such a direct recourse of the buyer was never an issue. The revision of the BGB (based on the European Directive on the Sales of Consumer Goods) only offered the choice to introduce a direct recourse of the ultimate seller (the retailer) against the manufacturer. However, as illustrated before, Germany decided for recourse within the chain of distribution for all parties in the chain.

A further difference is the kind of contract that is required for the applicability of the respective provisions. While the UCC does not specify whether the buyer must be a consumer, the European and German merchant's recourse only applies when the ultimate buyer is a consumer. The difficulties that can arise due to that requirement have been described before, namely that the sale of one and the same good can fall under different rules merely because the good is sold to a consumer instead of a merchant.[292] Since the direct liability of the manufacturer according to revised UCC §§2-313A, 2-313B does not require a consumer contract, those problems do not arise here.

3. Requirement of Giving Notice Versus Setting Fixed Time

Finally, the requirement that the buyer has to fulfill for claiming remedial rights differs. While a buyer in the US will have to give notice of the breach to the seller within reasonable time according to UCC §2-607(3) in order not to be barred from any remedy, a buyer in Germany will have to set a fixed time for a supplementary performance in order to claim the further remedies of termination of the contract, reduction of the purchase price and damages.[293] The CISG deals with both: a notice requirement similar to UCC §2-607(3)[294] and a setting of a fixed time period that a buyer governed by the CISG 'may' choose to set.[295] The European Union also adopted this "may" provision in its Directive on Sales of Consumer Goods, but in Germany, the setting of a fixed time for performance is principally[296] a mandatory requirement.

---

[292] *See supra* section D.VI.4.

[293] *See supra* section D.I.2.c.

[294] For a detailed comparison of the notice requirement in the UCC and in the CISG, *see* W. A. Hancock, Guide to the International Sale of Goods Convention (2004) at Chapter 103.6

[295] Art. 47 and 49 CISG.

[296] There are some exceptions, for example when primary or secondary performance are impossible or when the seller refuses to comply with his contractual obligations.

The requirements, of giving a notice of the breach within a reasonable time and one of setting forth a fixed time for the other party to perform to the original duty under the contract, seem to be quite different. Nevertheless, they both trigger the remedial rights of the buyer. In that respect, they can be compared.

II. Advantages of Direct Liability

To allow a direct claim by the consumer against the manufacturer, as in the American and also in the French legal system, brings a number of advantages.

First and foremost, the action is directed right away against the person that is responsible for the defect of the good. By that, this concept automatically leads to an effective way of pursuing the remedial claim. In a system like Germany, the consumer would have to take actions against his seller (the retailer) who would then take an action against his seller, and so forth. In the end, however, the manufacturer would be held liable if he was actually responsible.

Furthermore, this concept assures an adequate consumer protection. The consumer does not face the risk that the retailer has gone bankrupt and cannot stand in for his liability which might leave the consumer without a remedy. However, it has to be conceded that the German system based on the implementation of the EU Directive on Sales of Consumer Goods also solves the problem of the insolvency risk: it gives the retailer a possibility to shift his liability to his the seller, the retailer will then have to fulfill the buyer's remedial rights even in case of insolvency.[297] Besides consumer protection, consumer satisfaction is also promoted. The manufacturer will strive for higher product quality[298] because he will be liable for the products that do not conform to the contractual terms and cannot shift this liability to an "innocent" retailer.

Additionally, the concept of direct liability of the manufacturer meets the changes of sales situations with regards, for example, to mass sales and advertisement. The European Union also acknowledged those changes,[299] but it lags behind the revision of the UCC in its Directive on Sales of Consumer Goods.

III. Disadvantages of Direct Liability

1. Conceptual Difficulties

First of all, there are a number of dogmatic conceptual problems. It has been noticed during the case law development in the US, that the roots of a claim for breach of warranty against the manufacturer have oftentimes been unclear

---

[297] Jud, *supra* note 271 at 203.

[298] *See* instead of many Hyundai Motor America, Inc. *v.* Goodin, *supra* note 110 at 9. This argument is rejected by Th. J. Holdych, *A Seller's Responsibilities to Remote Purchasers for Breach of Warranty in the Sales of Goods Under Washington Law,* 28 Seattle Univ. L. R. 239, 278-279 (2005), in arguing that most sellers are interested in repeat sales of their products.

[299] *See supra* section C.II. *et seq.*

and obscure. The French concept of a direct action against the manufacturer, the *action directe*, also faced a number of similar problems.[300]

One example of the inconsistency, arising from the ignorance of contractual agreements within the privity relationship, is the handling of disclaimers. As shown before, the manufacturer can be held liable for an obligation under UCC §2-313A, 2-313B even if he had disclaimed the equivalent warranty within the contract.

Furthermore, a contractual liability proved to be difficult to define when there was no contractual relationship between the parties. Indeed, such a concept of contractual liability without privity is self-contradicting. As already explained, a contract is the agreement between two parties and the resulting legal obligation.[301] A liability that is imposed by law regardless of privity, however, is generally a tort concept. To introduce contractual liability without privity disregards the freedom of contract. Therefore, a number of contractual principles and rules, such as the requirement to give notice and the effectiveness of disclaimers,[302] do not fit within this concept.

Although the revision of the UCC sought to solve these inconsistencies, they can still arise. Indeed, with the new obligation of the manufacturer to stand in for direct representations towards the buyer according to UCC §§2-313A, 2-313B, there is an even greater risk that a confusion between a tort and contract liability will arise. Although comment 7 to revised UCC §2-314 suggests to base the claim for breach of implied warranty of merchantability on tort and the claim for breach of implied warranty of fitness for a particular purpose on contract, there is no evidence that courts will actually follow this recommendation. With regards to the intertwining of tort and contract roots in actions for breach of warranty in the past, it is even more realistic to assume that this trend will continue in the future.

2. Recovery for Lost Profits

Other issues, arising under the approach of a direct claim against the manufacturer, are the buyer's choice of remedies. Revised UCC §§2-313A(5)(b) and 2-313B(5)(b) follow a development in case law and exclude a buyer's recovery for lost profits, i.e. for consequential economic loss. This is not reasonable and fair with regards to lost profits that occurred because of the manufacturer's breach of a warranty or obligation. Rather, the buyer should be able to claim damages for consequential economic loss under UCC §2-715(2) as well.

3. Recovery from the Manufacturer

Another deficiency of direct liability approach is the question of remedial rights of the buyer: whether the buyer can revoke acceptance of the good and request recovery of the purchase price in an action against the manufacturer. As

---

300 von Sachsen-Gessaphe, *supra* note 180 at 729 with further references.
301 *See also* UCC §1-201(3) and (11).
302 *See supra* section B.III.1.

discussed before, this issue cannot be solved on the basis of the UCC provisions because they require revocation of acceptance against the direct seller and not the manufacturer.[303] To allow the revocation against the manufacturer on the ground of abolition of privity does not still fit in the concept of the UCC. This remedy only fits within the relationship of a buyer and direct seller.

> This is because the remedy cancels a contract of sale, restores title and possession of the goods to the seller, restores the purchase price to the buyer and returns the contracting parties to the status quo ante as fairly as possible. The remote manufacturer, having no part in the sale transaction, has no role to play in such a restoration of former positions.[304]

Therefore, a direct action against the manufacturer can only be for damages. Moreover, it is only possible under exclusion of lost profits but not for any other remedy.

IV. Advantages of the Recourse Within the Chain of Distribution

A buyers might prefer to take actions against the direct seller instead of the manufacturer. This can be the case where the buyer prefers to address the seller he knows and trust because of the previous course of dealing with him. Also, the situation can arise where the manufacturer goes bankrupt and the buyer cannot pursue an action directly against him. Furthermore, the buyer might be reluctant to sue a manufacturer who has headquarters outside of the US A direct claim cannot give consideration to these concerns and thus will not satisfy the buyer.

F. Conclusion

As it has been seen that the direct liability of the manufacturer as developed in US case law (included in the revision of UCC Article 2) meets the requirements of modern mass sale situations, simplifies legal actions and thereby promotes efficiency. On the other hand, the direct action against the manufacturer also has its weaknesses that have not been resolved so far. In particular, the direct action (proposed in revised UCC §§2-313A and 2-313B); faces conceptual difficulties that lead to continuing intertwining concepts of contract and tort liabilities, does not grant damages for lost profits, and lacks adequate remedies for the buyer other than damages. Those issues can be resolved by employing recourse along the chain of distribution as introduced with the revision of the German law of obligations due to the European Directive on Sales of Consumer Goods.

Therefore, a combination of the direct action and the action against the direct seller is in the best interest of the buyer. The buyer can claim damages from the manufacturer because of the nonconformity of the good to a record packaged

---

303 *See article supra* at 39 et seq.

304 Gasque *v.* Mooers Motor Car Co., *supra* note 136 at 162; *see also* Flechtner, *supra* note 132 at 405; Andover Air Ltd. Partnership *v.* Piper Aircraft Corp., 7 U.C.C. Rep. Serv. 2d 1494, 1500 (D. Mass. 1989).

with the product or to public statements in advertisements he relied on. But as explained before, some buyers might prefer to take actions against the direct seller.

Furthermore, concerning the remedial rights beyond damages that the buyer cannot claim in a direct action against the manufacturer, recourse within the chain of distribution would open the floor for the buyer to invoke all remedial rights he has according to the applicable law, e.g. the American UCC or the German BGB. The retailer held liable by the buyer, on the other hand, can take actions against his seller and so forth.

Although this approach exists in the US, besides the direct action against the manufacturer, several businesses (mainly the car business) have excluded liability for warranties on the retailer level. The UCC should include a section comparable to the German §§475 & 478(4) BGB, prohibiting exclusion of liability in consumer contracts without appropriate alternative remedies, to avoid limiting the buyer's remedial rights (against the manufacturer) to damages claim only. This would open the way for the buyer to pursue claims against both the manufacturer and the retailer depending on the remedy he is seeking.

However, a simple recourse within the chain of distribution would indeed make the proceedings cumbersome and inefficient. Also, they might leave one of the parties along the chain without remedies if the addressee of his action is insolvent. Therefore, the European Union imposed (with its Directive on the Sale of Consumer Goods) that all merchant-sellers in the chain of distribution have to have the possibility of easily shifting the actions they had to take because they have been held liable by the consumer-buyer to their respective seller. The German §478 BGB followed this European obligation by implementing a waiver of the requirement of setting a fixed time for the performance on the one hand and by giving the merchant a direct claim for reimbursement of costs incurred because of supplementary delivery or repair of the defective good on the other hand. Such model should also be introduced in the UCC by waiving off the requirement of giving a notice to the seller within a reasonable time.

Finally, the direct claim against the manufacturer should also include the recovery of lost profits for the reasons mentioned before. Furthermore, the above illustrated actions should only be applicable to the sale of new goods as it is provided in the revision of the UCC and in the German BGB. Otherwise, the manufacturer might be held liable for the defects that have been caused by a prior user.[305]

This proposition combines the advantages of both the concepts and leaves the choice to the buyer to either pursue a direct action against the manufacturer or to take an action against his direct seller whom he trusts more. In all probabilities, this proposition stays away from further weakening of the principle of privity, thereby leaving contract law what it is: the law governing the freedom of the parties to form agreements and the freedom to self-determine the resulting obligations.

---

[305] Similarly Holdych, *supra* note 298 at 286-288.