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Buyers' Remedies under the CESL:
Rejection, Rescission, and the Seller's Right to Cure

I. Historical Background

Breach of contract in sales transactions is an eternal subject. Historically, its roots lie in the legal framework that evolved in the markets of ancient Rome, where the main objects of trade were slaves, animals, and foodstuffs. The goods offered on Roman markets were not mass produced on the basis of a particular design, but had grown into the shapes and qualities through the work of natural processes. The more valuable categories of goods were slaves and cattle. These factors explain why the ancient Roman law was so hesitant about imposing liability for defects on the seller and instead started from the principle of 'let the buyer beware' (caveat emptor).

Another feature that is characteristic of the background against which the Roman law of sales developed is that the goods offered were immutable. If it turned out that the slave that was sold and tendered suffered from some physical or mental illness, that impaired his or her "quality" permanently, there was no way for the seller to cure the "defect". The same was true if it turned out that the cow sold and tendered was barren, lame or suffered from a disorder that impaired its capacity to produce milk. In such cases, the seller was as incapable of curing the defect as the buyer. Therefore, the remedies that were developed by the Roman market police (aediles curules) aimed at reversing the transaction, in whole or in part, in the form of rescission (actio redhibitoria) or price reduction (actio quanti minoris). The buyer had the choice between returning the defective goods to the seller in order to recover the full contract price and keeping the goods, defective as they were, and to recover a part of the contract price that reflected the diminution in value of the defective goods, as compared to conforming goods. Only in rather exceptional circumstances, i.e. where the seller failed to disclose a defect he positively knew about (dolus), or where he had warranted the absence of defects, was the buyer entitled to damages by way of the actio empti.

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2 The digest speaks of morbus and vitium.
3 Zimmermann (note 1) 316 ff.
4 Zimmermann (note 1) 308 ff.
With the advent of industrial production in the middle of the 19th century the supply of goods shifted from things organically grown to goods manufactured by men. As a consequence, repair or replacement of defective goods by the seller as an alternative remedy to rescission and price reduction became an issue that continued to challenge the law of sales throughout the following decades and well into the 20th century. In Germany, for example, the framers of the civil code that came into force in 1900 did not find the courage to depart from tradition and to include repair and replacement into the scheme of statutory remedies. As a consequence, contract practice took over and made cure by the seller the standard remedy for delivery of non-conforming goods. In the US, the Uniform Sales Act represents the thinking of the old days, while scholars like Karl Llewellyn and John Honnold fought for reform of the perfect-tender-rule that allowed the buyer to rescind the contract upon discovery of any defect. Llewellyn maintained the view that, at least in transactions between merchants, the seller deserved the privilege to cure delivery of non-conforming goods by means of a second tender. The outcome of his efforts may be seen in the scheme of remedies of the Uniform Commercial Code (UCC).

II. Acceptance and Rejection under the UCC (895 words)

The framers of the UCC deliberately avoided the Roman concept of rescission. They also avoided including a remedy for the buyer that allowed her to cancel the contract as an answer to the tender of non-conforming goods. However, by digging deeper into the UCC's title 2, it turns out that the obligation of the buyer to pay the price agreed in the contract is canceled under certain circumstances. Pursuant to § 2-709 (1) (a) UCC and disregarding some exceptions, the seller is entitled to payment of the contract price only for "goods accepted". The term "goods accepted" is a term of art and includes not only those goods that the buyer accepted under § 2-606 UCC but also goods that she did not rightfully reject under § 2-601, § 2-602 UCC. Matters are further complicated

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7 Karl Llewellyn (note 6), 37 Colum. L. Rev. 389: "Into such a picture, on the mercantile side, the Sales Act requirement of exact compliance, coupled not only with rejection but with rescission, cuts like an Arctic blast." See also Note, The Seller's Privilege to Correct an Improper Tender, 31 Colum. L. Rev. 1005 ff. (1931), that Llewellyn disclosed to have been written by one of his students and the content of which he embraced, cf. Karl Llewellyn, On Warranty of Quality, and Society, 36 Colum. L. Rev. 699 note * (1936).
8 In the interest of clarity, and to even out the use of gender, the seller is referred to in the masculine form (he, his), while the buyer will be referred to in the feminine form (she, her).
9 The same is said in § 2-607 (1) UCC.
by the fact that both - the seller and the buyer - are granted limited rights to correct their initial behavior. The seller is entitled to cure non-conforming tender by making a conforming delivery within the contract time or even after the expiration of the time for performance, if certain conditions have been met.\textsuperscript{10} To the extent that the seller succeeds with his efforts to cure the defect, the goods will be conforming, so that the buyer will accept them and become liable for the contract price. At the other end of the table, the buyer may switch from acceptance to rejection by revoking her acceptance. Revocation is available where the buyer accepted the goods on the reasonable assumption that the seller would cure any defect (which he failed to do) or where she was unable to discover the defect with the help of reasonable means.\textsuperscript{11} Ordinarily, the buyer who revokes the initial acceptance of the goods will have already paid the price, so that she is entitled to a refund.\textsuperscript{12}

As the sketch of remedies has revealed, the UCC makes the buyer's right to call off the sale, in order to keep the contract price to herself or recover the monies already paid to the seller, contingent on the rejection-acceptance distinction. The buyer must pay for goods she accepted, not for those that were rightfully rejected. The conformity of the goods as such is not a prerequisite for the seller's action for the price. Rather, the fact that the seller made a conforming tender is itself a precondition for rightful rejection, and for revocation of an initial acceptance. Only if the goods or tender of delivery fail to conform to the contract may the buyer reject them,\textsuperscript{13} or revoke her acceptance within a reasonable time after discovery of a latent defect.\textsuperscript{14} In both cases, the buyer has a choice whether to reject or revoke her acceptance of non-conforming goods. She may well resolve to accept goods that do not conform to the contract. In this case, she cannot refuse to pay the price or recover the amount already paid to the buyer but she remains entitled to damages. The buyer who failed to reject non-conforming goods has a claim for damages against the seller. However, the damages remedy does not allow the buyer to return the non-conforming goods and recover the difference between the market price to be paid for substitute goods and the contract price.\textsuperscript{15} Rather, the buyer is limited to the difference in value between the hypothetical goods that would have conformed to the contract and the goods that were actually delivered.\textsuperscript{16}

In summary, the seller who tends non-conforming goods is not automatically subject to the termination of the contract by the buyer. Rather, the buyer is entitled to call off the sale in reaction

\textsuperscript{10} § 2-508 UCC.
\textsuperscript{11} § 2-608 UCC.
\textsuperscript{12} § 2-711 (1) UCC.
\textsuperscript{13} § 2-601 UCC.
\textsuperscript{14} § 2-608 (1) UCC.
\textsuperscript{15} In other words, the remedy specified in § 2-711, § 2-712 UCC with regard to rejected goods is not available.
\textsuperscript{16} § 2-714 (2) UCC.
to a non-conforming tender only if she noticed the defect and rejected the goods or revoked her initial acceptance. Otherwise, the contract will stand, the buyer will not be entitled to recover the price but will be limited to damages reflecting the difference in value between conforming and non-conforming goods.

While the acceptance-rejection distinction serves the purpose of paving the way towards rescission or limiting the buyer to damages, this is not its only function within the framework of the UCC. In addition, it also governs the allocation of the burden of proof with respect to the non-conformity of the goods delivered. Where the goods have been rejected, the seller needs to prove their conformity in order to succeed with the action for the price, while the burden to establish the non-conformity of goods that were accepted is on the buyer. The nature of the acceptance-rejection distinction as a multi-functional tool has invited criticism from commentators who have argued that the different functions invite separate and different legal rules.

**III. Buyers' Remedies under the CESL**

The CESL avoids the terminology of acceptance and rejection entirely and addresses the issue of burden of proof in a rule that is separate from the substantive provisions of the proposal. In transactions between a merchant and a consumer it is presumed that a defect that becomes apparent within six months after the risk has passed to the buyer has existed at that time, unless this is incompatible with the nature of the defect. The reverse allocation of the burden proof applies in sales between merchants so that it rests with the buyer at all times.

In a case of non-performance of an obligation by the seller, the CESL accords the buyer a menu of remedies to choose from. The buyer may require performance, including repair or replacement of defective goods by the seller pursuant to Art. 106 (1) (a) CESL, withhold payment of the price under Art. 106 (1) (b) CESL, terminate the contract and require the seller to return any price already paid, Art. 106 (1) (c) CESL, reduce the price under Art. 106 (1) (d), and claim for damages under Art. 106 (1) (e) CESL.

This list of remedies reads as if the buyer was free to choose any remedy she liked, but this is not true. Art. 106 (6) CESL says that "remedies which are not incompatible may be cumulated". In

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17 § 2-709 (1) (a) UCC.
18 § 2-607 (4) UCC.
19 The different functions of the "acceptance-rejection fulcrum" are discussed and criticized in Jody S. Kraus, Decoupling Sales Law from the Acceptance-Rejection-Fulcrum, 104 Yale L. J. 129 (1994).
20 Art. 105 (2) CESL.
21 Cf. Art. 105 (1) CESL.
general, the buyer need not make a choice between the remedies but can instead resort to more than one remedy in the same case. As an exception, those remedies which are incompatible may not be cumulated so that, here, the buyer really has to choose between one and the other. Regardless of the relationship between the other remedies, the CESL adds provisions that coordinate three types of remedies, namely, first, the right to specific performance, i.e. delivery, repair or replacement, second, termination together with return of the contract price and, third, damages. This is done through the interplay of the sections on cure by the seller and on termination.

Under Art. 109 (1) CESL, a seller whose first tender was not in conformity with the contract may make a new and conforming tender as long as the time allowed for performance has not lapsed. In addition, i.e. even after the time allowed for performance has passed, the seller may still offer to cure the defect at his own expense. Even though Art. 109 CESL does not define the concept of "cure" it is clear what it means, namely the elimination of the non-conformity by the same means that the seller may use to remedy non conforming performance, i.e. through repair of the defective goods or through replacing them. In fact, Art. 109 CESL is somewhat displaced within the concept of buyers' remedies as it defines a right of the seller rather than a remedy of the buyer. The buyer's remedy that corresponds to the seller's right to cure is defined in Art. 110 CESL. In particular, the buyer is entitled to specific performance on the part of the seller, including the remedy of a performance which is not in conformity with the contract, at no cost to the buyer. Even though Art. 110 (2) CESL uses a different terminology – remedying instead of cure – there is no doubt that it is the flipside of Art. 109 CESL: not only is the seller entitled to cure a defective tender under Art. 109 CESL, the buyer also has a right to require him to do so under Art. 110 CESL. As may be inferred from Art. 111 CESL, the seller has the choice to either repair the defective goods or to replace them with conforming goods. If the remedy is replacement, then the seller must not confine himself to make a conforming tender, he also has to take back the replaced item at his own expense, while the buyer is not liable to compensate the seller for any use made of the replaced item during the time before replacement. With regard to consumer sales contracts, the choice between repair and replacement is allocated to the consumer-buyer. Vice versa, in B2B sales, the seller has the right to make the choice between repair and replacement. In any event, the result is

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22 Art. 109 seq. CESL.
23 Art. 114 seq. CESL.
24 Art. 106 (2) CESL.
25 Art. 110 (1), (2) CESL.
26 Art. 112 (1) CESL.
27 Art. 112 (2) CESL.
28 Art. 111 (1) CESL.
that the buyer eventually receives goods that conform to the contract and is therefore not entitled to expectation damages in the technical sense, i.e. the difference in value between conforming and non-conforming goods. Even though cure by the seller does not destroy the buyer's right to damages, these are restricted to the incidental damage that she suffered notwithstanding the cure effectuated by the seller, such as losses caused by the delay needed to repair the goods.

The distinction between consumer sales and B2B transactions is carried one step further by Art. 106 (2), (3) CESL that define the relationship between the seller's right to cure and the buyer's remedies, as defined in Art. 106 (1) CESL. The message of these provisions is that while consumer-buyers retain the option to require the seller to cure defective goods by either repairing or replacing them, at the choice of the buyer, the other remedies of consumer-buyers are not "subject to cure". This means that the consumer-buyer may refrain from insisting on repair or replacement and turn down any offer made by the seller to cure the defect in order to immediately reduce the price, claim damages or, most importantly, terminate the contract. In other words, sellers do not have a right to second tender. The only substantive limitation is provided by Art. 114 (2) CESL that excludes the right to rescind the contract where the lack of conformity is "insignificant".

It is important to note that the buyer's right to rescind the contract of sale is not limited to cases where the defect was discovered upon delivery so that the buyer rejected the goods. Quite to the contrary, the rules supplied by Art. 121 seq. CESL, on examination of the goods upon delivery and prompt notification to the seller of the lack of conformity, do not apply in consumer sales. As a consequence, the consumer-buyer may resort to the remedy of termination, call off the sales contract, require the seller to take back the defective item and demand repayment of the contract price any time after she took possession of the goods. The only temporal limitation operating on the right to terminate is the general period of prescription, which is two years after the buyer became (or could be expected to become) aware of the defect and her right to terminate the contract, and a maximum of ten years after delivery.

With regard to B2B transactions, the relationship between the right to terminate and the right to cure is different. The buyer's rights to exercise any remedy except withholding performance are subject to cure by the seller as set out in Art. 109 CESL, in addition to the requirements of examination and notification as defined in Art. 121 seq. CESL. If the rules stipulated in the

29 Art. 106 (7) CESL.
30 Art 106 (1) CESL.
31 Art. 106 (3) (b) CESL.
32 Art. 179 CESL.
33 Art. 106 (2) (a) CESL.
referenced provisions are drawn together, the following scheme emerges: upon delivery, the merchant-buyer must examine the goods, or cause them to be examined, within as short a period as is reasonable (not exceeding 14 days). If the buyer discovers a defect, she must give notice to the seller "within a reasonable time" after she discovered, or should have discovered, the lack of conformity, but no later than two years from the time at which the goods were actually handed over to the buyer. Buyers who do not comply with these burdens and fail to promptly inform the seller about a discoverable defect lose their remedies with respect to such a defect, as they are barred from relying on the lack of conformity.

In cases where the merchant-buyer discovers a defect she must not terminate the contract and demand repayment of the purchase price but is limited to the remedy of cure, either through repair or through replacement. As may be inferred from Art. 111 (1) CESL, the choice between repair and replacement is for the seller to make. The buyer must allow a reasonable period of time for the seller to effect cure during which her right to terminate the contract is suspended. Even merchant-buyers are entitled to immediately rescind the contract upon the discovery of a defect if the seller's breach is fundamental. The concept of fundamental breach is defined in Art. 87 (2) CESL as non-performance that "substantially deprives the other party of what that party was entitled to expect under the contract" or that is of a nature suggesting that the non-performing party's future performance cannot be relied on. While these two categories are mirror-images of Art. 109 (4) (b), (c) CESL, which entitle the buyer to refuse an offer to cure, Art. 109 (4) (a) CESL adds a third category, namely that cure cannot be effected promptly and without significant inconvenience to the buyer. In the latter case it remains unclear whether the right to termination remains suspended, so that the buyer is limited to her rights to reduce the price and to claim damages under whatever measure, or whether the hypothetical delay caused by an attempt to cure the defect also paves the way towards termination under Art. 114 (1) CESL.

34 Art. 121 (1) CESL.
35 Art. 122 (1) (2) CESL.
36 Art. 122 (3) CESL.
37 Discoverable defects are those that the buyer discovered or could be expected to discover, cf. Art. 122 (1) (cl. 2) CESL.
38 Art. 106 (2) (b) CESL.
39 The merchant-buyer is also barred from choosing the remedy of price reduction and reclaiming a part of the purchase price, and from claiming expectation damages. The right to incidental damages is preserved, however, Art. 109 (7) CESL.
40 Art. 109 (5) CESL.
41 Art. 109 (6) CESL
42 Art. 114 (1) CESL.
IV. The Systems Compared

The problems involving the acceptance-rejection distinction, the seller's right to cure, and the buyers' rights to rescind the contract and/or damages are complex and diverse. However, they have something that binds them together as they all concern the interface between enforcement of the contract made by the parties on one hand, and cancellation of that same contract on the other. It seems that every system of sales law has to confront this choice and resolve it one way or another. In this regard, ancient Roman law stands out because it supplied no mechanism at all to hold the buyer to her bargain with a seller who had delivered non-conforming goods. Rather, it was in her discretion to call off the deal (rescission) or to hold on to it under modified terms (price reduction). American law shared the same rules until the UCC introduced the seller's right to cure, together with an elaborate regulation of the buyer's decision to reject or to accept non-conforming goods that is tied together with the choice between rescission and damages. The CESL, in turn, distinguishes between consumer sales and commercial sales, and allows the consumer buyer to choose freely between rescission and other remedies aimed at contract enforcement, while commercial buyers may walk away from the deal only after according the seller a chance to cure the defect by making a conforming tender.

V. Analytic Framework

1. Rescission – the Under-theorized Remedy

It is anything but easy to spot the main policy issues involved in the maze of concepts and rules that bear upon the choice between rescission and simple expectation damages. Accordingly, the law and economics literature dealing with these issues is sparse, and the conclusions that are reached remain controversial.43 In glossing over variations in detail, it is possible to identify two opposing positions. One argues in favor of strict adherence to the perfect-tender rule, i.e. of the buyer's right to walk away from the contract upon non-conforming tender without further ado.44 The opposing position would restrict rescission as an immediate response to the delivery of non-conforming tender.


44 The most elaborate account of this position is Schwartz, 16. B.C. Indus. & Com. L. Rev. 543 (1975).
goods and instead allow the seller to try to cure the defect within a reasonable time or within other, similarly motivated confines. The following analysis tries to shed some light on the efficiency concerns involved in a right to rescission, as compared to the remedy of simple expectation damages.

2. Performance Incentives on the Part of Seller

It is received wisdom in law and economics that the remedy of expectation damages generates incentives for the obligor – in sales law terms: the seller – to behave efficiently, i.e. to take precautions to facilitate performance that cost less than the value created by the good promised in the hands of the buyer. In this context, the concept of expectation damages seems well-understood: the buyer must receive a money payment that makes her indifferent between the hypothetical state of the world in which she received conforming goods, and the actual state of the world in which she received defective goods. In this context, the question whether the defective goods are to remain with the buyer or be returned to the buyer is ignored, but implicitly answered in the former sense. Given that the parties entered into a sales contract and the buyer can easily be made whole by a payment of damages reflecting the difference in value between conforming goods and the non-conforming goods actually delivered, the question arises why the aggrieved buyer should ever be allowed to cancel the sale and reverse the trade.

In a recent article it has been argued that rescission, as a strict alternative to simple expectation damages, is required in order to induce the seller to deliver goods of optimal quality. Simple expectation damages, it is argued, do not suffice as they create incentives to supply goods that only meet the quality threshold agreed in the contract. The underlying model is based on the assumptions that the seller needs to make a relation-specific cooperative investment after contract formation, that the value of performance to the buyer becomes known before delivery, and that the

45 Priest (note) 963 ff.
47 In theory, the concept of expectation damages is compatible with any of these two solutions. Under the former German law of sales, strongly influenced by Roman law, it was unanimously accepted that a buyer who was entitled to expectation damages was allowed to choose between the two solutions. Huber, in: Soergel, BGB, 12th 1991, § 463 para 38 ff. German contract law doctrine has developed concepts labeling the two ways to calculate damages, namely "small expectation damages" and "large expectation damages". Ernst, in: Münchener Kommentar zum BGB, 5th ed. 2007, § 281 para 125.
parties will then renegotiate the contract.49 These assumptions quite adequately describe construction contracts, as well as contracts for works and services, but are rather unusual for sales contracts where sellers are typically merchants, and not manufacturers forced to make relation-specific investments.

With regard to sales contracts in general, a concern supporting the remedy of rescission is that other remedies, such as simple expectation damages, may actually not compensate buyers adequately. This is not because the buyer may incur attorney's fees and expend other efforts for enforcing his claim that he cannot recover in full from the seller. While this is true to varying degrees depending on the legal system involved, any shortcomings at this level affect not only the damages remedy, but also the one of rescission. If attorney's fees are not recoverable, for example, this applies regardless of whether the buyer sues for damages or for a refund of the purchase price. In order to see the true core of the concern of under-compensation, it is helpful to compare rescission to specific performance, a remedy that applies pre-delivery rather than post-delivery. Specific performance is the preferred remedy in cases where courts will have difficulty in appreciating the value lost to the buyer and will thus be likely to award damages that fall short of the real loss.50 The situation would be similar if the buyer who received non-conforming goods was restricted to simple expectation damages.51 If that were all, the seller could force a sale of non-conforming goods onto the buyer. The risk of persuading the court of the difference in value between the goods delivered and the goods received would be on the buyer. She would have to explain the court of the margin of diminished utility that is associated with the non conformity of the goods. The risk that the court underappreciated the loss to the buyer would be particularly serious where the non-conforming goods were so defective that they could not be resold to third parties with preferences that correspond to the real properties of the goods. To draw on an example presented by Llewellyn, the buyer of wall paper that is a little off-color would have to argue that the spoiled pleasure of enjoying the true color of the wallpaper translated into a certain money value.52 In returning the goods to the seller, the difficulties in measuring the loss to the buyer and appreciating the adequacy of her efforts to mitigate may easily be avoided.

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50 Shavell (note 46), 313, 377.

51 Priest (note) 965; see also Hermelin, Katz & Craswell (note 43), 126, arguing that supracompensatory remedies generally serve the purpose of protecting interests of the buyer that are not adequately reflected in simple expectation damages.

52 Llewellyn (note 6), 37 Colum. L. Rev. 341 (1937), at 388: "Rescission for minor defect is, however, essentially an ultimate consumer's remedy: it fits the case of the wallpaper which is just enough off-color, or the radio which is just enough off true, to edge the nerves."
3. Ex Post Mitigation

Another function of rescission is ex post mitigation. Efficiency requires not only that the seller takes precautions to facilitate performance ex ante, but also that the buyer, or rather both parties, take cost-effective measures to mitigate losses in case of breach.\textsuperscript{53} In a situation where the buyer receives goods that do not match the description agreed in the contract, the cheapest way to deal with this situation may be to return the goods to the seller. This presumption is particularly plausible where the goods cannot easily be repaired or otherwise adapted to the requirements of the buyer and where the buyer is not a merchant and thus unqualified to resell the goods on the market.\textsuperscript{54} Consumer-buyers lack access to the distribution channels for the goods in question, let alone to markets for the resale of non-conforming goods. In such a case, the seller is in a better position to dispose of the goods in the most efficient way. The remedy of rescission helps to place non-conforming goods in the hands of the party that is best placed in mitigating the consequences of breach.

Unfortunately, this explanation, while true for some cases, does not apply in every case, which may explain the complexities of the law governing this area. The prime example for the atypical case are trades between merchants where the buyer is as good an agent for reselling non-conforming goods as the seller. This may be so in cases involving goods that are not defective in a strict sense, but merely fall short of the quality required under the contract, while easily satisfying another, lower quality grade. Imagine a case where the seller promised to deliver "Grade AA" orange juice concentrate but the buyer received concentrate that only met the standards of "Grade AB". With regard to cases such as this one Llewellyn correctly observed that resale by the buyer at a reasonable price may easily be accomplished – and that the merchant-buyer may be in a better position to execute the resale than the seller since the goods need not be moved back to him.\textsuperscript{55}

In making the choice between the seller or the buyer as the party better positioned to maximize the value of the non-conforming goods, it needs to be remembered that rescission implies that the transaction is burdened with another layer of costs as an exchange that has already taken place must be unwound. This may entail substantial costs for freight, insurance, dismantling, and restoration.\textsuperscript{56} As the defective goods are now within the control of the buyer the need arises to return them to the seller. The cost of recovering goods from the buyer may be substantial, depending on the size,
weight, and potential hazards of the defective goods along with the distance between seller and buyer. They will be particularly high where the defective goods had already been installed into buildings, furniture, or the machinery of the buyer before the discovery of the defect and subsequent rescission. These cost items together represent the sunk costs of rescission. A legal rule that allows the buyer to cancel the sale upon discovery of a defect removes any incentive to take these costs into account. In a situation such as the one described, the costs of breach will be excessive under a rule permitting immediate rescission.

Another category of costs associated with rescission involves the diminution in resale value of defective goods. Take the example that an electric stove was sold, delivered to the consumer-buyer, and installed in her kitchen (a case that is familiar from the jurisprudence of the ECJ). A year and a half later, the stove fails and it turns out that it was already defective at the time of delivery. If the buyer rescinds the contract, the seller must recover the stove and sell it elsewhere. Regardless of whether the seller resolves to offer the stove with the defect or only after repair, the question remains the same: who on earth will buy a used, eighteen-month old stove, even if it is not defective? There may be a market for such items, but they will tend to be flea markets or markets for scrap metal dealers. In any event, the price to be fetched by reselling the defective item will be close to zero. The example of the defective stove does not represent an outlier, but is a rather typical of the consequences of rescission of contracts involving consumer goods. With regard to many categories of consumer goods, markets for used items do not exist at all, or they are marginal and characterized by trades in the lowest price segment. Therefore, if a buyer walks away from the purchase of a consumer good after she has used it, the value of the good is lost almost entirely. In the ECJ case cited above, the stove had been sold for €525. It is safe to assume that the seller who had to replace the defective stove did not recover more than the scrap value of it. This is not because the stove had been used for so long, i.e. roughly eighteen months. Rather, it seems highly unlikely that the outcome would have been different if the defect had been discovered after only eighteen days of use. Again, markets for used stoves practically do not exist. Even if the seller turned to eBay, transaction costs would be high and prices low.

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57 ECJ, 17.04.2008, Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände, C-404/06; a similar example involving a gas range is used by Schwartz, 16 B.C. Indus. & Com. L. Rev. 543, 548 (1975).
58 BGH NJW 2006, 3200.
59 A random search for used electric stoves on eBay Germany revealed that current prices fetched by private sellers who offer appliances that were never defective are typically around €50.
An even more extreme example was decided by the German Federal Supreme Court, albeit in the contract of withdrawal from an internet sale.60 In the case at hand, the buyer had bought a waterbed, i.e. a model called "Las Vegas", for a price of €1265. After the item had been delivered to him, he filled it with water and "tried it out" for three days. Then he revoked the contract of sale via email. The seller refused to refund more of the original price than a fraction of €258 that represented the value of the bed's heating system, arguing that a waterbed that had once been filled with water was impossible to sell in the market. The court assumed that was true but saw no other choice but to allow the claim of the buyer for refund of the rest of the contract price, i.e. €1007.61 This sum represents the net loss from the transaction to the seller. In light of this decision it is difficult to see how the sale of waterbeds over the internet could continue in the future.

A final issue that needs to be discussed with regard to the loss in exchange value relates to the alternatives to rescission. Without going into any detail and settling on one of the alternative remedies such as repair, price reduction, and/or damages, the question arises whether the loss represented by the slump in resale value is really inevitable, so that the law can do more than to allocate it between the parties. If that were true, the argument that the decline in exchange value must be added to the costs of rescission would fall apart as it would rather count among the inevitable losses caused by the breach. However, this does not seem to be the case. There is no doubt that in the hypothetical case where the buyer – instead of the seller – tried to resell the good on the market for used consumer goods, the outcome would be more or less the same as in the case that the seller tried. However, in the alternative scenario in which the buyer kept the product after its repair, the loss in resale value never materializes. My old car may fetch a very low price on the used-car market, but to me it may be worth much more, since I know that it is a great car that was always driven carefully by its owner. Prices for used consumer goods are as low as they are not because some of these goods may have been repaired but because they are used. The potential buyer of used consumer goods may correctly assume that the seller is offering it for sale because it is of low quality,62 and she will deduct the considerable amount of transaction cost involved in seeking out used consumer goods that fit the requirements of a particular buyer. For the initial buyer who used the good herself these concerns do not exist. She knows the real properties of the good and the

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60 Under Art. 6 (1) of Directive 97/7/EC on the protection of consumers in respect of distance contracts, OJ L 144, 19, the consumer-buyer is entitled to withdraw from a distance contract within seven working days form the day when she received the good without penalty and without giving any reason.

61 Federal Supreme Court (Bundesgerichtshof – BGH) NJW 2011, 56 para 15-33.

way in which it was used during its lifetime and will thus place a much higher use value on the good than a potential second buyer would calculate as its exchange value.

This is not to say that the utility of a buyer who is required by the law of sales to live with a repaired item is undiminished. It seems perfectly plausible to assume that her faith in the product may have suffered and that she attaches less value to owning a repaired item than to owning a perfect one. However, it is equally plausible to assume that the diminution of current use value to the initial buyer will be much smaller than the decline in exchange value that will be reflected in the price a reasonable second buyer will be prepared to offer for the used product. In order to account for the additional loss to the buyer, it is only necessary to add an allowance for the diminution of value to the costs of repair. The loss in exchange value that is inevitably associated with the resale of used consumer goods, regardless of whether they are perfect or defective, may thus easily be avoided by remedies that force the buyer to keep the goods, but to make her whole by other means. Therefore, the loss in exchange value must be added to the bill representing the costs of rescission.

4. Buyer Opportunism

_Llewellyn_ himself, who helped to contain the perfect-tender rule and to establish a right to cure on the part of the seller, was motivated not by the concern for efficient post-breach mitigation but by the risk of buyer opportunism. The scenario he envisioned was the one of defective tender in the face of a falling market. In a situation where the price of the goods has declined in the time between contract formation and the delivery date, the buyer is better off buying goods of the same quality that are called for in the contract on the open market for less money. The tender of non-conforming goods presents the buyer with a welcome opportunity to walk away from the deal and cancel what would otherwise be a binding contract. Therefore, the right to immediate rescission shifts the risk of a falling market onto the seller for no good reason. Under an ordinary sales contract with a definite and fixed price term, the risk of price fluctuations is for the buyer to bear. The risk allocation agreed by the parties, so the argument goes, needs to be respected regardless of whether the seller tenders conforming or non-conforming goods.

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63 Schwartz, 16 B.C. Indus. & Com. L. Rev. 543, 549 (1975), correctly identifies out the loss to the buyer but, in my view, exaggerates its proportions.

64 The legal basis for an additional compensation of the reduction in exchange value is supplied by Art. 109 (7) CESL.

65 Llewellyn (note 6), 37 Colum. L. Rev. 341, 390 (1937); the argument is widely shared; cf. Priest (note) 966; Goetz & Scott (note), 996 f.; Kull (note) 1469.
A second, related point that counsels against a right of immediate rescission is that the remedy opens the door for the buyer to act upon reversed preferences. A buyer who regrets her decision to acquire the good for the agreed price is, in any case, presented with a chance of withdrawing from her commitment if the goods delivered turn out to be non-conforming. In both cases - the one of buyer's remorse and the one of a falling market - a right to immediate rescission promotes buyer opportunism. The ex-ante costs associated with opportunistic actions on the part of the buyer decrease the surplus created by the contract. Both parties would be better off if buyer opportunism could be avoided.

5. Conclusions

In summary, rescission as a remedy for defective performance serves the functions of mitigating the costs of breach and of avoiding under-compensation of buyers. However, these benefits come at a price. Rescission allows buyers to take advantage of a declining market and to act upon changed preferences. Furthermore, as rescission necessarily imposes costs for moving the goods back to the seller, these must be recouped in the form of higher returns from the seller's salvaging efforts. Depending on the facts of the case, the balance of benefits and costs may be positive or negative. Where the non-conforming good has been used by the buyer or even installed into buildings or appliances, before discovery of the defect and subsequent rescission, their value is greatly diminished or even destroyed. In these settings, rescission is clearly not the most efficient remedy, as it fails to create incentives to mitigate the consequences of breach.

What can lawmakers take away from the preceding analysis? The most obvious conclusion would be to provide default rules that allow the parties to define their own rules where the statutory scheme does not fit their needs. Too much seems to depend on the circumstances of the individual case to allow for a 'one size fits all'-remedy.

VI. Policy Analysis of the CESL

1. The Distinction between Commercial Transactions and Consumer Sales

Under the CESL, termination is available as a remedy in case of non-conforming tender but its scope differs, depending on whether the buyer is a consumer or a merchant. In sales between merchants, the buyer is forced to provide the seller with a second chance to 'earn' the contract price

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66 Priest (note) 966.
by curing the defect. Vice versa, where the buyer is a consumer, rescission is available without more, upon the delivery of non-conforming goods. Except for cases where the defect is "insignificant", the buyer may walk away from the transaction without allowing the seller to cure the defect. While the scheme of remedies supplied for B2B transactions is of a default nature only, the parties to a consumer sale must not derogate the unconditional right of rescission granted to the consumer-buyer.

The exclusion of party autonomy in consumer transactions is unfortunate in itself, as the freedom of contract is reduced to the freedom to enter into a pre-fabricated contract or to abstain, while the authority to agree on the terms of the transaction are eliminated. With regard to the interface between contract remedies such as repair, replacement and damages, and the off-contract remedy of termination or rescission, the petrification of the statutory scheme is particularly regrettable. The preceding analysis of the policy issues involved did not yield a clear-cut result in favor of one solution or the other. Rather, much depends on the circumstances of the individual case. This suggests that lawmakers are well advised to follow a modest approach that facilitates rather than eliminates private bargains, which adapt the statutory scheme to the interests of the parties. In an area where cases are heterogeneous, lawmakers should supply clear-cut rules that allow the parties to foresee their consequences, in order to then make a reasoned choice of whether to accept these consequences or to derogate from the statutory scheme.

2. Commercial Transactions

The regime set up for sales between merchants is modeled on the framework developed for the UN law of sales, the CISG. In contrast to the method adopted under the UCC, the buyer's right to rescind the contract is not contingent on immediate rejection of defective tender or on subsequent revocation of acceptance, and the double standards of reasonableness governing the application of § 2-602 and § 2-608 UCC are also irrelevant. Regardless of whether the buyer rejected or accepted the goods upon delivery, the seller is entitled to cure defects and the buyer remains obliged to allow the seller to do so. All that matters is that the buyer complied with the burden to inspect the goods and to notify the seller promptly of any defect that she discovered, or should have discovered, upon proper inspection. With regard to commercial sales, the limits of the right to cure – which

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67 Art. 114 (2) CESL.
68 Art. 108 CESL.
70 Art. 122 CESL.
translate into requirements for an immediate right to rescind the contract – are that cure cannot be
effected promptly and without significant inconvenience to the buyer, or that the buyer has reason
to believe that the seller's future performance cannot be relied on, or delay in performance would
amount to a fundamental non-performance.71

While these provisions surely employ a number of vague terms, their rationale seems sound and
clear: where it is likely that the seller succeeds in remedying the defect and making the buyer whole
again, rescission must wait. Vice versa, where the buyer must expect even more trouble and delay
by allowing the seller a second chance, immediate termination remains an option. These principles
seem to fit in well with the economic rationale underlying the choice between rescission and
damages. In cases where the seller is able to cure the defect promptly, he must be allowed to do so,
while the buyer is barred from canceling the contract opportunistically, i.e. in reaction to a falling
market or changed preferences. In addition, in the majority of commercial transactions it seems
reasonable to assume that the principle of ex post mitigation supports the seller's option to cure
defects in performance. Under the CESL, cure is an option on the part of a seller who will use it
only if the costs to him of doing so are less than the costs to him of the remedy otherwise chosen by
the buyer. Since the buyer - in the event that the defect remains uncur ed - may choose between
termination and damages, the seller has the desirable incentive to offer cure only if it is the cheapest
response to the breach. While it is true that the buyer may require the seller to remedy non-
conforming tender even where the seller does not offer cure, this remedy is not available where
repair or replacement would be impossible, unlawful, or would place a burden or expense on the
seller which is disproportionate to the benefit obtained by the buyer.72 Together, these rules ensure
that non-conforming tender will be cured only if doing so costs less than the value represented by
the conforming goods in the hands of the buyer.

It might be supposed that a broad right to cure would water down the incentives of the seller to
perform accurately. A seller who knows that he will have the chance to cure defects might not take
cost-effective precautions to avoid defects in goods tendered in the first place. If this were true, the
concerns of ex post mitigation were at war with the concerns for ex ante efficiency. The goal to
minimize the costs of breach would distort incentives to avoid breach. But such conflict does not
exist. The seller will always be better off in tendering conforming goods in the first place rather than
delivering defective goods and then be forced to repair or replace them at his own cost. The sum of
the costs of non-conforming tender and the costs of cure will always be higher than the costs of

71 Art. 109 (4) CESL.
72 Art. 110 CESL.
initial perfected tender. Where this is not true, efficiency does not stand in the way of a rule that minimizes the costs of breach and thus maximizes the pie for the parties.

3. Consumer Sales

Disregarding its mandatory nature and focusing on substance, the framework set up for consumer sales differs from the one supplied for commercial sales in one important respect: the buyer who receives a non-conforming tender is not required to accord the seller a chance to cure the defect. Rather, the buyer may immediately rescind the contract or resort to any other remedy supplied by the CESL. A rational buyer will make this choice based on the benefit to her of the several remedies. In case the buyer looks at the contract favorably, possibly because market prices have gone up since the time of contract formation or because she managed to negotiate a favorable deal with the initial seller, she will settle on repair or replacement of the defective good. In the reverse cases that the market price for the goods in question has declined in the time between contract formation and delivery, or that she regrets having entered the sales contract in the first place, she will terminate the contract, and recover the contract price. The CESL provides no check whatsoever against opportunistic termination. The proviso that instant termination is not available for "insignificant" defects bears no relation to the situations just described, i.e. a falling market or changed preferences on the part of the buyer. Rather, it only excludes defects that are of minor importance.

Things do not get better for the CESL's provisions on consumer sales when analyzed in light of the mitigation principle. As the choice between remedies is entirely within the discretion of the buyer, she has no incentive to choose the one that minimizes the costs of breach. In particular, there is no good reason for the buyer to avoid termination where the costs of cure are low, whereas termination imposes substantial costs on the seller.

Nonetheless, the framework reflected in the CESL is exactly what Llewellyn recommended for consumer sales. In his opinion, consumer buyers deserved the option of immediate rescission because price fluctuations on markets for consumer goods were rare and consumers were unlikely to be able to resell defective goods at lower cost than professional sellers. Using the terminology of this essay, Llewellyn's claim was that the costs of buyer opportunism will tend to be low in consumer sales, while the concern of ex post mitigation of losses will favor immediate rescission over the damages remedy as the latter would force consumers to act as resellers of defective goods.

73 Art. 114 (2) CESL.
74 Llewellyn (note 6), 37 Colum. L. Rev. at 389.
While these arguments may have been valid at the time *Llewellyn* wrote, i.e. in the 1930s, they are not true today. As far as buyer opportunism is concerned today's markets for consumer goods are not so stable that the possibility of a steep decline in prices over a short time span is negligible.\(^{75}\) Tellingly, with regard to sales over the Internet the CESL exclude the right of withdrawal with respect to the sale of wines and other alcoholic beverages.\(^{76}\) The reason is that prices for high-quality wines, such as the ones of the Bordeaux region, fluctuate so rapidly that a right of withdrawal would allow the buyer to speculate at the expense of the seller – the same concern that underlies the decision against an immediate right of rescission. More importantly, price fluctuations are but one source of potential buyer opportunism, another is revised preferences. If the buyer regrets having bought the product in question, she may be tempted to use the instance of a non-conforming tender to rid herself of the transaction. She may even fabricate a defect to achieve this end, and the law facilitates such behavior in supplying a presumption to the effect that the defect was present at the time of delivery if non-conformity becomes apparent within six months after delivery.\(^{77}\)

As far as the concern for ex post mitigation is concerned, the point that retailers are in a better position to resell or otherwise dispose of defective goods than consumer buyers is of course valid. However, as has been explained above, the essential point is not whether the buyer or the seller is better positioned to effect a resale but that used consumer goods are impossible to sell at reasonable prices for either party while the defect could be repaired with little effort. To take up the example of the defective stove again, imagine that the contract price that would have to be refunded is €525, the costs of repair are €50 while the value of the repaired stove, sold by the seller as used, is €200. In this case, efficiency suggested the remedy of repair while the buyer contracting under the CESL is free to terminate the contract and require the seller to recover the stove and refund the full contract price, inflicting a net loss of €375 on the seller. There is nothing in the CESL restraining the buyer from choosing this course of action.

These concerns against the exclusion of the right to substitute performance and its mandatory nature are reinforced by the broad definition of the scope of the European Sales Law. Pursuant to Art. 2 (k) PR CESL the application of the CESL is not limited to contracts of sale in the narrow sense of involving the transfer of ownership of goods but extends to contracts for the supply of goods to be manufactured or produced by the seller pursuant to the requirements and specifications

\(^{75}\) This argument is made in Schwartz (note), 546.

\(^{76}\) Art. 40 (2) (f) CESL. The other categories of goods listed in Art. 40 (2) CESL are illustrative of other cases where a right to immediate rescission may be problematic.

\(^{77}\) Art. 105 (2) CESL.
of the buyer. If, for instance, a dress has been manufactured to the sizes and tastes of the buyer, she may, upon discovery of a defect, terminate the contract without further ado, even though the dress fits no one else. The same is true for appliances and furniture manufactured to fit the sizes of certain buildings or structures. In such cases, the buyer is in a position to inflict substantial losses onto the seller-manufacturer, and the latter will take this risk of loss into account when calculating the contract price. This benefits no-one but harms both parties. With a view to contracts calling for construction or manufacture of a good according the promisee’s specifications it has never been doubted that a right of the promisor to cure defective performance is the adequate remedy.78

This conclusion holds even in light of the parties' authority to negotiate away inefficient outcomes ex post. To be sure, the mandatory nature of the CESL in B2C transactions only excludes derogatory agreements ex ante, not renegotiation ex post, after the breach has occurred.79 Where the law entitles the buyer to remedies that do not minimize the losses from breach, the seller may always buy off his contracting partner. In the example of the defective stove that could be repaired at trivial cost, the seller will induce the buyer to forego termination and accept repair in exchange for an additional payment that will fall in the range between the seller's cost of repair (€50) and his total costs in case of termination (€525 + €50 - €200 = €375), i.e. between €1 and €275. However, ex post negotiations involving inefficient remedies impose transaction costs on the parties that diminish the joint gains from the exchange. In the current example, buyer and seller would be better off if the law had limited the buyer to demand cure in the form of repair, plus complementary damages, rather than giving him the option to terminate the contracts, which the parties then had to negotiate away.

Moreover, ex post negotiations will only work where the concern of the seller is to avoid waste in dealing with the consequences of the breach. If the buyer terminates opportunistically, because she can now buy the same product at a lower price or because her preferences have changed so that she wants to avoid the contract anyway, there is little leeway for ex post renegotiations. The buyer has no incentive to forego her right of termination for anything that is worth less than the savings she can achieve by calling off the sale and commit the contract price that the seller had to refund to another purpose.


79 Art. 108 CESL: "before the lack of conformity is brought to the trader's attention by the consumer".
VII. Conclusion

In conclusion, the solution found in the CESL for the interface between cure and remedial performance on one hand, and immediate termination on the other, is plausible with regard to commercial sales. In contrast, the proposed modifications for consumer sales, i.e. free choice of the consumer between remedies coupled with a ban on party agreements, seem to be ill-advised. The better solution would have been to generalize the scheme of remedies for commercial sales to apply to consumer sales too. In addition, the law of consumer sales should operate in the standard mode of contract law, i.e. as default rules. It is important to keep in mind that the failure of the CESL to commit to these principles does not benefit the consumer, as the framers intended. Quite the opposite, the rules on consumer sales will decrease the pie and hurt consumers just as much as sellers.