Nathalie WHARTON,
Faculty of Law,
Institute of Comparative Law,
McGill University, Montreal

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THE BUYER'S CONTRACTUAL REMEDIES AND BREACH OF QUALITY WARRANTY REMEDIES

A Comparative analysis of Swiss law and modern law systems

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ABSTRACT

In Swiss law the buyer's remedies for breach of warranty of quality remedies are different in many respects from his other contractual remedies. The aim of this thesis is to show that it is not a necessity but rather a source of confusion for the Swiss legal system to have special remedies for breach of warranty. General contract remedies could very effectively and rationally compensate buyers for breaches of quality warranties. To achieve this aim this study starts by analysing the historical reasons for the adoption of special warranty remedies. In its second half it compares each warranty remedy found in the Swiss Code of obligations with its equivalent in three recent legal systems: Quebec law, the Uniform Commercial Code of the United States and the United Nations 1980 Convention on Contracts for the International Sale of Goods.

En droit suisse, les remèdes qui découlent de la violation de la garantie des défauts par le vendeur diffèrent considérablement des autres remèdes contractuels de l'acheteur. Le but de cette étude est de démontrer que des règles spéciales pour les remèdes de la garantie non seulement ne sont pas nécessaires mais qu'en plus ne font que compliquer le droit des obligations. La partie générale du Code des obligations suisse possède tous les remèdes nécessaires à compenser complètement et adéquatement l'acheteur d'un objet non conforme au contrat. Cette étude consiste d'abord en une recherche des raisons historiques qui motivèrent l'adoption de règles spéciales sur la garantie des défauts. Dans la seconde partie de ce travail, chaque remède de la garantie en droit suisse est comparé à son équivalent dans trois systèmes juridiques plus modernes : le droit québécois, le Code de commerce uniforme des Etats-Unis et la Convention des Nations-Unies de 1980 sur les contrats de vente internationale de marchandises.

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INTRODUCTION

The buyer aggrieved by a delivery of defective or non-conforming goods has to face a special set of rules in the Swiss obligations Code. Indeed, those rules are not only separate from the other rules on the seller's duties, they are also different. Pierre Cavin [1], who was very aware of the specificities of warranty of quality rules [2], deplored them:

> *[l]a réglementation de la garantie en raison des défauts,"...", exorbitante du droit commun, apparaît à bien des aspects difficilement réductible aux règles de la partie générale, dont les dispositions régissant les contrats spéciaux devraient être le prolongement naturel.* [3]

His criticism appears quite founded. But the fact remains that the legislator's intent was to treat the warranty duty of the seller differently from his other contractual duties. [4] Despite having created some exceptions to the separateness and specificity of warranty rules, Swiss courts and commentators have generally respected that intent. This study aims at challenging the Swiss legislator's decision and finding ways of changing the system.

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1 P. Cavin, "Considérations sur la garantie en raison des défauts de la chose vendue" (1969) 22 La Semaine Judiciaire 329, at 330.

2 Cavin considers the seller's warranty duty as a legal rather than a contractual one because of the special characteristics of warranty rules, see P. Cavin, "La vente, la donation, le bail", *Traité de droit privé suisse*, Tome VII, (Fribourg: Editions Universitaire Fribourg Suisse, 1978) at 73 and 74 and Cavin, *supra* note 1 at 329 to 333.

3 This quotation mentions general contract rules rather than sale rules in comparison with warranty rules because sale follows largely contract rules.

4 W. Stauffer, "Von der Zusicherung gemäss Art. 197 OR" (1944) 80 Zeitschrift des Bernischen Juristenvereins 145 at 146. The seller's warranty duty was to be considered as a legal duty not a contractual one.

Warranty of quality rules cover three important topics: the nature of the warranty engagement, its extent, and the remedies provided in case of breach. Because it would be impossible to go into any depths by studying all of those areas of warranty rules, we shall limit our investigations to the subject of remedies. Our focus will be further narrowed to the appraisal of the nature and compensation aim of warranty remedies in comparison with sale remedies. Because of that all the rules on conditions in which each remedy can be exercised will not be included in this study [5] unless they have a significant bearing on our comparison.

Lets first identify what distinguishes warranty remedies from breach of contract remedies in Swiss law:

WARRANTY REMEDIES	BREACH OF CONTRACT OF SALE REMEDIES
specific performance: For generic goods: substitute goods *action en remplacement:* 206 CO For specific goods: NO EQUIVALENT	**specific performance** *action en exécution*
termination of contract *rédhibition:* 205 CO **with direct or indirect damages** *dommages-intérêts directs et indirects* If seller at fault: 208 II CO If no fault of seller: 208 III CO	**termination of contract** *résolution:* 109 CO **with reliance damages** *dommages-intérêts négatifs* ONLY IF FAULT OF SELLER: 109 II CO
price reduction *réduction du prix:* 205 CO	NO EQUIVALENT
NO EQUIVALENT (controversial)	**expectation damages** *dommages-intérêts positifs* with fault of seller: 97 CO

5 For instance, rules on time limits.

These two columns of remedies have been arranged so as to compare warranty types of remedies with those found in rules on sale contract. It is immediately clear that both sets of remedies are mostly different: warranty remedies do not offer the equivalent of specific performance for specific goods [6] nor do they contain any expectation damages remedy; and sale remedies do not have the equivalent of reduction of price.

Even when both sets of remedies offer the same type of remedy, its effects might be different. This is the case for the remedy of termination of the contract: warranty termination comes with direct and indirect damages whereas sale termination is accompanied by reliance damages.

All these differences underline the fact that warranty rules were initially designed to rule exhaustively the field of breach of warranty for defects. This intention of the legislator, as we have already said, is mostly respected by courts and legal authors. However, there is an important debate on whether to apply warranty remedies exclusively or to allow concurrent application of some sale remedies in cases of delivery of non-conforming goods. There are also controversies as to whether it is best to emphasise similitudes or differences between warranty and corresponding contractual remedies when their rules are interpreted. These controversies indicate that the separate system set up by the legislator for warranty remedies is not always considered to be adequate and is being indirectly challenged. Unfortunately this challenge is not systematic which makes the whole field of warranty remedies very confusing and uncertain. Undeniably the coexistence of those two sets of remedies is far from satisfactory.

Before looking for ways of improving this system, we must find the reasons behind its adoption. There is no doubt that the distinction between warranty and sale remedies has its origins in legal history, ancient legal history. It goes back to Roman law and the adoption of the Edict on warranty for defects. This famous Edict was a police regulation that provided comprehensive rules and original sanctions against sellers of "defective" slaves or cattle on public markets. Its creation came at a time when the civil law did not protect the buyer against delivery of defective goods. Although the rules contained in the Edict were taken up later by Roman contract law and properly integrated in sale remedies, Roman and, later, medieval traditionalists managed to keep the Edict alive within contract law. This conservatism created the uneasy coexistence of special warranty rules alongside sale rules. Despite some attempts by the Natural Law movement followers to consider the warranty duty as just any other contractual duty of the seller,

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6 This would be the remedy of repair.

special warranty rules remained. And finally, this ill digested history was taken as the basis of the Swiss obligations Code's rules on warranty for defects.
Tradition is rarely a good reason to retain rules that are inadequate. In the present case, Swiss law cannot even be said to have followed the Roman law tradition because it was influenced by a mixture of contradictory principles from different periods. Late classical Roman law is usually considered by Roman law commentators to be most characteristic of that tradition. It is unfortunate that Swiss law has not chosen to follow the law of that period because late classical law had integrated warranty remedies in sale remedies. This would have provided an excellent model for the Code of obligations' warranty rules.

Apart from the late classical Roman law model, we can turn to other, more modern systems [7] to find an example of harmonious relations between warranty and sale rules. We have chosen to compare Swiss law to three systems that are representative of the two main legal traditions of the Western world and that have some influence on other legal systems. And not so surprisingly, the new civil Code of Quebec, the United States Uniform Commercial Code and the 1980 United Nations Convention on Contracts for the International Sale of Goods all offer the example of a legal system where warranty remedies have been integrated in sale remedies. Of course, those systems differ in many respects from Swiss law. But as Allan Watson [8] tells us:

> I was of the opinion that successful borrowing could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion. What, in my opinion, the law reformer should be after in looking at foreign systems was an *idea* which could be transformed into part of the law of his country. For this a systematic knowledge of the law or political structure of the donor system was not necessary, though a law reformer with such knowledge would be more efficient.

The idea forwarded by the three legal systems we are comparing Swiss law to is that a system that does not contains specific warranty remedies can nevertheless function perfectly well. The late classical Roman law model points to the same direction: the suppression of special warranty remedies.

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7 Swiss law sale of goods rules are now more than a century old, see W. Munzinger, *Projet de Code de commerce suisse*, (Geneva: 1864) at 241ff.

8 "Legal Transplants and Law Reform" in A. Watson, ed., *Legal Origins and Legal Change* (London and Rio Grande: Hambledon Press, 1991) 293 at 293.

In part one of this study we shall determine where Swiss warranty remedies came from and how they compare with their equivalent in modern legal systems.

In part two, we shall evaluate the problems separate warranty remedies create and compare Swiss law's solutions with three modern legal systems' approach. This should help us find out if the Swiss obligations Code's sale and contract remedies can satisfactorily compensate the buyer for warranty breaches. We should also be able to determine whether this can be achieved by way of interpretation or whether adopting new rules is necessary.

PART ONE

HISTORICAL BACKGROUND AND MODERN TRENDS

In late classical Roman law the obligations of the seller were to:

> take care of the thing till delivery, to deliver it, to answer for eviction, to answer for latent defects. In the final state of the law all four were enforceable by *actio empti* [the buyer's general sale remedy], all being capable of being regarded as imposed by *bona fides* [good faith duty] and so inherent in the relation of buyer and seller. But the warranties against eviction and latent defects had grown up otherwise than as deductions from *bona fides*, and this is reflected in the texts even of the *Corpus Iuris* [9]. In continental law they still bear the special name of *garantie* or *Gewärleistung*, which, like "warranty", connotes responsibility for the existence of a state of facts rather than a promise of performance. [10]

It is as if European continental law had been influenced by an early period of Roman law rather than by late classical law. These systems reflect the period of Roman law where warranty remedies were separate from other sale remedies. The result of this influence is that Swiss law warranty remedies are found in a separate set of rules that apply exclusively to that type of breach. Some Swiss authors have argued on that basis that warranty for defects is a legal obligation of the seller and not a contractual one. That implies that general rules on contracts do not apply to warranty.

Roman law is often said to be the origin of Swiss law rules but the extent to which we are indebted to or in some cases burdened with that heritage is greater that we think. [11] The reason is that sale of goods rules in developed Roman law were extremely sophisticated. Unfortunately, in the course of time, Roman law rules, principles and institutions from different periods got mixed up. This was not just the work of the commentators of the *Corpus Iuris* but also that of its makers; not to mention the uncertainty resulting from the absence of complete documentation. It is a common occurrence that a system borrows a concept from another without first harmonising it with its existing legal principles. That incident happened a lot with warranty remedies from their "invention" up to the Swiss Code of obligations. The result of the legal history of those remedies has proved quite unsatisfactory especially when compared with more recent legal systems.

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9 The *Corpus Iuris* is the great codification of Roman law made by the emperor Justinian in 523 A.D.

10 F. Zulueta, *The Roman Law of Sale : introduction and select texts*, (Oxford: Clarendeon Press 1945) at 35.

11 See E. Rabel, "The Nature of Warranty of Quality" (1950) 24 Tulane Law Review 273.

I. WARRANTY "ACTION" FOR DEFECTS AND BUYER'S OTHER "ACTIONS" AGAINST THE SELLER IN ROMAN LAW

Roman classical lawyers were not so much concerned with laying down rules on rights and duties as with discussing the conditions under which a certain action lies and the redress which might be obtained by it. [12] For instance, if the parties had concluded a contract of sale (*emptio venditio*), only the *actiones empti* and *venditi* could enforce it. If the agreement was not a sale, these particular actions were not available to the parties. [13] Furthermore, the formulary system demanded that the claimant use the correct words (*formula*) to describe his action. [14]
Despite the fact that the classical system of actions did not survive the end of the classical period, that system continued to haunt Justinian law and lurks behind our modern rules on sale remedies.

We shall first show the evolution of Roman sale and warranty remedies (A) and then compare them in the period preceding the one they merged (B).

A. Evolution of Roman sale and warranty for defects remedies

1) Sale remedies

The earliest form of what had the practical results of a sale was the ceremony of *mancipatio*. This was a very formal way of transferring an object for money and it was an immediate exchange. This purely private transaction came to be ruled by the State in the

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12 F. Schultz, *Classical Roman law*, (Oxford: Clarendon Press 1956) at 11.

13 Of course the agreement struck by the parties did not become a sale simply because it was described by them as such, see Pomponius, Digest 18,1,55.

14 Zulueta, *supra* note 10 at 7

Twelve Tables [15]. Two actions were given to the buyer against the seller: the *actio auctoritatis* that made the seller liable for double the price in case of eviction, and the *actio de modo agri in duplum* which was available if the seller has overstated the acreage of land sold. [16]

From the time of the Twelve Tables, parties to a sale could also enforce their "agreement" outside the *mancipatio* realm. They could use a penal undertaking [17] or ask for real or personal security to secure payment if parties had agreed that it was to be deferred. [18]

There is a lack of information about the Republic period but it seems clear that the *stipulatio* developed greatly as a means of achieving contractual results. [19] A *stipulatio* [20] was a formal, unilateral obligation. It was also a strict liability engagement (with some exceptions). The formality resided in the use of an oral question and answer form. The same verb had to be used in the question and in the answer, for instance:

> ....*spondesne ? spondeo.* .... do you promise that ? I promise.

The advantages of *stipulatio* were that it provided easy to satisfy formality and that it could be used in many different situations. That flexibility and usefulness made possible the development of a substantial law of sale. [21] These advantages also explain why the stipulations remained in use in Roman law after the invention of consensual contracts as a instrument to create additional obligations on a contract.

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15 The law of the Twelve Tables was adopted in about 450 B.C. and it constituted a kind of codification of the State law of the time.

16 Zulueta, *supra* note 10 at 3

17 *Ibid.* at 4.

18 Institutes 2, 1, 41.

19 Zulueta, *supra* note 10 at 4

20 See A. Watson, *The Law of Obligations in the later Roman Republic*, (Oxford: Clarendon Press, 1965) at 85

21 Zulueta, *supra* note 10 at 5. See also A. Watson, "The Notion of Equivalence of Contractual Obligation and Classical Roman Partnership" in A. Watson, ed., *Legal Origins and Legal Change* (London and Rio Grande: Hambledon Press, 1991) 239 at 239 [hereinafter "The Notion of Equivalence"]: "Before *emptio venditio* parties in a sale like situation would create their obligations by each taking a stipulatio or a number of stipulations from the other."

However, stipulations had important disadvantages. First of all, even when they were reciprocal, one party promising the price and the other the object of the sale, they remained unilateral and independent of each other. The seller's obligation was not conditional on the buyer performing his part of the deal and vice-versa. Secondly, each stipulation was to be literally construed. That meant that the parties had to have the foresight to incorporate in the stipulation every necessary duty or implication of the deal. These disadvantages did not suit the growing trade of the beginning of the second century B. C. [22]

Although the passing of time and disappearance of evidence erased knowledge of the exact way and time at which they were invented [23], consensual contracts are among the most impressive findings of Roman law. [24] No philosophical background motivated this invention and yet it has remained a legal tool for many countries around the world. As in the European continental tradition, the sole basis for the validity of a consensual contract in Roman law was the consent of the parties. There was no need for formalities anymore and that enabled parties to contract at a distance, by letter or messenger.
The contract of sale (*emptio venditio*) emerged as a bilateral contract which meant (and still means) that the liability of one party depended on the other having discharged or

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22 Zulueta, *supra* note 10 at 5.

23 See A. Watson, "The Origins of Consensual Sale : A Hypothesis" in A. Watson, ed., *Legal Origins and Legal Change* (London and Rio Grande: Hambledon Press, 1991) 239 [hereinafter "The origins of Consensual Sale"].

24 *Ibid.* at 165ff.: He says that consensual contract of sale was not the sudden incredible discovery it was said to be: transfer of ownership was never included in the seller's duties and eviction and latent defect took time to be integrated. It was in fact the stipulations that were very important for sale, the *actio empti* with its *bona fide* implication was only there to fill the gaps left by the stipulations. This author concludes on page 169 :

> Thus one must not say that, at the beginning, stipulations against eviction and latent defects had to be taken because the *actio empti* did not cover these obligations. Rather, the *actio empti* did not cover these obligations because that action was dependent upon the presence of thes stipulations. ...as the texts of Varro show (De re rust. 2.2.6, 2.3.5., 2.4.5.) where warranties against eviction and latent defects were both wanted "..." they were in fact covered by one single stipulation.

On page 171, Watson goes on to say the gap the *actio empti* had to fill was the problem of bilaterality. That was of course a problem in cases of deferred delivery or payment. For eviction and latent defects it was not so important.
Finally at pages 173 and 174, Watson places the origin of sale contract in the middle of the third century B. C. For more details see his reasoning and notes.

being ready to discharge its obligations. [25] Good faith became a requirement of the sale contract. [26] The formula used for sale actions was:

"*quidquid dare facere oportet ex fide bona*" (Emphasis added)

which clearly meant that good faith was part of the measure of the liabilities of the parties. *Bona fides* like "reasonable conduct" or *bonne foi*, had the flexibility of adapting to changing moral values but was dependent on a judge's opinion. [27] Apart from this corrective effect, the good faith requirement had a creative effect. Some standard duties, like the duty of the seller to protect the buyer against latent defect, became implied in the contract of sale relationship. That way, little by little, good faith actions absorbed obligations that had previously been outside the consensual contract. [28]

The actions through which one party could force the other to respect its obligations based on the contract of sale were solely the *actio empti* for the buyer and the *actio venditi* for the seller. The *actio empti* enabled the buyer to seek redress for all types of contract breaches by the seller and consisted in the award of damages.

2) Warranty for defects remedies

Initially, Roman law did not offer any protection to the buyer of a faulty object. [29] The object of the sale was bought in its actual state. This legal situation was not very

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25 Zulueta, *supra* note 10 at 7 and Digest 19, 1, 13, 8 and Institutes s. 135 to 137.

26 See Institutes, s. 135, 136 and 137.

27 To counter this uncertainty, parties still used the *stipulatio* to add or get away from duties that may be implied in the contract.

28 Zulueta, *supra* note 10 at 9 and Digest 19, 1, 11, 1.

29 Mancipation did offer limited protection to the buyer of land, as we saw above. See M. Kaser, *Das römische Privatrecht*, vol. 1, 2d ed. (Munich: C. H. Beck'sche Verlagsbuchhandlung, 1975) at 557 and , *Manuel élémentaire de droit romain*, vol. I, 6th ed., (Paris: Domat, Montchretien, 1947) at 158 [hereinafter *Manuel élémentaire*] and R. Monier, *La garantie contre les vices cachés dans la vente romaine*, (Paris: Recueil Sirey, 1930) at 8 [hereinafter *La garantie*]: *" dès la loi des XII Tables, il existait un véritable système de garantie des vices : la garantie n'existait pas évidemment de plein droit, mais supposait que par une clause de la mancipation, l'aliénateur avait solennellement déclaré l'absence de vices. "*

satisfactory; therefore, probably since a very early time, the buyer asked of the seller that he warrant him against defects through a *stipulatio.* [30] The simple and strict character of the *stipulatio* was very adapted to the warranty situation. Whatever the involvement of the seller in the appearance of the defect, he was to guarantee the delivery of a sound object. If the object was faulty the *actio ex stipulatu* was the remedy. This practice became very widespread to the extent that Varro presented in his *De re rustica* (37 BC) a list of the usual wording of warranty stipulations that he recovered from old manuals.

> *"de reliquo antiqua fere formula utuntur; cum emptor dixit "tanti sunt mi emptae ? et ille respondit "sunt" et expromisit nummos, emptor stipulatur prisca formula sic, "illasce oves, qua quod recte sanum est extra luscam surdam minam, id est ventre glabro, neque de pecore morboso esse habereque recte licere, haec sic recte fieri spondesne ?"* [31]
>
> For the rest, they mostly follow the ancient precedent. When the buyer has said: "Are they mine for so much ?" and the seller has answered: "they are", [32] and when the buyer has formally promised the money, (6) the buyer puts a stipulation in the following traditional form: " That these sheep, with which we are dealing, are thoroughly sound, according to the standard of a thoroughly sound flock, excluding any that is one-eyed, deaf, or smooth-bellied, and that they do not come from sickly stock, and that I am free to possess them without disturbance--do you solemnly warrant these matters ?" [33]

Despite this, there were still some areas where this system was not satisfactory. This was the case in particular in public markets. There, slave sellers, who were mostly foreigners, had a reputation of dishonesty. An intervention by the State apparently seemed necessary to protect weak Roman citizens who had been foolish enough to buy "faulty" slaves. [34] The intervention took the form of an edict. At first, this edict was only the political program of the praetor, an elected magistrate who had local administrative functions. In

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30 See Kaser, *supra* note 29 at 558, H. Honsell, T. Mayer-Maly & W. Selb, *Römisches Recht*, 4th ed. (Munich: Springer-Verlag, 1987) at 316.

31 M. Terentius Varro, *E libro secundo Rerum Rusticarum*, 2, 2, 5.

32 Although, at first this way of making a sale may appear to be an exchange of stipulations, it is not. The transition to the consensual contract was progressive and some old habits were kept. See Watson, "The Origins of Consensual Sale" *supra* note 23 at 169.

33 Zulueta, *supra* note 10 at 62 and 63.

34 See Digest 21, 1, 1, 2.

the course of time the political manifesto became more important as it acquired some normative effect for civil law matters: it gave citizens actions to defend their rights. [35] Although the pretor could give actions he did not create or modify the civil law strictly speaking. He built his rules on the civil law foundations and granted actions to protect rights. In the case of warranty remedies, he used the civil law *stipulatio* and made it compulsory [36]:

> *"Si venditor de his quae edicto aedilium continentur, non caveat, pollicentur adversus eum ad redhibendum iudicium intra duos menses; vel quanti emptoris intersit, intra sex menses."* [37]
>
> The aediles, if a seller will not enter into a formal verbal contract concerning the matters provided by their edict, promise an action of redhibition against him within two months and an action for the buyer's damages within six. [38]

This extract indicates that it was likely that the responsibility of the seller depended initially on the adoption of a stipulation precisely because it was compulsory. [39] This was an ordinary civil law stipulation because its violation gave the buyer the choice between using the ordinary *ex stipulatu* action and the special actions given by the Edict. [40] The advantage of the civil law action was that the claimant escaped from the time limits of the

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35 W. Selb, "La fonction originale de l'édit du préteur : caractère politique ou acte normatif ?" (1985) 36 Iura 115.

36 The date of the first Edict is not precisely known but some authors situate it in the 3rd century B.C. already. See B. Huwiler, "Die "Vertragsmässigkeit der Ware"" in Berner Tage für die Juristische Praxis 1990, *Wiener Kaufrecht, der Schweizerische Aussenhandel unter dem UN-Uebereinkommen über den Internationalen Warenkauf*, (Bern: Stämpfli & Cie, 1990) 249 at 252, footnote 15; Monier, *Manuel élémentaire, supra* note 29 at 159 and 160 and Monier, *La garantie, supra* note 29 at 14.

37 Digest 21, 1, 28.

38 Zulueta, *supra* note 10 at 144

39 Monier, *Manuel élémentaire, supra* note 29 at 162 and 163 and Monier, *La garantie, supra* note 29 at 107; A. Rogerson, "Implied Warranty against Latent Defects in Roman and English Law" in David Daube, ed., *Studies in the Roman Law of Sale* (Oxford: Clarendon Press, 1959) 112 at 128; Honsell, Mayer-Maly & Selb, *supra* note 30 at 316; Kaser, *supra* note 29 at 559 and 560. See also Raymond Monier, *La garantie, supra* note 29 at 91 explains that "[l]*a stipulation édilicienne relative à l'absence de vices est en rapport étroit avec l'obligation de déclarer certains vices : le vendeur est en effet uniquement obligé de promettre par stipulation l'absence des vices que l'édit lui prescrit de faire connaître au moment de la vente.*"

40 Zulueta, *supra* note 10 at 51.

aedilician actions. Its disadvantage was that it only awarded damages whereas the aedilician actions allowed rescission of the contract or reduction of the price.
Later the duty to declare defects evolved into a duty to declare the absence of any defect and then became simply implied. The implied duty of the seller was strict as he could not escape liability; even by showing that he could not have discovered the defect even if he had tried. [41]

The Edict was not part of the civil law (ordinary contract law) but it was a special set of rules that only applied to sales of slaves and (later) of farm animals in public markets. It had two important effects: first it compelled the seller to warrant the buyer against certain latent defects; even if he did not even know of those defects. Secondly, it provided the buyer with two powerful remedies: the *actio redhibitoria* (cancellation or termination of the contract) and the *actio quanti minoris* (price reduction). Both those remedies are still found in most Western European countries' legislation. [42]
The Edict was also very comprehensive as it covered nearly all aspects of the delivery of non-conforming slaves or animals.

In its most evolved state the Edict had the following wording:

> *Aiunt aediles: qui mancipia vendunt, certiores faciant emptores, quid morbi vitiive cuique sit, quis fugitivus errove sit noxave solutus non sit: eademque omnia, cum ea mancipia venibunt, palam recte pronuntianto. Quod si mancipium adversus ea venisset sive adversus quod dictum promissumve fuerit cum veniret fuisset, quod eius praestari* oportere *dicetur: emptori omnibusque ad quos ea res pertinet (in sex mensibus, quibus primum de ea re experiundi potestas fuerit* [43] *), iudicium dabimus, ut id mancipium redhibeatur, si quid autem post venditionem traditionemque deterius emptoris opera familiae procuratorisve eius factum erit, sive quid ex eo post venditionem natum adquisitum fuerit, et si quid aliud in venditione ei accesserit, sive quid ex ea re fructus pervenerit ad emptorem, ut ea omnia restituat, item, si quas accessiones ipse praestiterit, ut recipiat. Item si quod mancipium capitalem fraudem admiserit, mortis consciscendae sibi causa quid fecerit, inve harenam depugnandi causa ad bestias intromissus fuerit, ea*

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41 See Monier, *La garantie, supra* note 29 at 89ff. and Honsell, Mayer-Maly & Selb, *supra* note 30 at 316 footnote 3 *in fine* but it is not settled when these changes took place.

42 See Rabel, *supra* note 11 at 275.

43 The words in brackets are not found in the fragment but according to O. Lenel, *Essai de Reconstitution de l'Edit Perpétuel*, (Paris: Librairie de la Société du Recueil Général des Lois et des Arrêts, 1901) at 304, this omission is the result of a simple error.

omnia in venditione pronuntianto: ex his enim causis iudicium dabimus, Hoc amplius si quis adversus ea sciens dolo malo vendidisse dicetur, iudicium dabimus. [44]

The aediles say: "Sellers of slaves are to inform buyers of any disease or defect in any slave and whether any slave is a runaway, a vagabond, or not free from noxal liability: all these matters they must declare with proper publicity when the slaves shall be sold. But if a slave was sold in contravention of the foregoing or in contravention of what was stated or promised when he was being sold, in respect of which a legal claim shall be made, we will grant to the buyer and to all whom the matter concerns an action for redhibition of the slave (within six months from when it shall first have been possible to bring an action on that account). The buyer must, however, make good to the seller all the following: any deterioration of the slave which has occurred since the sale and delivery and has been caused by himself or his household or his procurator, also anything born from or acquired through the slave since the sale, also any other thing that went with the slave as an accessory on the sale and any profits that have come to the buyer therefrom. Furthermore, seller must declare at the time of sale all the following: any capital offence committed by the slave or any attempt at suicide on his part or the fact that he has been sent into the arena to fight with wild beasts. For all these grounds we will grant an action. Moreover we will grant an action if it be alleged that a slave has been sold with conscious dishonesty against our rules." [45]

This text is very important because its influence has been enormous on civil law systems as well as on Roman law itself. The reasons for its impact must first be found in the originality of the remedies it provides. Roman law did not offer a remedy of rescission outside cases of vitiated consent (mistake, for instance). Redhibition was the only mechanism that allowed the buyer to end unilaterally a valid contract. Although the text of the Edict does not mention reduction of price, this remedy was also part of its arsenal and also constituted an innovation. [46] Another reason for the Edict's success is the fact it is very complete. It provides clear rules on compensation after rescission of the contract, it states all the defects covered by the warranty and it even has a provision on fraud.

Swiss commentators constantly refer to this Edict to explain the origins of warranty rules in the obligations Code. However, the Edict did not have the monopoly of the quality warranty rules. From the first century BC, the civil law was developing its own rules on

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44 Digest 21, 1, 1.

45 Zulueta, *supra* note 10 at 139 and 140.

46 Digest 21, 1, 31, 16; Digest 21, 1, 38, 13; Digest 21, 1, 48, 1.

the seller's warranty duty, probably under the influence of the Edict. [47] As we have seen, this was made possible by the invention of the principle of good faith in consensual contracts to which sale belonged. Only progressively did the principle of good faith include the warranty duty in the "natural" obligations of the contract of sale. Initially, it was only when the seller had omitted to declare defects in the goods of which he knew that the requirement of good faith was considered to be violated. [48] With time, good faith simply meant that the seller was responsible for the quality of the object sold. [49] The remedy was then, of course, the *actio empti*. It is noteworthy that at the end of the classical law period, the *actio empti* had also absorbed the seller's duty to take care of the object before delivery and the duty to protect the buyer against eviction.

The "rivalry" [50] between the aedilician remedies and the civil law *actio empti* ended when the jurisdiction of aediles was abolished. Civil law then became the only body of rules to govern the field of warranty.

Unfortunately for the simplicity of law, Justinian maintained references to the Edict in the Digest at a time when the jurisdiction of the aediles curules was long gone and *formulae* no longer in use. He simply extended the Edict to all kinds of sales where until then it was limited to cattle and slaves.

> *Labeo scribit edictum aedilium curulium de venditionibus rerum esse tam earum quae soli sint quam earum quae mobiles aut se moventes* [51]
>
> Labeo writes that the edict of the curule aediles applies as well to sales of land as to sales of chattels inanimate or animate. [52]

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47 Honsell, Mayer-Maly & Selb, *supra* note 30 at 318 and 319, Rogerson, *supra* note 39 at 117 to 119.

48 See Cicero, *E libro De Officiis tertio*, C. 16, 65 and the translation in Zulueta, *supra* note 10 at 63.

49 See Digest 19, 1, 6, 4; Digest 19, 1, 13; R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, (Cape Town: Juta &Co, 1990) at 320, Kaser, *supra* note 29 at 558; Honsell, Mayer-Maly & Selb, *supra* note 30 at 319, Rogerson, *supra* note 39 at 118 and 119.

50 There was really not much rivalry because the Edict only applied to sales of slaves or cattle on public market whereas the civil law rules applied to every sale.

51 Digest 21, 1, 1, pr.

52 Zulueta, *supra* note 10 at 139

The result of this was the coexistence of the classical law *actio empti* which had absorbed the aedilician actions and of the extended aedilician actions that could now apply to all sales !

B. Comparison between the *actio empti* and the aedilician actions in a delivery of faulty object

The uneasy coexistence of those two types of remedies are at the root of many of the problems facing Swiss warranty remedies. To understand better the differences between them we shall compare their respective fields of application and their compensation aim. In order to compare the effects of warranty and breach of contract remedies, we will take the late classical period when the remedies were in the process of merging. The reason for this choice is that this process shows the fundamental differences between the two actions and how they were eliminated. But we must bear in mind that the Edict was in force for around 450 years and its scope varied with that of the *actio empti* in that period. [53] In addition, it is not always easy to retrace what the state of the law was in any given time. The Digest, which is our main source of information on Roman law, is also the source of historical confusion. That monumental work is not a codification in the modern sense. It does not reflect the state of the law under Justinian. It consists of a compilation of edited writings of jurists. Those writings date from the late Republic to the mid-third century and some of them do not even represent the law of the time of their author but a collection of opinions. [54] To add to the uncertainty, some of the writings have been edited by the compilers to suit the law of their time and others have been modified by Middle Ages commentators of the Digest.

In general, from their origin, the aedilician actions (termination of contract and price reduction) and the civil law action (*actio empti*) can be said to cover different situations. The *actio empti* could first be used in the same way as an *actio ex stipulatu*, that is to

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53 A. M. Honoré, "The History of the Aedilitian Actions from Roman to Roman-Duch Law" in D. Daube, ed., *Studies in the Roman Law of Sale* (Oxford: Clarendon Press, 1959) 132 at 133.

54 O. F. Robinson, T. D. Fergus & W. M. Gordon, *European Legal History* (London: Butterworths, 1994) at 3.

make the seller responsible for his assertions as to the qualities of the goods. [55] It could also be used against a fraudulent seller who knew about the defects of the object sold and did not inform the buyer. [56] It aimed at compensating the buyer for the loss he had incurred because of the defective goods [57], putting him in the situation he would have enjoyed if he had not made the contract. The *actio empti* had a compensatory aim.
The aedilician actions provided a remedy to the buyer where the seller was not fraudulent but had sold defective goods. [58] They aimed at the restitution of the object sold (*actio redhibitoria*) or of the value of it that was affected by the defect (*actio quanti minoris*). [59]

But, as we will see, these differences were progressively eliminated. First we will see how the basis' of responsibility of the two sets of actions compare (1), then how the remedies themselves provide relief to the buyer (2).

1) Basis of responsibility

Although responsibility for false assertion on qualities and fraud were characteristic of the *actio empti*, they were also found in the Edict.
The Edict was at first based on the affirmations of the seller.

> *"Si quis adfirmaverit aliquid adesse servo nec adsit, vel abesse et adsit, ut puta si dixerit furem non esse et fur sit, si dixerit artificem esse et non sit: hi enim, quia quod adseveraverunt non praestant, adversus dictum promissumve facere videntur."* [60]
>
> If a seller affirms that the slave has some quality which he has not, or that he has not some quality which he has, he is liable; for example, if he says that the slave is not a thief and he is one, or that he is a skilled workman and he is not. Such a

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55 See for example Digest 19, 1, 6, 4

56 See M. Tullius Cicero, *E libro De Officiis tertio*, C. 16 (65)

57 But not the loss of profit that did not exist in Roman law, see Honoré, *supra* note 53 at 156.

58 See the Edict in Digest 21, 1, 1.

59 Gaius, Digest 21, 1, 18, 1.

60 Digest 21, 1, 17.

seller, because his affirmation is not made good, is held to contravene his statement or promise. [61]

Furthermore it also applied to a fraudulent seller:

> *Hoc amplius si quis adversus ea sciens dolo malo vendidisse dicetur, iudicium dabimus.* [62]
>
> Moreover we will grant an action if it be alleged that a slave has been sold with conscious dishonesty against our rules. [63]

This was really aimed at preventing sellers from escaping the rules of the Edict by, for example, selling the slaves as an accessory to another sale. But it seems wide enough to allow buyers to use aedilician actions where the seller is in any way fraudulent. [64]

These two extracts show that the Edict covered the seller's responsibility for false assertions and his fraudulent behaviour. Those two bases of responsibility are traditionally characteristic of the ambit of the *actio empti* of the civil law.

Lets now come to the basis of responsibility of the *actio empti*. Although at first the civil law had no remedy for the buyer of defective goods from an innocent seller we have seen that it evolved so as to grant such a remedy. [65] Although this used to be controversial, it seems that now most authors recognise this evolution. [66] The extract that is amongst the most compelling on that point is the following:

> *"Si vas aliquod mihi vendideris, et dixeris certam mensuram capere, vel certum pondus habere, ex empto tecum agam, si minus praestes. Sed si vas mihi vendideris, ita ut adfirmares integrum: si id integrum non sit, etiam id quod eo*

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61 Zulueta, *supra* note 10 ate 142.

62 Digest 21, 1, 1.

63 Zulueta, *supra* note 10 at 140.

64 Honoré, *supra* note 53 at 136 and 137.

65 See above section A. 2).

66 Five extracts are evidence of that although they might have been edited by the compilers : Digest 19, 1, 6, 4 (Pomp. si vas); Digest 19, 1, 13, pr.-2 (lex Iulianus), Digest 19, 1, 21, 2 (Paul); Digest 18, 1, 45 and Digest 19, 1, 21 pr.

nomine perdiderim, praestabis mihi. Si vero id actum sit, ut integrum praestes, dolum malum dumtaxat praestare te debere. Labeo contra putat, et illud solum observandum, ut nisi in contrarium id actum sit, omnimodo integrum praestari debeat. Et est verum." [67]

If you sell me a vessel stating it to be of a certain capacity or weight I can sue you *ex empto* if there is shortage. Also, if you sell me a vessel affirming it to be sound, then, if it is leaky, you will be further liable for what I have lost thereby; but if its soundness was not in the bargain, you are liable only for bad faith. **Labeo dissents, holding that the sole rule to be followed is that you must answer for soundness in every case except where soundness was excluded from the bargain: this is the correct view.** [68] (Emphasis added)

This extract shows that warranty for latent defects that was characteristic of the Edict also became a duty of the seller under the civil law.

It seems therefore that the two sets of actions, aedilician and civil law, were based on the same principles of responsibility. [69]

2) Compensation aim of the aedilician and civil law actions

The real difference between the *actio empti* and the aedilician actions lies in the amount of compensation they give to the buyer. Aedilician actions compensate the buyer for the absence or diminution in value of the seller's performance whereas the *actio empti* covers all expenses and losses due to the seller's breach. This difference did not remain as marked as one would have expected.

The *actio redhibitoria* might have been initially purely restitutionary but it developed some compensation element [70]: the seller had to return the price with an interest and the buyer had to return the "object" with its fruit. That meant that the buyer was partially compensated for having entered the agreement. Classical Roman law did not allow unilateral termination of the contract unless the parties had agreed to it through a contract

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67 Pomponius, Digest 19, 1, 6, 4.

68 Zulueta, *supra* note 10 at 119.

69 Honoré, *supra* note 53 at 144.

70 Digest 21, 1, 29, 2.

provision called *lex commissaria*. Rescission was possible for *dolus*, mistake or other cases of vitiated consent but only the *actio redhibitoria* enabled one party to end unilaterally the contract after it had come into force. Despite this, there is some evidence that the *actio empti* came to be used to terminate the contract. To achieve this, the *lex commissaria* was considered to be implied in some agreements. [71]

Lets now turn to the *actio quanti minoris*. [72] The method of calculation of the reduction of price seems to have been to deduct from the purchase price the amount the buyer would have paid if he had known of the defect. [73] This method of calculating the buyer's loss was not unique to the *actio quanti minoris*. Other texts that have nothing to do with that action allow the recovery of a similar measure of compensation. [74]

The only difference remaining between the *actio empti* and the aedilician actions near the end of the classical period of Roman law was that the latter did not give compensation for consequential loss: the *actio redhibitoria* and *quanti minoris* were linked to the object sold, to its value. The *actio empti* took into consideration consequential loss. [75]

The wider compensation aim of the *actio empti* enabled it to absorb completely the aedilician actions. Everything an aedilician action could achieve compensationwise, the *actio empti* could also do.

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71 See Digest 18, 3, 4, pr.. It gives the *actio empti* and it cannot be considered as the aedilician *actio redhibitoria.*

72 There has been a great deal of debating on whether or not the *actio quanti minoris* was an invention of Justinian's compilers or a truely classical action. The general opinion now is that it was classical. See Digest 21, 1, 31, 16; Digest 21, 1, 38, 13; Digest 21, 1, 43, 6; Digest 44, 2, 25, 1; Digest 21, 2, 32, 1; Digest 21, 1, 31, 16. The *quanti minoris* was probably introduced as an alternative to the *actio redhibitoria* to enable the buyer to keep the object of the sale, see Honoré, *supra* note 53 at 153, footnote 8 and see Digest 21, 1, 48, 1.

73 That method is expressly mentionned in Digest 19, 1, 13 (see below) although it is not quite certain that the fragment talks about the *actio quanti minoris*. But there is a gloss that confirms this method of calculation: Digest 21, 2, 32, 1 : Fingamus, et seq.

74 Honoré, *supra* note 53 at 155; see also Digest 19, 1, 13, 4, and Paul's *Sentences*, 2, 17, 6 : the remedy of reduction of price is granted to the buyer where the seller has been fraudulent in stating the qualities of the slave. But the action used is clearly the *actio empti*. See also Digest 21, 1, 61 and Constitutions 4, 49, 9 concerning land subject to a servitude.

75 See Digest 19, 1, 13 pr.; Constitutions 4, 58, 1. As we have already said, loss of profit (*lucrum cessans*) was never taken into account in Roman law.

The following text of Julian shows that the *actio empti* actually did absorb the *actio quanti minoris*:

> *"Iulianus libro quinto decimo inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto; ait enim, qui pecus morbosum aut tignum vitiosum vendidit, differentiam facit in condemnatione ex empto; ait enim, qui pecus ignorans fecit, id tantum ex empto actione praestaturum, quanto minoris essem empturus, si id emptorem decepti, omnia detrimenta, quae ex ea emptione emptor traxerit, praestaturum ei: sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morbosi pecori perierunt quod interfuit idonea venisse erit praestandum."*
>
> In the matter of damages in the action *ex empto* Julian, book 15, distinguishes between one who has sold with knowledge and one who has sold in ignorance. For, he says, the unwitting seller of a diseased herd or of unsound timber will have to make good **in the action *ex empto*** only the amount by which the price would have been reduced had the buyer known the truth, whereas, if the seller knew, but was silent and so deceived the buyer, he will have to make good to the buyer all losses that have fallen on him in consequence of the purchase: thus, if a house has collapsed owing to the unsound timber, he must make good the value of the house, or if the buyer's beasts have perished through being infected by the diseased herd, the damage sustained. [76] (Emphasis added)

Julian explains quite clearly that the *actio empti* can be used to reduce the price. The mechanism is contractual because it is linked to the consent of the buyer who would have paid less had he known about the defect. Furthermore, Julian talks about the sale of timber and treats it the same way as the sale of a slave. The buyer of timber was not protected by the Edict contrary to the buyer of slaves. Julian only makes a distinction between the amount of compensation awarded to the buyer when seller was aware of the defect and when he was not. In the former case consequential loss is also recoverable. This is not a distinction between two different remedies, it is only a question of extent of compensation available under the *actio empti*.

There was no need for Justinian to revive the aedilician actions, especially when the jurisdiction of the aediles was abolished. With little difficulty the rules of classical Roman civil law could have been retained and interpreted in a simple way: the reduction of price remedy was totally absorbed in the *actio empti* as the above passage of Julian

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[76] Digest 19, 1, 13, in Zulueta, *supra* note 10 at 124.

shows; and the redhibitory *actio empti* remedy was availabe when a *lex Commissaria* could be implied in the contract of sale.

The late classical Roman law model was a very satisfactory evolution achievement in terms of rationality and simplicity. One single action enabled the buyer to seek remedy for all sale contract breaches. The remedy took the form of damages [77] and its availability was based on the good faith expectations of the parties. Fraud on the part of the seller would naturally increase his liability. In the absence of fault, the buyer would be compensated for the difference between the performance he received and that which, in good faith, he could have expected. There were two measures of damages: those linked to the performance itself and those, wider, linked to all the consequences of the breach.

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77 Roman law did not offer the remedy of specific performance for contractual duties, see J. P. Dawson, "Specific Performance in France and Germany" (1959) 57 Michigan Law Review 495 at 496ff. It did not recognise synallagmatic remedies as such because the notion of synallagma was not yet discovered, see Watson, "The Notion of Equivalence", *supra* note 21 at 239 and 240.

II. WARRANTY EVOLUTION LEADING TO SWISS LAW

After the fall of the Roman Empire in the West, the law of sale evolved very differently in the fallen Empire and in the East where the Empire still held on.
In the West, under the Germanic influence of the barter type of sale, the liability of the seller for defects was very restricted ("*Augen auf, Kauf ist Kauf*"). There was no warranty for latent defects. [78]
In the East, the Byzantine jurists had extended the Edict that was restricted to slaves and cattle, to all sales. Although Justinian law had retained the aedilician remedies absorbed in the *actio empti* [79], another set of aedilician remedies appeared:

> ... the seller's objective liability for latent defects was sanctioned indifferently by the aedilician actions or by the so-called *actio empti ad redhibendum* or [*actio empti*] *quanti minoris*. His objective liability for incorrect statements was sanctioned by any of these actions or by the *actio empti in quod interest*. The latter action was, of course, still available against a fraudulent seller. [80]

From that time right up to the 19th century codifications, the confusing coexistence of two sets of remedies dealing with breach of warranty for defects would continue to influence lawyers and law makers. [81] The main reason for the continuing existence of this problem probably rests on the arrangement of the Corpus Iuris. The *actio empti* is dealt with in book 19 of the Digest and the aedilician actions in book 21. [82]

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78 P. Stein, "Medieval Discussions of the Buyer's Actions for Physical Defects" in D. Daube, ed., *Studies in the Roman Law of Sale* (Oxford: Clarendon Press, 1959) 102 at 102 and 103.

79 *ibid.*.

80 Stein, *supra* note 78 at 104.

81 Zimmermann, *supra* note 49 at 322.

82 W. J. Klempt, *Die Grundlagen der Sachmängelhaftung des Verkäufers im ‚Vernunftrecht und Usus Modernus*, (Stuttgart: W. Kohlhammer, 1967) at 16.

Sale of goods in the Western European countries remained a mixture of Germanic customs and some remains of Roman law until the "discovery" of the Digest in the 12th century.

The glossators had many difficulties in reconciling *lex Iulianus* [83] with other texts of the Digest. They simply wanted to expose Justinian's principles but, as we have seen, warranty remedies were and still are difficult to determine in classical and in Justinian Roman law.

They determined that there were two sets of remedies: the aedilician and the *actio empti*. The former applied to certain types of defects and the latter applied generally. [84] But it still meant that both set of remedies were available for the seller's objective liability for aedilician defects. Another difference between these remedies was that only the *actio empti* was available to claim damages. But both the *actio empti* and the aedilician remedies were available for a reduction in price or a redhibition. [85] The glossators found themselves trying to distinguish the reduction of price in the *actio empti* and in the aedilician actions. The main difference they found was that aedilician reduction of price was to be calculated objectively i.e. the difference between the contract price and the value of the object sold and the *actio empti* reduction of price was calculated subjectively i.e. the difference between the contract price and the price the buyer would have paid had he known about the defect. Furthermore, the aedilician remedies had short time limits and *actio empti* did not. [86]

Others also tried to distinguish the effects of the *actio redhibitoria* in a praetorian sense and for the *actio empti*. [87]

Contrary to the Glossators, some Commentators [88] tried to merge both sets of remedies in so far as they overlapped. [89] The commentators who maintained the two sets of remedies

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83 Digest 19, 1, 13, pr.-2.

84 Stein, *supra* note 78 at 106 and 107.

85 Zimmermann, *supra* note 49 at 322; Stein, *supra* note 78 at 107.

86 Accursius, *Glossa Ordinaria*, (lugduni: 1557) at essem empturus ad Digest 19, 1, 13 pr.:

> *"Not. hic differentiam inter actionem quanto minoris, civilem et praetoriam. Nam in civili agitur, quanto minoris esset empturus, si scisset, ut hic (sc. D. 19, 1,13 pr.) . Sed in praetoria quanto minoris valuit tempore contractus propter vitium : ut infra D. 21, 1, 31, 5"*

87 See A. Bechmann, *System des Kauf nach gemeinen Recht*, vol. III, 2, (Leipsig: 1908) at 189ff.

subjected the *actio empti quanti minoris* and *redhibitoria* to the short limitation of the aediles. Only the claim for damages, *quod interest* had a 30 years time limit but that could take the form of *quanti minoris* or redhibition ! [90]

The Humanists put an end to the stale arguments that derived from the distinction between the conditions and types of compensation offered by the aedilician actions and the *actio empti*. [91] They also developed the idea that the delivery of a conforming sale object was part of the seller's contractual duties. [92] Because of that new way of seeing the problem, the aedilician remedies were gradually fitted into the framework of the *actio empti*. However the coexistence of the two types of remedies remained because of their time limits differences. [93]

The Natural Law movement of the 17th and 18th centuries went even further in rationalising warranty and sale obligations. Under the influence of the doctrine of the late scholastics [94] Natural Law followers adopted the principle of equality in synallagmatic

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88 However, Stein, *supra* note 78 at 110: Bartolus, ad D. 19, 1, 13 pr., was impressed by the apparent use of the *actio quanti minoris* with reference to *tignum vitiosum*, to which the praetorian action, in his view dit not apply. He supported the distinction between the price the individual buyer would have paid and the common valuation.

89 For instance Baldus de Ubaldis, *Consilia*, vol. 5, (Venetiis: 1608) at 499:

> *"emptor potest agere redhibitoria, vel certe quanto minoris ... potest agi actione ex empto similiter"*

90 Zimmermann, *supra* note 49 at 325 and see Windscheid, Kipp, *Lehrbuch des Pandektenrecht*, 9th ed. (Frankfurt-am-Main: Gütten & Koenig 1906) at para. 393.

91 Stein, *supra* note 78 at 111.

92 H. Donellus, *Commentatiorum de Jure Civili*, (Francoforti: 1596) at book XIII, c. II, n. 30:

> *Earum praestationum, quae a venditore in re vendita citra aliam conventionem exiguntur, quatuor sunt capita. Primum, ut rem venditam tradat emptori ... Tertium, ut dum emptor rem habebit, habeat incorruptam ..."*

93 Klempt, *supra* note 82 at 22.

94 J. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, (Oxford: Clarendon Press, 1991) at 71; Klempt, *supra* note 82 at 32. The late Scholastics had themselves based their doctrine on Aristotelian principles and Thomas Aquinas' application of these principles to contract law. Gordley, above, at 94 offers a good summary of that doctrine:

contracts. [95] This principle implied that a disproportion between the value of the parties' performances had to be remedied. Contrary to the late scholastics who contended that equivalence of performances was the essence of synallagmatic contracts; the Natural law doctrine thought that equivalence rested on the parties' (presumed) will to make a balanced contract [96].They applied this doctrine to *laesio enormis,* mistake and warranty of quality. [97] Contrary to most thinkers of that time, Christian Wolff thought eviction should be given the same treatment as warranty of quality. [98]

Delivery by the seller of a non-conforming object was just another instance of inequality in the contract that the law had to remedy. Again this was not really new since Thomas Aquinas and the late scholastics had already come to the conclusion that delivery of non-conforming goods created inequality in the contract. [99] As to the remedies, the "equivalence doctrine" unfortunately did not provide a uniform solution for all contractual breaches. Reduction of price was explained as being the difference between the contract price and the amount the buyer would have paid had the defect been known then. And the availability of rescission was presented as the solution when the goal of the contract is not attainable because of the defect. [100] The consequence of this would have been to consider all contract breaches as disturbing the balance of the contract and to grant the two above mentioned remedies in all cases. Instead the Natural Law school stuck to the Roman rules they found in the *Corpus Iuris* which they essentially respected.

Thomas, "..." thought that one could start with the definition of a particular transaction and move to a description of the obligations that this transaction entails. These obligations either were included in the concepts used to formulate the definition or were means to the end in terms of which the transaction has been defined. Thus, after defining commutative justic in terms of equality, and sale as an act of commutative justice, Thomas explained the obligations of seller and buyer as following from the concept of equality.

95 Gordley, *supra* note 94 at 101; Zimmermann, *supra* note 50 at 305; Klempt, *supra* note 82 at 26ff.; H. Grotius, De jure belli ac pacis, (Hagae Comitis: 1680) at book II, c. XII, 8: *"In contractibus natura aequalitatem imperat, et ita quidem ut ex inaequalitate jus oriatur minus habenti."*

96 Klempt, *supra* note 82 at 33, 45.

97 Klempt, *supra* note 82 at 32ff.

98 C. Wolff, *Institutiones juris naturae et gentium,* (Halae Magdeburgicae: 1750) at vol. 2, c. 12, para. 618: *"Haud difficulter patet, jura, quae tertius in re emta habet, vitiis annumeranda esse."* See also Klempt, *supra* note 82 at 46.

99 Gordley, *supra* note 94 at 105ff.

100 Klempt, *supra* note 82 at 35.

This meant that they did not solve the problem of the concurrent applicability of general contractual remedies and aedilician remedies. [101] They merely explained the role of aedilician remedies in a contractual system.

The ideas of the Natural Law school, in particular those of Wolff, were partly embodied in the Prussian Code of 1794 (Preussische Allgemeine Landrecht (ALR)) and in the Austrian civil Code of 1811 (Oesterreichische allgemeine Bürgerliche Gesetzbuch (ABGB). First, both codes had a common provision for quality and eviction warranties. Second, a general warranty provision applied to all synallagmatic contracts. It is interesting to know that the 1862 cantonal Code of the Grisons (Graubünden), which is a province of Switzerland, also contained a general warranty provision. [102] This shows that the Natural Law movement had at least some rationalising and simplifying effect on the law of its time.

The 19th century lawyers discarded the equality in the contract principle because they considered that they involved a paternalistic and many difficulties in evaluating the value of the performances. [103] This would lead to the codes that were adopted since that time to lack a general provision on warranty. The Pandectists, however retained the notion that delivery of non-conforming goods was a breach of the seller's contractual duties. [104] As for the competition between warranty and other sale remedies, lawyers of that time did not find a generally accepted solution. Some advocated a choice between the two actions [105] while others recommended the elimination the *actio empti* from the field of warranty. [106] That was the doctrinal background of the adoption in the second half of the 19th century of the 1881 first Swiss *Code des obligations*. [107] Following the Dresden Code of

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101 Klempt, *supra* note 82 at 55-56.

102 J. Lautner, "Grundsätze des Gewährleistungsrecht", *Festgabe für Fritz Fleiner* (Zurich: 1937) at 22.

103 Gordley, *supra* note 94 at 167.

104 Huwiler, *supra* note 36 at 266.

105 B. Windscheid, *Lehrbuch des Pandektenrechts*, 7th ed. (Frankfurt-am-Main: Gütten & Koening, 1891) at para. 393.

106 Huwiler, *supra* note 36 at 264.

107 Before the adoption of the 1881 Code, all the Swiss provinces (cantons) had their own obligations codes.

1866 and the 1853-1855 Code of the province of Zürich [108] neither of which revealed what their doctrinal basis was, the new Swiss Code might have considered breach of warranty as a contract breach. [109] The present Swiss Code of obligations adopted in 1911 retained most of the rules on sale of chattels of the previous 1881 Code. [110] Despite this it treats warranty breaches as the breach of a legal [111] obligation and takes the warranty duty outside the realm of the contract. There ensues an exclusive application of the rules and remedies found in the warranty provisions to all deliveries of non-conforming goods. [112]

Despite some attempts by the Natural law movement to include warranty rules into general contract law no clear solution was ever found to harmonise warranty and contract remedies. It is remarkable that so many rules of Roman law as embodied in the *Corpus Iuris*, have entered European continental Codes and how little was done to take some distance from them.. The reason might be that legal thinkers have not yet formulated an adequate contract theory to replace the pragmatic and useful Roman law rules.

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108 Article 1398 of the Zürich PGB only said that the seller had the duty to:

> *... die verkaufte Sache ... in das Eigentum und den Besitz des Käufers zu übertragen oder, wenn andere Rechte verkauft sind, ihm diese zu vollem Recht und Genuss zu übergeben.*

Whereas, for instance, article 1603 of the French civil Code has the following wording:

> *Le vendeur a deux obligations principales, celle de délivrer et celle de garantir la chose qu'il vend.*

which makes it clear that warranty is part of the seller's contractual duties.

109 Huwiler, *supra* note 36 at 267-268.

110 Feuille Fédérale, 1905, Volume II, at 19 and 20; Lautner, *supra* note 102 at 26.

111 The Roman Edict on warranty of quality also burdened the seller with a legal rather than a contractual duty.

112 Stauffer, *supra* at note 4 at 145ff.; Huwiler, *supra* note 36 at 268.

III. SOME MODERN TRENDS IN ASSIMILATING OR DISTINGUISHING WARRANTY AND SALE CONTRACT REMEDIES

Swiss law has inherited heavily from Roman law in its most awkward interpretation. Warranty remedies are the object of a whole set of rules that are different from those applying to general sale remedies. This way of dealing with warranty and breach of contract remedies is not in keeping with that of modern legal systems. The merging of both sets of remedies seems to be the present trend. The three systems we are comparing Swiss law to are evidence of this tendency. They are representative of civil (A) and common law (B) legal traditions as well as international rules (C).

A. Civil law systems: the Province of Quebec

The law of the province of Quebec is very interesting because it has recently adopted a new civil code. [113] Its interest as a comparison to Swiss law does not stop there. Indeed, it has the characteristic of being derived from the French Civil Code which has also influenced Swiss law.

The new Code is a comprehensive codification that covers all contract law but also the *droit civil* i.e. private law by opposition to public law (constitutional, criminal and administrative law). The Swiss Code of obligations only applies to .... obligations.

The civil Code of Quebec (C.C.Q.) has chosen to treat all obligations, whether contractual or not, under the same rules as much as possible. [114] Remedies for breach of an obligation are all set out in article 1590 C.C.Q. that stresses that an obligation must be "performed in full, properly and without delay". It is up to every nominate contract to define what those obligations are. For sale, article 1716 C.C.Q. provides that:

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113 The Québec civil Code was adopted in 1991.

114 See article 1372 C.C.Q.

> The seller is bound to deliver the property and to warrant the ownership and **quality of the property.**
> These warranties exist of right whether or not they are stipulated in the contract of sale. (Emphasis added).

This tells us that warranty of quality is part of the seller's obligation and article 1590 C.C.Q. remedies apply to it. The remedies found in article 1590 paragraph 2 of the Quebec civil Code [115] are: **specific performance, resolution of the contract** [116], and **reduction of the correlative obligation.** [117] Article 1607 C.C.Q. adds the remedy of **damages** to the list of remedies available to the party aggrieved by the breach.
In the few articles the Quebec civil Code has on warranty, predictably only one deals with remedies. But article 1728 C.C.Q. only concerns cases where: "*...the seller was aware or could not have been unaware of the latent defect..*". The article goes on to say that in this case, "*...he is bound not only to restore the price, but to pay all damages suffered by the buyer.*" Article 1728 C.C.Q. does not really provide a different remedy to articles 1590 and 1607 C.C.Q.. All it does is add a requirement for the award of damages in the breach of warranty context: the knowledge or presumed knowledge of the seller as to the defect.
Apart from that requirement, all warranty remedies are found in the general breach of obligation remedies.

This is how general sale remedies compare to warranty for defects remedies:

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115 *Where the debtor fails to perform his obligation without justification on his part and he is in default, the creditor may, without prejudice to his right to the performance of the obligation in whole or in part by equivalence,*
(1) force specific performance of the obligation;
(2) obtain, in the case of a contractual obligation, the resolution or resiliation of the contract or the reduction of his own correlative obligation;
(3) take any other measure provided by law to enforce his right to the performance of the obligation.

116 Article 1590 C.C.Q. also mentions *résiliation* of the contract. This method of putting an end to the contract is generally reserved to duration contracts such as employment. But it can apply to a long term contract of sale where deliveries are made periodically. Again, in order to avoid lengthening this study too much, this remedy will not be included in the discussion.

117 Articles 1736 and 1737 C.C.Q. on the rights of the buyer merely restate the general remedies.

SALES REMEDIES	WARRANTY REMEDIES
Specific performance 1590, 1601 C.C.Q.	**Specific performance** 1590, 1601 C.C.Q. (Substitute goods and repair)
Ending of contract 1590, 1604 ff., 1736 and 1737 C.C.Q.	**Ending of contract** 1590, 1604 ff. C.C.Q.
Reduction of price 1590, 1604, 1737 C.C.Q.	**Reduction of price** 1590, 1604 C.C.Q.
Expectation damages 1607, 1611 ff. C.C.Q.	**Expectation damages** 1607, 1611 ff., 1728 C.C.Q.

The similarity between breach of contract of sale and breach of warranty remedies is striking. Apart from a few additional articles on breach of sale contract remedies, both sets of remedies are identical.

B. Common law systems: the United States

The most recent and influential legal system of sale rules in common law countries is without doubt the Uniform Commercial Code of the United States. Despite the fact it dates back to 1950, it has influenced other legal systems. Its importance for Swiss law lies precisely in the fact that it has influenced the Vienna Convention which Switzerland has ratified. Swiss judges now find themselves applying legal principles and rules that are rooted in the Uniform Commercial Code and they might be influenced by those principles. Its interest for Swiss law also comes from the fact that it approaches remedies in a radically different way. Many new ideas can be gathered from that comparison.

1) Evolution of warranty remedies

To understand the Uniform Commercial Code distinction between warranty and breach of sale contract remedies, a brief summary of the evolution of warranty in the United

States' common law can be useful. It shows that just as in Roman law, the warranty duty of the seller evolved very separately from the other contract remedies.

The evolution of the warranty in common law went through different stages. At first common law courts seemed to favour the seller (a) but then they progressively began to protect the buyer (b).

a) The *caveat emptor* rule

The early common law [118], contrary to the rules found in the Church, the courts of guild and the law merchant [119], did not offer much protection to the aggrieved buyer. [120] The Chandelor v. Lopus case [121] apparently marked the birth of the *caveat emptor* rule in common law. [122] It is not, however before the 19th century that it got to be systematically applied. Yet, even then, it was subjected to the fact the seller had not made an enforceable warranty of quality or committed a fraud. [123]
The early American law was even harder on the buyer than English law owing to the strong philosophy of individualism prevailing at the time. [124] Only a clear express warranty as to the quality of the goods could enable the buyer to recover damages for breach of warranty. [125]

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118 The common law here is of course the law administered by the official national courts. At the time, they were the kings's courts.

119 They usually contained public law rules, see W. Hamilton, "The Ancient Maxim Caveat Emptor" (1931) 40 Yale Law Journal 1133 at 1133 to 1163.

120 *ibid.*

121 (1603), 79 England Report 3 (Ex.).

122 This is only the principle this case seems to lay out. Hamilton, *supra* note 119 at 1166 and 1167, argues persuasively that the rule of the case is not as clear as 19th century interpreters made it out to be.

123 Hamilton, *supra* note 119 at 1172ff.

124 See *Sexias* v. *Wood*, 2 Cai. R. 48 (NY 1804).

125 See *Kinley* v. *Fitzpatrick*, 5, 4 Howard 59 (Miss. 1839).

Although these rules were very harsh towards the buyer, they fitted perfectly in the general contract remedies.

b) The *caveat venditor* rule

There was a progressive erosion of the United States' *caveat emptor* doctrine in the late 19th and early 20th centuries. This was due to the changing conditions in which the goods were being produced and to a more paternalistic approach of the courts. [126] The movement towards greater protection of the buyer was accelerated with the adoption of the Uniform Sales Act in 1906 (USA) and, later, of the Uniform Commercial Code by all States save for Louisiana in 1950. [127] The seller's warranty became implied in the sale's conditions and the remedies originated from the breach of warranty.

This meant that warranty for defect remedies still fitted in the general contractual remedies.

2) Warranty and breach of sale contract remedies in the Uniform Commercial Code

In the Uniform Commercial Code (UCC), specific warranty remedies are reduced to the recovery of primary economic loss (section 2-714 UCC). On the other hand, specific performance (2-716 UCC) can only remedy an absence of delivery. Cancellation (2-711(1) UCC), cover (2-712 UCC) and contract/market price differential (2-713 UCC) and incidental and consequential damages (2-715 UCC) apply to all types of contract breach.

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126 B. Clark and Ch. Smith, *The Law of Product Warranties* (Boston: Warren, Gorham, Lamont, 1984) at 1-4.

127 See Sullivan, "Innovation in the Law of Warranty: The Burden of Reform" (1981) 32 Hastings Law Journal 341.

SALE REMEDIES	WARRANTY REMEDIES
Specific performance 2-716 UCC	NO APPARENT EQUIVALENT
Ending of the contract 2-711 UCC	**Ending of the contract** 2-711 UCC
Cover 2-712, 2-706 UCC	**Cover** 2-712 UCC
Market/contract price differential 2-713 and 2-708 UCC	**Market/contract price differential** 2-713 UCC
NO APPARENT EQUIVALENT	**Primary economic loss** 2-714 UCC
Expectation damages (incidental and consequential) 2-715 UCC	**Expectation damages** (incidental and consequential) 2-715 UCC

Although the recovery of primary economic loss appears to be a remedy specifically applicable to warranty breaches, the form of compensation it offers resembles that of contract remedies. Primary economic loss will enable the buyer to recover the cost of repair. This means that the buyer will have a third party repair the goods which is similar to the cover remedy where substitute goods are purchased from a third party on the market. If the cost of repair is inadequate compensation, primary economic loss will be measured by taking the difference in value of the goods on the market with and without the defect. This last method of calculating the primary economic loss is very similar to the market/contract price differential remedy.

All the other remedies, except specific performance that applies when there is no delivery at all, are applicable to a breach of warranty as well as to any other breach.

This shows that a breach of warranty under the Uniform Commercial Code is treated in the same way as any other breach.

C. International law: The 1980 Vienna Convention on international sale of goods

The movement towards international unification of sale of goods rules [128] started with a report by Ernst Rabel in the 1930's to UNIDROIT. It concluded that not only was that useful but that it was also feasible. [129] One reason for this unification aspiration was that national legislation designated by conflict of law rules were not adapted to international sales. Most national contract laws date from the 19th or beginning of 20th century. [130] The movement Rabel has started led to the adoption, on the first of July 1964, to two conventions. One on contract formation and the other on the execution of contract: the Uniform law on international sale (ULIS). Those conventions did not attract many countries for diverse reasons, notably because it was made solely by west Europeans. UNCITRAL, soon after, started working on a new convention that was to have universal involvement and approval. The United Nations Convention on Contracts for the International Sale of Goods was concluded in Vienna on the 11th of April 1980. It applies to international contracts in Switzerland since the first of March 1991. Like its predecessor, it contains rules that are directly applicable to an international sale.
Despite universal involvement in the elaboration of the Convention, most of the rules it contains are a product of the civil or the common law tradition. [131] Remedies are no exception. Some were borrowed from the civil law and others from the common law, more precisely from the Uniform Commercial Code.
Article 45 I of the Vienna Convention presents all the buyer's remedies together:

> If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
>
> (a) exercise the rights provided in articles 46 to 52 [specific performance, delivery of substitute goods, repair: article 46, avoidance of contract: article 49 and reduction of price: article 50];
>
> (b) claim damages as provided in articles 74 to 77 (Emphasis added.)

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128 We are not talking about conflict of law rules but substantial rules.

129 P. Windship, "The Scope of the Vienna Convention on International Sales Contracts" in Galston and Smith, eds., *International Sales : The United Nations Convention on Contracts for the International Sale of Goods*, Conference held by the Parker School of Foreign and Comparative Law, (New York: Columbia University 1984) at 1-4.

130 E. Rabel, *Recueil d'Etudes Edouard Lambert*, tome II, 699.

131 See G. Eörsi "A propos the 1980 Vienna Convention on Contracts for the International Sale of Goods" (1983) 31 The American Journal of Comparative Law 333.

The following chart helps to replace these remedies:

SALES REMEDIES	WARRANTY REMEDIES
Specific performance 46 I CISG	**Specific performance** Repair: 46 III CISG Substitute goods: 46 II CISG
Ending of contract 49 Ia and b CISG	**Ending of contract** 49 Ia CISG
Cover 75 CISG	**Cover** 75 CISG
Contract/market price differential 76 CISG	**Contract/market price differential** 76 CISG
NO EQUIVALENT	**Reduction of price** 50 CISG
Damages 74 CISG	**Damages** 74 CISG

Although the intention of the Vienna Convention in article 45 to treat all the buyer's remedies, including warranty, in the same way is clear, the remedies themselves tell a slightly different story. Reduction of price is a remedy exclusively available for delivery of non-conforming goods but not for any other contract breach. Delivery of substitute goods and repair come under special rules although they are just a form of specific performance.

All other remedies are identical. Not surprisingly, it is the civil law tradition that has provided the remedies that differ in each columns. The other remedies are found in the Uniform Commercial Code which, as we have seen, contains identical warranty and sale remedies.

PART TWO

WARRANTY REMEDIES COMPARED WITH SALE OF GOODS REMEDIES IN SWISS LAW AND IN OTHER MORE RECENT LEGAL SYSTEMS

In this second part of the study we will compare the buyer's warranty remedies with his contract of sale remedies in Swiss law. As we mentioned it in the introduction, these two sets of remedies come under two different sets of rules: articles 102ff. of the Code of obligations (CO) for breach of contract remedies and articles 197ff. CO for warranty remedies. Furthermore, there are important differences between both sets of remedies. We will determine what those differences are and compare Swiss law solutions with those of the three more recent laws presented in part one. We must stress that this is not a comparison between Swiss law remedies and those found in the other systems. We are only interested in determining whether warranty remedies are identical or not to general sale remedies. This means we shall not examine in any depths the conditions at which the remedies are available [1] but rather whether the nature and **the compensation aim** of each remedy are the same.

The comparison we will make between Swiss law and the three modern legal systems chosen for this study takes into account some fundamental differences. The Swiss Code of obligations (CO) and the ivil Code of Quebec (C.C.Q.) are complete systems in that they provide rules for every type of contract. The Uniform Commercial Code (UCC) and the Vienna Convention (CISG), on the other hand, only contain rules on the contract of sale. [2] This difference shows in the way general sale remedies tend to be dealt with. In Swiss and in Quebec law, there is a general set of rules that apply to all contractual obligations. The seller's and the buyer's obligations mostly obey those general rules. This is a common and rational way of diminishing the number of rules on nominate contracts.

It might be useful, at the outset, to briefly present Swiss law remedies because the present study is based on that system to make comparisons.
Remedies for breach of contract are mainly found in article 107 of the Swiss obligations Code [3] that presents all the remedies parties can use in a bilateral contract. These

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1 Of course warranty remedies are subjected to stricter time limits than other sale remedies and there are some special notice requirements. These differences might or might not be justified. In order to keep the debate within limits it is not the place here to discuss those differences.

2 This is slightly untrue of the Uniform Commercial Code that has rules on securities and other matters.

3 This is the content of article 107 CO:

> *1. Lorsque, dans un contrat bilatéral, l'une des parties est en dèmeure, l'autre peut lui fixer ou lui faire fixer par l'autorité compétente un délai convenable pour s'exécuter.*

remedies are: **specific performance, expectation damages** and **resolution of the contract.** [4] Article 109 II CO allows the claimant to seek **reliance damages** with the resolution of the contract if the breaching party is at fault.
For breach of warranty, remedies are found in articles 205, 206 and 208 CO. Article 205 I CO gives the buyer a choice between the **reduction of price** and the **resolution of the contract** remedies. Article 206 I CO, that applies to generic goods only, adds an extra remedy to the list: **delivery of substitute goods.** Finally, article 208 II and III CO allows the buyer to claim **direct** or **indirect** (if the seller is at fault) **damages** (*dommages directs ou indirects*) after terminating the contract.

The following chart shows the differences (in capital letters) between both groups of remedies:

WARRANTY REMEDIES	**SALE REMEDIES**
delivery of substitute goods	**specific performance**
NO REPAIR REMEDY	
resolution of contract	**resolution of contract**
WITH DIRECT OR INDIRECT DAMAGES	WITH RELIANCE DAMAGES
price reduction	NO EQUIVALENT
NO EQUIVALENT	**expectation damages**

The differences in the two sets of remedies are obvious and numerous in comparison with Quebec law, the Uniform Commercial Code and the Vienna Convention.

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2. Si l'exécution n'est pas intervenue à l'expiration de ce délai, le droit de la demander et d'actionner en dommages-intérêts pour cause de retard peut toujours être exercé; cependant, le créancier qui en fait la déclaration immédiate peut renoncer à ce droit et réclamer des dommages-intérêts pour cause d'inexécution ou se départir du contrat.

4 Articles 190 and 191 CO on the seller's contract breach merely restate the general remedies with slightly different conditions.

To put some order in those remedies, the sale remedies as well as the warranty remedies will be grouped into three categories the first of which will be specific performance remedies (I), the second is positive compensation remedies (II) and finally we have negative compensation remedies (III). Specific performance remedies can be close to a form of money compensation and therefore to a compensation remedy. For instance, having another person than the debtor perform the contract and recovering the expense from the debtor. Furthermore, they are accompanied by damages which compensate the creditor for the debtor's breach. But they retain their specificity which is that the buyer gets exactly what he asked for. For that reason, they are treated separately.

The categories of positive and negative compensation remedies are not familiar to many legal systems. They are nevertheless the basis of Swiss contract law. They also have the advantage of clarity because they show what type of financial loss the buyer can expect to be compensated for. It is equally important to realise that the systems we are comparing Swiss law to, do not follow this division at all. It would be a long, yet fascinating, debate to evaluate the merits of the choice made by Swiss law, but once again this goes beyond the scope of this study. We will retain the Swiss law system as a theoretical and rational starting point. The following chart illustrates the way Swiss law remedies should be classified:

COMPENSATION REMEDIES IN SWISS LAW [5]

	Positive compensation remedies	**Negative compensation remedies**
Synallagmatic remedies	reduction of price	resolution
Damages	expectation damages	reliance damages

The positive compensation remedies' aim is to put the buyer in the financial situation he would have enjoyed if the contract had been properly performed. The negative compensation remedies put him in the situation he would have been in if the contract that was breached had never been made. These two compensation categories contain two

5 This chart mixes warranty and general sale remedies and is only aimed at showing the theoretical side of the principles underlying the remedy system.

different remedies: one synallagmatic remedy and one damages remedy. The synallagmatic remedy is designed to restore the balance of the contract: price reduction if the agreement is a little unbalanced and termination of the contract if the breach makes it impossible or too difficult to restore its balance. This type of remedy is available to the buyer even if the seller is not at fault. The damages remedy is only available, generally, if the seller is at fault. Expectation damages are the only kind of damages that can be claimed if the aggrieved party wishes to maintain the contract, whereas reliance damages only come into consideration if the claimant wants to get out of the contract.

The specific performance remedies suppose of course that the contract is maintained. For that reason they can be considered as being part of the positive compensation category in a wider sense and only expectation damages can be claimed with them.

The theory and principles underlying Swiss contract law forbids the mixing of positive and negative compensation remedies. However, as we will see, this principle is not always respected.

I. SPECIFIC PERFORMANCE REMEDIES

Specific performance can entail a variety of things. The most obvious is the forced compliance of the parties with their main duties [6]: for instance the delivery of the goods by the seller. [7] But it can also concern their secondary duty: the duty to deliver a sound object. In that case specific performance can take the form of repair of the defective object. [8]

Specific performance could also mean performance in kind at the expense of the debtor: for instance having a third party perform the debtor's obligation. This resembles the damages remedy yet the debtor gets what he was promised and does not have to prove that he has incurred losses. [9] This form of specific performance applied to contracts of sale would mean the buyer could purchase substitute goods or have the defective goods repaired by a third party at the expense of the seller.

Civil law and common law legal traditions have a fundamentally different theoretical approach to remedies for breach of contract. For the common law the main remedy of contract law is the award of damages whereas for civil law it is specific performance.

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6 For sale obligations, specific performance is easy to enforce. Usually the performance of the contract is not linked to the personnality of the parties.

7 But it could also be another duty like taking an insurance or finding a carrier. See E. Erdem, *La livraison des marchandises selon la Convention de Vienne* (Fribourg, Switz.: Editions Universitaires Fribourg Suisse, 1990) at 148-151.
There is controversy as to whether the forced payment of the price is a specific performance remedy or not. See A. Farnsworth "Damages and specific relief" (1979) 27 American Journal of Comparative Law 247 at 249-250 who thinks it is not and J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 2d ed. (Deventer, Boston: Kluwer Law and Taxation Publishers, 1991) at para. 280 who thinks it is. See for further details J. Dawson, "Specific Performance in France and Germany" (1959) 57 Michigan Law Revue 495.

8 P.-G. Jobin, *La vente dans le Code civil du Québec*, (Cowansville Qué.: Yvon Blais, 1993) at para. 165.

9 See B. Nicholas, *The French Law of Contract*, 2d ed., (Oxford: Clarendon Press, 1992) at 217-218.

Like all civil law systems, Swiss law places theoretical emphasis on specific performance remedies. This difference in approach should not be overestimated as the common law recognises the value of specific performance in some situations, generally when damages are not adequate. [10] Furthermore civil law countries' litigants do not value that remedy very much because generally it is not an efficient way of remedying a breach. [11] Despite this, the new Quebec Civil Code [12] and the Vienna Convention [13] have adopted the same view as Swiss law on the matter. Naturally, the Uniform Commercial Code follows the common law approach to specific performance. [14] However, the debate on the usefulness of that remedy in the United States has not yet died as, *inter alia*, economists do not all agree that specific enforcement is a waste of economic resources. [15]

Together with specific performance, whether it concerns warranty or breach of contract remedies, all four legal systems we consider grant expectation damages to the buyer. This unanimity is very logical and perfectly justified. It also dispenses us with examining that subject.

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10 When goods are difficult to acquire elsewhere, the debtor is insolvent or damages are difficult to ascertain.

11 See J. Ziegel, "The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods" in Galston and Smith, eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Conference held by the Parker School of Foreign and Comparative Law, (New York: Columbia University 1984) at c. 9, 9-10; Honnold, *supra* note 7 at para. 281.1.

12 See J.-L. Baudouin, *Les obligations*, 4th ed., (Cowansville Qué.: Yvon Blais, 1993) at para. 742.

13 See articles 46 and 62 CISG.

14 Section 2-716(1) UCC provides that specific performance will be granted when the goods are unique or "in other proper circumstances". This last sentence seems to indicate that the Uniform Commercial Code wanted to broaden the specific performance remedy. But R. Hillman, J. McDonnell & S. Nickles, *Common Law and Equity under the Uniform Commercial Code*, (Boston: Warren, Gorham, Lamont, 1985) at c. 9, 20-21 and 1992 update at c. 9, 11, report that the courts have not followed suit.

15 See Schwartz, "The Case for Specific Performance" (1979) 89 Yale Law Journal 271.

A. Swiss law

1) Specific performance of the contract of sale

Both parties to a sale contract can be forced to perform their contractual duties, main or secondary. [16] Articles 184 to 215 of the Swiss Code of obligations that apply to ordinary sale contracts do not contain any specific performance remedies, nor do articles 102 to 109 CO on contractual remedies. The right to a specific performance remedy must be inferred from article 19 CO on freedom of making contracts and from the principle that engagements must be respected (*pacta sunt servanda*). Articles 97 II and 107 II CO confirm this existence of a specific performance remedy because they expressly refer to it.

2) Specific performance and breach of warranty

In the context of warranty there are two remedies that constitute a form of specific performance: the delivery of substitute goods and repair. Indeed specific performance means the seller has to fulfil his obligations resulting from the contract by acting in a certain way. For faulty generic goods, the delivery of substitute goods constitutes specific performance (a); for specific goods it is repair (b). Theses are remedies for specific claims for performance. [17]

a) Delivery of substitute goods

Generic goods remedies are dealt with in a separate article [18] in the warranty rules although the delivery of substitute goods is the only remedy that is particular to that type

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16 H. Merz, "Einleitung und Personensrecht" in *Berner Kommentar*, vol. I, (Bern: 1962) at para. 262 ad art. 2 CCS.

17 F. Enderlein, D. Maskow, *International Sales Law*, (New York: Oceana, 1992) at para. 1 ad art. 46 CISG.

18 Article 206 CO talks about fungibles rather than generic goods but it is unanimously considered to be a mistake of the legislator. See the *Arrêt du Tribunal Fédéral*, (1968), vol. 94, part II, 26, [hereinafter ATF [part number] [volume number] [first page number]] its translation in French is in the *Journal des Tribunaux*, (1969), part I, 322, [hereinafter JT [part number] [year] [first page

of goods. The reason for the separate legal treatment of generic goods is probably that Roman law considered the sale of generic goods as impossible. [19] Therefore remedies related to that type of goods evolved separately.
The reason the remedy of delivery of substitute goods is limited to generic goods is that the will of the parties when they concluded the contract materialised on an abstract idea not on a concrete identified object. Therefore when the seller fails to deliver a conforming object he fails to deliver the object the parties had in mind which was faultless. This makes that remedy identical to a "pure" specific performance remedy and yet the special warranty rules apply to the delivery of non-conforming objects.

The remedy of delivery of substitute goods contained in article 206 CO has been the source of many doctrinal problems and debates. The only thing that distinguishes the applicability of the delivery of substitute goods remedy from the general specific performance remedy lies in the assessment of whether the goods delivered are faulty or of another type from what the contract provided. There is an important difference between the usefulness of the two actions because the general specific performance remedy comes with much longer time limits than the warranty remedy and no notice requirements.
The courts have a hard time deciding when the lack of quality is a defect and when it makes the goods belong to another type [20]. The majority of authors [21] believe that article 206 CO attracts all fact patterns where non-conforming goods are delivered. Only goods that are obviously of another type could come under the general specific performance action. Others commentators [22] contend that the buyer has the choice between the two courses of action.

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number]].

19 They considered that selling unascertained goods amounted to a sale of unexisting goods.

20 See for instance JT 1969 I 322, *La Semaine Judiciaire*, 1980, 416, ATF 94 II 26 where the Swiss federal Tribunal has applied warranty provisions to the delivery of an *aliud*.

21 See G. Stanislas, *Le droit de résolution dans le contrat de vente*, (Geneva, Switz.: Mémoires publiés par la faculté de droit, 1979) at 172ff.

22 *Ibid.*

b) Repair

When the parties to the sale contract have identified the goods but it turns out they have a defect, the buyer might want the seller to repair them. Repair would be a form of specific performance because the seller would have to correct his performance and redeliver the goods to the buyer.

The Swiss Code of obligations does not provide a remedy of repair. The legislator of the 1881 Code of obligations deliberately rejected the provisions of the cantonal Code of Grisons [23] on repair. The reason was that he wanted to avoid practical problems linked to the question of determining whether the object could be repaired or not. [24] The French Civil Code does not contain any remedy on repair either but French authors do recognise such a remedy. They limit it to cases where repair is possible and does not mean disproportionate expenses for the seller. [25] Despite this example, the federal Tribunal has consistently denied the existence of an implied repair action in the Code of obligations. [26] The majority of Swiss authors [27] also exclude the remedy of repair from the contract of sale remedies. Only a minority of them talk about an omission of the legislator which should be corrected by an analogical application of articles 368 II CO (the contract of enterprise provides a remedy of repair) or 206 CO (the delivery of substitute goods) limited by good faith requirements. For these commentators, the reason for allowing the buyer to benefit from the remedy of repair is that it is a form of specific performance. [28] Any party should be able to force the performance of the other party's obligations according to the general system of our Code. The performance in question relates to the seller's duty to guarantee the buyer against defects.

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23 See Part one, chapter II.

24 W. Munzinger, *Projet de Code de commerce suisse*, (Geneva, Switz.: 1864) at 252.

25 J.-F. Heim, *La réparation de la chose défectueuse dans la vente au détail*, (Lausanne, Switz.: Faculté de droit de l'Université de Lausanne 1972) at 26-27.

26 ATF II 95 119 which corresponds to JT I 1970 238.

27 Against the repair remedy see for instance: M. Keller, T. Loertscher, *Kaufrecht; ein systematische Darstellung*, 2d ed. (Zürich: Schulthess 1986) at 91. For repair: H. Giger, "Allgemeine Bestimmungen - Der Fahrniskauf; Art. 184-215 OR" in *Berner Kommentar*, vol. VI, 2, part I (Bern, Switz.: 1979) para. 33ff. ad art. 205 CO; T. Guhl *et al.*, *Das Schweizerische Obligationenrecht*, 8th ed. (Zürich: Schulthess 1991) at 363.

28 See above the introduction of chapter I.

Many authors deny buyers the remedy of repair, not only because it is clear our legislator did not want it, but also for reasons of logic. If the specific object or the generic good accepted by the buyer cannot be repaired, the delivery of an object that conforms to the contract was impossible from the conclusion of the contract. That would mean that the contract was void from the start according to article 20 of the Code of obligations. [29] That would be absurd because the articles 197 to 210 CO rest on the premise that the contract is a valid one. [30] The argument of these authors goes further: warranty is not a contractual obligation of the seller but a legal obligation. [31] Therefore that duty does not arise from the contract but from a state of facts. This argument is based on legal history and the way warranty rules have been put in the Code without being harmonised with the rest of sale rules. It is reminiscent of the role played by the rules of the Roman Edict that were imposed on the parties and were, at first, separate from the civil law rules.

B. Other systems

1) Quebec civil Code

Specific performance is mentioned first in the article 1590 C.C.Q. list of remedies. This position seems to indicate that this is the " ... usual and normal recourse and one of the creditor's basic rights." [32]

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29 Indeed, the object of the sale was faulty from the conclusion of the contract and nobody on earth could make it conform to the contract. See P. Cavin, "La vente, la donation, le bail, *Traité de droit privé suisse*, Tome VII, (Fribourg: Editions Universitaire Fribourg Suisse, 1978) at 108; Ch. Heiz, *Grundlagenirrtum*, (Zurich: 1985) at 146; R. Furrer, *Beitrag zur Lehre des Gewährleistung im Vertragsrecht*, (Zürich: 1973) at 34.

30 A. Schubiger, *Verhältnis des Sachgewährleistung zu den Folgen der Nichterfüllung oder nicht gehörigen Erfüllung*, (Bern: 1957) at 22ff; see also Heiz, *supra* note 29 at 147-148 for whom a concurrent application of articles 20 (the contract is void if the obligation is impossible) and 197 CO is out of the question. Their effects are incompatible. Even if they were to be applied concurrently, there is no reason to drop article 20 rather than article 197 CO.

31 Schubiger, *supra* note 30 at 31-33 comes to the conclusion that the buyer has no right to an object that is in conformity with the contract. Furthermore, he contends that it cannot be considered as a partial impossibility justifying partial avoidance. The reason is that specific goods cannot be devided putting identity on one side and quality on the other. The contract cannot even be partly maintained. Finally, the object of the sale, that was identified when the contract was concluded was delivered.

32 *Report on the Civil Code of Quebec: Commentaries*, Volume II, Tome 1. Books 1-4 (Québec:

Two articles are devoted to specific performance in the Quebec civil Code. First, according to article 1601 C.C.Q:

> A creditor may, **in cases which admit of it,** demand that the debtor be forced to make specific performance of the obligation. (Emphasis added.)

The wording of this article was deliberately kept flexible in order to allow the judge to take into account all the circumstances of the case. [33] It also constitutes a restriction on the availability of that remedy that lies in the sole power of the judge.
Obligations to give or deliver are nearly always susceptible of specific performance. The reason is that whether it is the debtor or another person who performs does not matter. They are not linked to the personality of the debtor like, for instance, an artist's performance. It is easy for the State to organise proceedings to force recovery of the money or the object promised. The only problem that arise is when the debtor has a unique or rare object and has disposed of it or where generic goods have not yet been individualised. [34]

As warranty rules do not contain any remedy, repair and delivery of substitute goods remedies must be found in or deduced from general contract remedies. Commentators have no problem agreeing that repair is a form of specific performance. [35] Article 1601 C.C.Q. is considered without any dispute whatsoever, to be the source of the remedy of repair. The delivery of substitute goods can also be inferred from article 1601 C.C.Q. The reason is that in Quebec law, a defective execution, that is the fact the obligation does not conform to the model of execution of the contract, is considered as non-execution or an absence of execution. [36]

Editeur officiel du Québec, 1978) at para. 254 [hereinafter *Report on the Civil Code*]. Baudouin, *supra* note 12 at para. 742. See also R. Jukier, "The Emergence of Specific Performance as a Major Remedy in Québec Law" (1987) 47 Revue du Barreau 47 at 64ff. who says that caselaw has been moving towards granting specific performance more easily.

33 Baudouin, *supra* note 12 at para. 267; *Commentaires du ministre de la Justice: le Code civil du Québec*, (Québec: Publications du Québec, 1993) ad art. 1601 [hereinafter *Commentaires du Ministre*].

34 Baudouin, *supra* note 12 at para. 749.

35 Jobin, *supra* note 8 at 131.

36 According to Baudouin, *supra* note 12 at para. 768, ... *le débiteur ne remplit pas son obligation*

Article 1602 C.C.Q., first paragraph, says:

> In case of default, the creditor may perform the obligation or cause it to be performed at the expense of the debtor.

By placing article 1602 C.C.Q. right after the classical specific performance remedy, the civil Code indicates that it is a form of specific performance. It has been a current practice to allow this self help remedy to come to the rescue of the debtor when the creditor refuses to perform his obligations. What makes it even more attractive is that it is not conditional on a judicial authorisation. [37]

This article concerns obligations to act in a certain way (*faire*) or to abstain (*ne pas faire*) by contrast to obligations to give (*donner*). It also supposes that the third party's performance is equivalent to the debtor's. [38] Article 1602 C.C.Q. is applied in the context of obligations resulting from the contract of enterprise (the obligation to build a house for instance) or repair in the contract of rent. [39] But it is also applied in the context of sale where the buyer can have the defective object repaired by a third party. [40] It is not clear however whether on the basis of this article, the buyer can purchase substitute goods on the market. The purchase of substitute goods should be possible in this context because it is the logical consequence of what that article implies.

2) Vienna Convention

The Vienna Convention has very rationally regrouped all specific performance remedies in the same article.

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en livrant ou faisant une chose autre que celle à laquelle il s'est obligé par contrat. En d'autres termes, une obligation mal exécutée est une obligation non exécutée.

See *Pasq Inc.* v. *Petrazzuoli*, [1977] C.A. 515; *Ville de Jonquière* v. *Beaver Foundations Ltd.*, [1981] C.S. 834; [1984] C.A. 519.

37 *Report on the Civil Code, supra* note 32 at para. 268. There must also be a formal notice of default that enables the debtor to take necessary steps.

38 Baudouin, *supra* note 12 at para.752; *Commentaires du Ministre, supra* note 33 ad art. 1602.

39 Baudouin, *supra* note 12 at para. 754.

40 *Richler Truck Centre Inc.* v. *Lapierre*, [1984] C.A. 136; *Hamel* v. *Jetté*, [1982] C.A. 577.

Article 46 CISG provides that:

> (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement
> (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract...
> (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances....

However, although delivery of substitute goods and repair are both a form of specific performance, this article treats them differently. Paragraphs 2 and 3 start with the words "If the goods do not conform with the contract..." indicating that these rules apply to special cases that do not come under the general rule of paragraph 1. [41] Another sign of the fact these paragraphs are *lex specialis* is that they are subjected to restrictions: a fundamental breach in the case of paragraph 2 and reasonableness in the case of paragraph 3. Paragraph 1, on the other hand, gives an unrestricted right to performance. The reason delivery of substitute goods [42] only applies in cases of fundamental breach is that it is an expensive remedy for the seller. [43] But it is interesting to notice that article 46 II CISG does not restrict the delivery of substitute goods to generic goods.

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41 See K. Neumayer, C. Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises*, (Lausanne, Switz.: publication CEDIDAC, 1993) para. 8 ad art. 46. The fact that these remedies are a form of specifc performance can have some important bearings on the applicability of article 28 CISG. Article 28 provides that:

> "If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

It is not clear if this article applies to all paragraphs of article 46 CISG or only to paragraph 1. Neither UNCITRAL nor the Diplomatic Conference gave a clear awnser to that problem, see Honnold, *supra* note 7 at para. 285.1 who contends that article 28 CISG only applies to 46 (1) CISG. See also Neumayer, Ming ,quoted above, para. 5 ad art 46: commentators of the Vienna Convention do not agree on whether article 28 CISG should apply to repair. But it seems that if 46(2) and 46(3) CISG are forms of specific performance, they should be subjected to article 28 CISG.

42 This poses a small problem in civil law systems where this remedy is usually only available for generic goods. See Neumayer, Ming, *supra* note 41 at para. 4 ad art. 46 who think that the remedy is only available for generic goods. This is disputable as the Vienna Convention does not make any distinction between unique and generic goods. See J. Hellner, "The UN Convention on the

The 1964 Uniform Law on International Sales adopted at the Hague also contained a remedy of repair (article 42(1)(a)) but it had a limited scope. Article 46 (3) CISG "takes full account of the importance of the remedy of repair.". [44] The reason it is subject to a reasonableness requirement is to provide flexibility. It allows judges to take into account as many elements as possible in granting the remedy of repair. Flexibility was considered to be important by the makers of the Convention as not only is this remedy unknown to the common law but it is also alien to many civil law countries.

3) Uniform Commercial Code

The Uniform Commercial Code provides a remedy of specific performance to the buyer (section 2-716) but it is granted only in cases where the seller has not delivered the goods. Furthermore, it is restricted to cases where monetary compensation is inadequate. This is in keeping with the common law approach to that remedy.
Where the goods are delivered but do not conform to the contract the buyer cannot, apparently, force the seller to repair the goods or deliver substitute goods. [45] But there might be another mechanism through which the buyer could achieve the same result as delivery of substitute goods or repair remedies.

International Sale of Goods: Its Influence on National Sales and Contract Law" in R. Cranston and R. Goode, eds, *Commercial and Consumer Law, National and International Dimensions*, (Oxford: Clarendon Press, 1993) 41 at 44.

43 Under article 46 (2) CISG the seller must deliver substitute goods even if this is more costly than the measure of damages and even if the non-conformity can be repaired. But, the seller can cure by repairing through an analogical application of article 48 CISG, see Neumayer, Ming, *supra* note 41 at 4 ad art. 46.

44 Hellner, *supra* note 42 at 44-45

45 In the Uniform Commercial Code the buyer has no right as such to compel the seller to repair or to replace the non-conforming goods unless the parties have agreed to it. Yet the seller does have a right to cure (UCC 2-508). That right to cure also exists in the Vienna Convention (article 48 CISG). Threatened with a damage suit, the seller might prefer to repair or replace the goods if it is less expensive.

Lets take an example from John Honnold's commentary of the Vienna Convention [46]:

> Seller delivered goods that were seriously defective -- i.e., a "fundamental breach" under Article 25. Buyer telexed, "Rejecting shipment for the following serious defects [specifying them]. Demand prompt delivery in conformity with the contract.

Under Swiss law or the Vienna Convention rules, there is a rejection of the goods delivered by the seller followed by a request for substitute goods. The rejection of the goods does not put an end to the contract. There is no release of the parties from their obligations and the right of the buyer to performance still stands. By separating the rejection of the defective goods from the request for substitute goods it is easier to compare delivery of substitute goods with the remedies offered by the Uniform Commercial Code. If we take the example provided by Honnold, a buyer under the Uniform Commercial Code rules would reject the goods (section 2-601 UCC) the same way as in the above example. After that, instead of cancelling the contract the "Uniform Commercial Code buyer" could ask for specific performance. That way the remedy of delivery of substitute goods could be recreated in the Uniform Commercial Code. [47] It is however unlikely that a United States' court would grant specific performance in cases where the goods are easily available on the market. Our "Uniform Commercial Code buyer" will have to resort to cancelling the contract and to buying substitute goods on the market. But is buying goods from a third party on the market and charging the seller for the difference in price very different from obtaining a delivery of substitute goods ? In both cases the buyer gets what he has contracted for, a specific type of goods at the contract price. In one case it is the seller who performs the contract. In the other case a third party performs the contract at the expense of the seller. In neither cases does the buyer have to prove the existence or the amount of his loss. These features indicate that in both cases the remedy could be a form of specific performance. [48] The Quebec civil Code recognises this in its article 1602. [49]

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46 *supra* note 7 para. 283.

47 The right to cure of the seller could have the same effect in practice if the cost of the goods is lower for him than the market price.

48 Nicholas, *supra* note 9 at 217.

49 See above under 1).

The Uniform Commercial Code does not provide the buyer with a right to get repair from the seller. But the same somewhat far-fetched reasoning applied to recreate a remedy for the delivery of substitute goods could be applied here to recreate a remedy of repair. Again it is unlikely that the court would grant specific performance in the form of repair if a third party can also repair the goods. Furthermore under section 2-714 UCC the buyer can claim the cost of repair of non-conforming goods. Instead of asking the seller to repair the goods, the buyer can get someone else to do so at the expense of the seller. Just as the cover remedy, the recovery of the cost of repair remedy appears as a form of specific performance.

To sum up the scope of specific performance remedies in the Uniform Commercial Code, generally, the buyer can in some very limited cases obtain specific performance if the seller has not delivered the goods. But the seller cannot be forced to correct his performance. The warranty remedies do not provide an equivalent to forced delivery of the goods. Nevertheless by separating rejection of the goods from cancellation and allowing specific performance the effects of the remedies of repair and delivery of substitute goods can be achieved. Furthermore, warranty and sale remedies are very similar when it comes to having a third party perform the contract at the expense of the seller. The remedy of cover applies to breach of warranty as well as to breach of sale and the award of the cost of repair remedy come into the same category of remedies.

Discussion

The difference between the general specific performance remedy and its equivalent in the warranty rules has created some problems in Swiss law.

For generic goods, delivery of substitute goods is indeed the equivalent to specific performance. But the mere fact that delivery of substitute goods belongs to another set of rules gives rise to delimitation problems. Because although the remedy is the same, the conditions in which it can be used are different. Therefore it becomes important to distinguish the fact pattern specific to each remedy. The same problem has arisen in the Vienna Convention where is it important to distinguish between the delivery of defective goods and a wrong delivery which amount to an absence of delivery. In the former case, some special time limits and notice requirement apply. In the latter case, the buyer does not need to react. The distinction between the type of breach that is subject to the warranty remedy of delivery of substitute goods or to the general remedy of specific performance has created a heated debate amongst commentators of the Convention. The majority of them would only give the general remedy of specific performance in cases where, in good faith, the buyer could consider the seller has delivered a wrong order. [50] Swiss law has not yet come to a generally accepted solution to that problem and judges still try to determine whether the object delivered is of another type from what the contract provided or if it is of the same type but has some quality missing.

Swiss law does not offer the buyer the remedy of repair despite the fact that it is only a form or specific performance. Quebec law, that does not either have a rule on repair, offers the buyer that action as an obvious form of specific performance that is not even worth discussing. [51] The argument Swiss authors oppose to the Quebec law point of view is that because warranty is a special legal duty it does not obey general contractual obligations rules and remedies. If warranty were part of the seller's main duty to deliver the object, his duty becomes impossible *ab initio* if the object cannot be "repaired" (for instance a horse with a incurable disease). This argument is not only contrary to the present study's wish to harmonise warranty rules with contractual rules on remedies but it

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50 Neumayer, Ming, *supra* note 41 at para. 3 ad art. 35.

51 Jobin, *supra* note 8 at 131.

is also wrong. Warranty is a secondary duty of the seller, it is not part of his main delivery duty. For the contract to be valid, parties to it must agree on the sale's object, on its price, on the seller's duty to deliver the object and on the buyer's duty to pay the price. [52] The parties' essential agreement for the validity of the sale is on the identity of the object (or, for generic goods, its type). Warranty attaches to the contract as a secondary contractual obligation derived from the good faith principle. [53] Therefore, if the object of the sale was faulty from the conclusion of the agreement, the performance of the contract was still possible although the warranty was breached. Even if warranty were part of the seller's main duty, the argument of the authors who support the theory that warranty is a legal obligation is not a convincing one. The question of impossibility of delivery of a conforming object arose in Roman law in a case where a seller had stipulated that the slave sold enjoyed good health and was in fact hopelessly ill. The jurists decided that the sale object was not impossible because what was promised in fact was damages if the slave was not healthy. [54] Quebec law recognises that principle very clearly in its classification of types of obligations. The warranty obligation is twofold: the seller must deliver what he promised; repair the goods if they do not conform to the contract; but if that is beyond his power, then he must guarantee the buyer against the loss that ensues.
Quebec law is not the only modern law that provides the remedy of repair. The Vienna Convention also offers it. The 1964 Uniform Law on International Sale hesitated about giving it full force. The new Convention has not because it controls its use through a reasonableness requirement. As long as the repair remedy is limited by good faith requirements that ensure that the seller is not unduly sanctioned by that remedy, it is a very acceptable way to deal with the problem.

Specific performance remedies are odd to discuss because their practical importance is very limited. In a competitive market where goods are readily available it seems that specific performance has a reduced role to play.
In the field of warranty remedies, buyers seldom need to coerce sellers to replace or repair defective goods it is rather sellers who want to do these things to " ... preserve good will, reduce damage liability and avoid the drastic remedy of avoidance of the

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52 H. Schönle, "Kauf und Schenkung, Erste Lieferung, Art. 184-191 OR" in *Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch*, vol. V 2a, (Zürich: 1993) para. 20 ad art. 184.

53 Merz, *supra* note 16 at para. 260 ad art. 2 CCS.

54 R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, (Cape Town: Juta &Co, 1990) at 310.

contract. In the infrequent instances where sellers are unwilling to perform, coercing performance is seldom so speedy and effective as purchasing substitute goods." [55]
The Uniform Commercial Code has countered this argument by adopting a very interesting approach to the problem. When the seller has delivered defective goods, the buyer can reject them, cancel the contract and get substitute goods on the market (i.e. cover) or have the defective goods repaired by a third party at the expense of the seller. This constitutes a very efficient self-help remedy. The Uniform Commercial Code puts some restrictions on the use of those remedies (substantial breach for substitute goods and reasonableness for repair [56]) but they truly remain a form of specific performance because the buyer does not have to prove the existence or the extent of the damages. The self-help remedy of buying substitute goods at the expense of the seller is also available for any other substantial breach of contract.

Could those remedies be introduced as specific performance remedies in Swiss law the way they are in Quebec law ? Their availability could easily throw the classical specific performance remedies out of business (except in cases where damages are not an adequate compensation) and they could be used for general sale remedies as well as for warranty remedies.
Article 98 I of the Code of obligations says:

> *S'il s'agit d'une **obligation de faire**, le créancier peut se faire autoriser à l'exécution aux frais du débiteur; toute action en dommages-intérêts demeure réservée.* (Emphasis added.)

In Swiss law and in Quebec law there is no need to put an end to the contract in order to have a third party perform it. This is logical because the third party is only substituting its performance to the seller's. On its face, article 98 I CO could come to the rescue of the buyer in the same way as the Uniform Commercial Code's self-help remedies of cover and repair and of article 1602 of the Quebec civil Code which is similar to article 98 I CO. Repair by a third party at the expense of the seller could be claimed that way. So could the cost of purchasing substitute goods on the market. Incidently article 191 II CO already expressly provides this remedy for commercial sales. And just like the Uniform

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55 Honnold, *supra* note 7 at para. 286.

56 Not too suprisingly, these restrictions are exactly the same the Vienna Convention puts on the remedies of delivery of substitute goods and repair.

Commercial Code and the Vienna Convention considers it as a damages remedy. This approach is incorrect because, as we saw earlier, the buyer of substitute goods does not have to prove the amount of his losses, he has obtained a substitute performance.
Unfortunately, commentators and the federal Tribunal do not apply article 98 CO to cases where the debtor's obligation involves only the delivery of an object. The reason is that Swiss judges and commentators consider delivery as an "*obligation de donner*" (*dare*). Their view is incorrect: delivery of a sound object is an "*obligation de faire*" (*facere*) because it involves a certain behaviour of the seller, i.e. the action of delivering. [57]
De lege lata, Swiss law could escape some of the disadvantages the buyer faces when using the warranty specific performance remedies by applying widely article 98 I CO. Sellers would perform or correct their performance more easily under the threat of the article 98 CO remedies. And if they did not, buyers could take advantage of this efficient self-help remedy.

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57 See H. Tandogan, *Notions préliminaires à la théorie générale des obligations,* (Geneva: Georg, 1972) at 3-4.

II. POSITIVE COMPENSATION REMEDIES

The positive compensation remedies mimic the performance or at least try to be equivalent in their effects.

Two types of remedies come into that category: the reduction of price remedy and the award of expectation damages (*dommages-intérêts positifs*). Both these remedies aim at placing the buyer in the financial situation he would have been in if the contract had been properly performed. The Uniform Commercial Code and (under its influence) the Vienna Convention provide expressly two categories of expectation damages. One of them is linked to the value of the goods delivered and the other remedies the other consequences of the seller's breach. The former category of expectation damages is the contract/market differential or the loss of value of the goods and the latter is the incidental and consequential damages. We shall not discuss the distinction between these two categories of expectation damages because they are designed to be claimed cumulatively and have exactly the same compensation aim. Article 191 III of the Swiss Code of obligations also offers the buyer in a commercial sale the contract/market differential remedy which the courts have extended all sales. [58] However, Swiss law treats this remedy merely as a way of calculating part of the expectation damages remedy.

A. Swiss law

1) Sale remedies

Expectation damages (*dommages-intérêts positifs*) are the only positive compensation remedy for breach of contract. Article 97 I of the Code of obligations is the legal basis for this type of damages and it applies to all types of obligations including sale. It has the following wording:

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58 See ATF II 49 77 which corresponds to JT I 1923 546.

Lorsque le créancier ne peut obtenir l'exécution de l'obligation ou ne peut l'obtenir qu'imparfaitement, le débiteur est tenu de réparer le dommage en résultant, à moins qu'il ne prouve qu'aucune faute ne lui est imputable.

If the seller breaches any of his obligations, [59] the buyer can claim these damages. They will put him in the financial situation he would have been in if the contract had been properly executed. He will get compensation for his losses and expenses (*damnum emergens*) and for his loss of profit (*lucrum cessans*). This corresponds to the common law notion of "expectation damages". [60]

2) Warranty remedies

Positive compensation warranty remedies are different from their equivalent in general sale remedies:

- the remedy of reduction of price is only found in article 205 of the Code of obligations that deal with warranty remedies;

- and nowhere in articles 197 to 210 CO, that apply to the warranty obligation, is there a rule that allows the buyer to claim expectation damages as a positive compensation remedy.

The reduction of price remedy comes directly from the Roman law tradition. However, Swiss law does not adopt any of the methods derived from that early tradition to calculate reduction of price. We have come to view the contract primarily as a synallagmatic relation and the remedy of reduction of price reflects this. [61] Consequently, reduction of price is calculated with reference to the proportion between the market value of the object with and without the defect. That ratio is then imposed on the contract price. [62]

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59 There are some conditions attached to that claim, see articles 102 and following of the Code of obligations.

60 See Fuller and Perdue "The Reliance Interest in Contract Damages" (1936) 42 Yale Law Journal 52 at 55.

61 See Cavin, *supra* note 29 at 102.

62 In many cases this calculation method comes to the same result as the Roman law reduction of

To illustrate this remedy it might be helpful to consider the following example:
We are supposing that the contract price is 90 $ but the goods are really worth 120 $ (we are also supposing that the market price does not vary). The goods delivered do not conform to the contract and have a value of 80 $. The value of the non-conforming goods taking into account the contract price is calculated as follows:

$$\frac{\text{market value of the non-conforming goods}}{\text{market value of the conforming goods}} \qquad \frac{\text{contract value of defective goods}}{\text{contract price}}$$

In this example the calculation would be:

$$\frac{80}{120} = \frac{x}{90} \qquad x = \frac{80 \times 90}{120} = 60\ \$$$$

In this example the amount of the reduction of price will be 90 $ (the contract price) minus 60 $ (the contract value of the defective goods): 30 $.
This calculation takes into account the fact that one of the parties has benefited from a good deal. It also shows that reduction of price is not a form of damages but merely restores the balance of the contract affected by the breach. Damages would allow the buyer to recover the difference between the contract price and the market value of the defective goods which would be only 10 $.

Lets now turn to the problem of the absence of expectation damages remedies in the Code of obligations' articles on warranty. The federal Tribunal, against the opinion of a number of commentators, has decided that the buyer could also use the article 97 CO remedy of expectation damages (when the seller is at fault, of course) in case of breach of warranty. That remedy can be used alone or combined with the reduction of price remedy. But the time limit and the notice requirements of the warranty remedies are to be applied to the expectation damages claim. [63] This interpretation of the law is very

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price. Indeed, to estimate what the buyer would have paid had he known about the defect implies taking into account the balance of the contract. Yet the Roman law approach is much more subjective because the value of the defective goods is based on the buyer's appreciation.

63 See ATF II 63 401 which corresponds to JT 1938 I 306; ATF II 82 136 which corresponds to JT 1957 I 105; ATF II 96 115 which corresponds to JT 1971 I 258; ATF II 107 161 which

reminiscent of the Roman law debate on the *actio empti* and the aedilician actions except that here, the federal Tribunal puts the *actio empti* into the aedilician remedies.

B. Other systems

All the other systems we are comparing with Swiss law award expectation damages for any contract breach including breach of warranty. In other words, Quebec law, the Uniform Commercial Code and the Vienna Convention all grant expectation damages to the buyer of defective goods as well as to the buyer aggrieved by any other breach of contract. In the case of breach of warranty, those damages are available **with or without** what corresponds to the reduction of price remedy. [64]

1) Vienna Convention

Ernst Rabel, who was at the origin of the first draft of the Uniform Law on International Sale that preceded and inspired the rules of the Vienna Convention, doubted the usefulness of the "*actio quanti minoris*". [65] Despite his opinion, this remedy was incorporated in the Vienna Convention. [66] This remedy of price reduction is unfamiliar to common law lawyers as it is different from an award of damages. Yet it results in a pecuniary compensation. This ambiguity caused some problems for these lawyers in the drafting of the Convention. [67] Its significance had to be made clear hence the fact that article 50 CISG is rather detailed.

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corresponds to JT 1981 I 582; ATF II 107 419 which corresponds to JT 1982 I 380.

64 Articles 1607, 1611 and 1728 C.C.Q.; articles 45, 74 and 75 CISG and articles 2-713, 2-714 and 2-715 UCC.

65 See E. Rabel, "A Specimen of Comparative Law: The Main Remedies for the Seller's Breach of Warranty" (1953) 22 Revista Juris Universalis P.R. 167 at 191.

66 E. Bergsten, A. Miller,"The remedy of reduction of price" (1979) 27 American Journal of Comparative Law 255 at 273, report that the remedy of reduction of price is used in commercial deals.

67 Bergsten, Miller, *supra* note 66 at 266ff.

Article 50 CISG says:

> If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price [68] in the same proportion as the value that the goods actually delivered had at the time of the delivery [69] bears to the value that conforming goods would have had at that time...

This awkward description shows us that this remedy is identical to the Swiss law remedy of reduction of price. It is also exclusively available to the buyer if the goods do not conform to the contract. Other types of breach of contract will be sanctioned by expectation damages only (in the category of positive compensation remedies).

Under the rules of the Vienna Convention, the buyer may use the article 74 damages together with or alternatively to the reduction of price remedy. [70] Article 45 II CISG expressly recognises that right:

> The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

Those damages are measured as follows in article 74 CISG:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. ...

This assessment of damages combined with the cover-and contract/market differential of articles 75 and 76 CISG, show that they were intended to be a form of expectation damages whether the contract is avoided or not. [71]

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68 The reduction of price is a power the buyer can exercise without the help of the court, see Neumayer, Ming, *supra* note 41 at para. 1 ad art. 50.

69 In article 46 ULIS it was time of the conclusion of the contract but that was abandoned because it was more difficult to ascertain in practice.

70 See Neumayer, Ming, *supra* note 41 at para. 1 ad art 50, at page 356; Honnold, *supra* note 7 at paras 312-313.

71 But see Neumayer, Ming, *supra* note 41 at para. 1 ad art. 74, pages 487-488.

2) Uniform Commercial Code

The Uniform Commercial Code appears to have a special remedy that applies only when a buyer of defective goods accepts them despite their non-conformity to the contract. The Uniform Commercial Code treats this remedy in a special way which seems to indicate that it is not similar to expectation damages that are awarded for other breaches of contract. We have to determine how it compensates the buyer for the seller's breach of warranty.

Section 2-714 (2) UCC deals with the measure of damages the buyer can obtain when he could not or has not rejected or revoked:

> ...the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they should have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

This measure of damages is called primary economic loss to distinguish it from incidental and consequential loss. The difference between these two types of losses is that the first one is linked to the goods themselves whereas the second one is a consequence of the breach. [72]

To evaluate the diminution in value of the defective goods the courts have taken two measures: the cost of repair and the diminution in value itself.

The cost of repair will be the measure of the diminution in value of the goods under section 2-714 (2) UCC in cases when it is reasonable and ascertainable. [73] When the cost of repair cannot be used as a measure of primary economic loss the court will evaluate the diminution in value of the goods. This diminution in value is ascertained as between

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72 B. Clark, Ch. Smith, *The Law of Product Warranties*, (Boston: Warren, Gorham, Lamont, 1984) at c. 7, 48. See the introductive remarks made under chapter II.

73 *Tarter* v. *MonArk Boat Co.*, 430 F. Supp. 1290 (ED Mo. 1977), 22 UCC Rep. 33, aff'd, 574 F. 2d 984 and see for instance *Nelson* v. *Logan Monior Sales Inc.*, 370 S.E. 2d 734 (W. Va. 1988), 7 UCC Rep. 2d 116.
If the cost of repair is higher than the price of the goods, the buyer should be expected to mitigate his loss by selling the non-conforming goods, buying conforming goods on the market and claiming damages, see Clark, Smith, *supra* note 72 at c. 7, 50 but there are some exceptions notably in cases where the goods couldn't be purchased on the market. See *City of New York* v. *Pullman Inc.*, 662 F. 2d 910 (2d Cir. 1981), 31 UCC Rep. 1375.

the value of the goods as warranted and their value as accepted according to the wording of Section 2-714(2) UCC. In the typical case the value of the goods as warranted will be the contract price. [74] But the contract price is not a good starting point to measure the diminution in value if the market has fluctuated a lot between the formation of the contract and the delivery of the goods. In that case, the market price of the goods as warranted will be used which means that the buyer would lose out on the bargain if the market sinks but would make a benefit if the market rises. [75] Furthermore, if the value of the goods (the use of which was expressly warranted) as warranted exceeds by far the contract price, that value could be retained. [76] This principle is consistent with the terms "value as warranted" contained in Section 2-714 (2) UCC. It is also consistent with Section 1-106 UCC that asks of the court that it uses the Uniform Commercial Code's remedies to put the buyer in the financial position he would have enjoyed had the seller fully performed.

The value of the goods as accepted can be measured either by their resale price [77] or by their market value. [78]

Finally, the "special circumstances" exception is only an escape route allowing courts to depart from the above rules. Its main relevance should be in circumstances where although the value of the non-conforming goods is below the sale price, the buyer's use of these goods is not impaired by the diminution in value. [79]

A right to set off the diminution in value of the goods from the price is provided by Section 2-717 UCC:

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74 See for instance *Auto-Teria, Inc.* v. *Ahern*, 352 N.E. 2d 744 (Ind. Ct. App. 1976), 20 UCC Rep. 336 [hereinafter *Auto-Teria* cited to UCC Rep.] or *McGrady* v. *Chrysler Motors Corp.*, 360 N.E. 2d 818 (Ill. App. Ct. 1977), 21 UCC Rep. 532.

75 Clark, Smith, *supra* note 72 at c. 7, 53

76 See *Chatlos Systems, Inc.* v. *National Cash Register Corp.*, 670 F. 2d 1304 (3d Cir. 1982), 33 UCC Rep. 934.

77 See for instance, *B&L Produce, Inc.* v. *Mims Produce, Inc.*, 24 UCC Rep. 341 (US Dept. Ag. 1978) and *Auto-Teria, supra* note 74 where the seller resold the goods.

78 See for instance *Lackawanna Leather Co.* v. *Martin & Stewart, Ltd.*, 370 F. 2d 1197 (8th Cir. 1984), 38 UCC Rep. 475.

79 See *Vorthman* v. *Keith E. Meyers Enterprises*, 296 N.W. 2d 772 (Iowa 1980), 30 UCC Rep. 924 and Clark, Smith, *supra* note 72, 1992 update, at c. 7, 36.

> The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

Incidentally, this also applies to incidental and consequential damages under Section 2-715 UCC.

It is true that the remedy of section 2-714(2) UCC, if it is taken as applying the difference of value between the contract price and resale price or market value combined with section 2-717, appears to be very similar to the remedy of reduction of price. [80] In a situation where the contract price is the same as the market price and where the market does not alter this will indeed be the case. Nevertheless, it is fundamentally different in its nature because the reduction of price is not a damages provision but rather a synallagmatic remedy. It does not seek to indemnify the buyer but to restore the balance of the contract as it was set by the parties at the time of formation. The Uniform Commercial Code remedy does not generally take into consideration the fact that the purchaser has made a good or a bad bargain. The recovery of primary economic loss is really an expectation damages remedy contrary to reduction of price because it does not take into account the balance of the contract at the time of formation.
If we take the example chosen above (Swiss law) to demonstrate the effect of the reduction of price remedy the result would be the following:

contract price	market price of non-conforming goods	UCC measure of damages
90$	80$	10$

In the reduction of price example the reduction of price was 30 $ whereas in the 2-714(2) UCC measure of damages the recoverable amount by the buyer is only 10 $. The result would have been very different if the market price had been taken as a reference. But in this case, the contract price seemed more appropriate because we started with the hypothesis that the market did not vary. Anyway, even if the market price of the conforming goods had entered the calculation (in which case the amount of damages

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80 President R. REAGAN, "Message" in Katrein & Magraw, eds., *The Convention for the International Sale of Goods: A Handbook of Basic Materials* (New York: American Bar Association, Section of International Law and Practice, 1987) 75 at 88 states that: "[a]lthough the remedy in Article 50 (reduction of price) has its origin in civil law concepts, its formula has been amended so as to approximate the common law right to deduct damages from the price (cf. UCC 2-717)".

would have been 40$), there is no doubt the Uniform Commercial Code fails to take into account the fact that in this example the buyer got a good bargain.
Of course Section 2-714(2) UCC allows the buyer to claim damages in the form of repair costs which could be more advantageous depending on the circumstances. This remedy is a form of specific performance because a third party will repair the goods at the expense of the seller. It is also a form of positive compensation in a wider sense than considered in this chapter because it puts the buyer in the financial situation he would have been in if the goods had conformed to the market price.
Of course the Uniform Commercial Code enables the buyer to combine the primary economic loss remedy with the incidental and consequential damages. Both remedies are aimed at compensating the buyer for the breach of contract and replacing him in the financial situation he would have enjoyed if the contract had been properly performed.

The primary economic loss remedy is equivalent to the other breach of contract remedies found in the Uniform Commercial Code. It provides either an expectation damages remedy by allowing the buyer to recover the difference between the goods "as warranted" and the goods accepted or a form of specific performance in the form of an award of the cost of repair. The latter type of remedy is equivalent to the general cover remedy where the buyer can claim the cost of buying substitute goods and the former type of remedy is identical to the contract/market price differential. The only difference between primary economic loss and the other contract remedies is that in the former case the goods are accepted and in the latter they are rejected.

3) Quebec civil Code

There are two types of positive compensation remedies in Quebec law: reduction of the correlative obligation and damages. Both remedies apply to warranty breaches as well as to general contract breaches.
The most interesting feature of Quebec contract law remedies is the proportional reduction of obligations remedy. Reduction of obligation used to be restricted to certain contracts; in the new civil Code it applies generally. [81] Article 1590 C.C.Q., which sets out all the breach of obligation remedies, provides the reduction of correlative obligation remedy and restricts it to contractual breaches. That means that for any contract breach,

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81 *Report on the Civil Code, supra* note 32 at para. 254.

parties can have recourse to this remedy. The idea behind synallagmatic remedies is that the parties wouldn't have entered the agreement or at least not on the same terms if they had known about the lack of conformity at the time they were contracting. [82] Despite the general application of that principle, the only synallagmatic remedy found in general contract law remedies in other civil law systems is the ending of the contract.

Article 1604 C.C.Q. second paragraph gives the creditor of a contractual obligation the remedy of proportional reduction of correlative obligation when the breach is not serious enough to justify ending the contract. The third paragraph states that:

> All the relevant circumstances are taken into consideration in assessing the proportional reduction of the correlative obligation. If the obligation cannot be reduced, the creditor is entitled to damages only.

The reason for generalising the use of that remedy was that it is sometimes in the creditor's interest to keep to the agreement but reduce his obligation to what the debtor gave him. "The article is intended to sanction this interest and remains faithful to the basic policy of encouraging execution of obligations above all." [83]

Warranty rules, as we have seen, do not contain any remedy. The buyer will turn to the general reduction of correlative obligation remedy to reduce the price of defective goods. As P.-G. Jobin [84] very clearly explains:

> *On parlait jadis de l'"action estimatoire", terme qui désignait ce type particulier de réduction du prix dont le régime comportait certaines règles particulières, dont l'exigence que l'action soit intentée dans un délai raisonnable. Ces particularités on disparu aujourd'hui et le terme tombera sans doute en désuétude. Dans le Code civil du Quebec, la réduction du prix, dans la garantie contre les vices cachés, est régie par les règles du droit commun des contrats.*

But the reduction of price remedy is by no means of the same nature as the reduction of price in Swiss law or in the Vienna Convention. It is not a synallagmatic remedy. Courts calculate the reduction of price by calculating the diminution in value of the purchased

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82 see Bergsten, Miller, *supra* note 66 at 259-260 who give the example of part avoidance for non-conformity in quantity to illustrate the reduction of price mechanism; see also page 274 where they explain that "[t]he justification for a reduction of price for defect in quality is a refomation of the original contract which retains the relative balance of the bargain made by the parties".

83 *Report on the Civil Code, supra* note 32 at para. 272.

84 Jobin, *supra* note 8 at para. 171.

goods that is attributable to the defect. [85] They also take the cost of repair as a basis to calculate the reduction of price ! [86] As we have seen for the Uniform Commercial Code, these monetary compensations are no more than an award of expectation damages or a form of specific performance. The reason the courts take the cost of repair or the diminution in value as the basis of the price reduction is because to claim damages for breach of warranty, the seller must have been aware of the defect. This requirement does not apply to the other warranty remedies.

The new Quebec civil Code, in article 1607 enunciates the right of the creditor to claim damages if the debtor is in default. Article 1611, first paragraph, explains how the damages are assessed:

> The damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived.

On the face of it, this measure of damages corresponds to expectation damages. This impression is confirmed by the commentators of Quebec law. Damages in Quebec law are like those in common law [87] and are aimed at restoring the creditor in the position he would have enjoyed had the contract been properly performed. Losses and expenses as well as loss of profit are part of expectation damages. [88]

Just as in the Vienna Convention, recourse to expectation damages is the last resort. This appears clearly from the end of paragraph 3 of article 1604 C.C.Q. quoted above. Damages are also a remedy that can accompany any other remedy.

As we have just mentioned, there is unfortunately one important difference between warranty and breach of contract remedies. That difference concerns the award of damages and results from article 1728 C.C.Q.:

> **If the seller was aware or could not have been unaware of the latent defect,** he is bound not only to restore the price, but to pay all damages suffered by the buyer. (Emphasis added.)

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85 *Ouellet* v. *Eymann,* [1988] R. J. Q. 2448 (C.A.) [hereinafter *Ouellet*].

86 *Caron* v. *Centre Routier Inc.,* [1990] R. J. Q. 75 (C.A.); *Placement Jacpar Inc.* v. *Benzakour,* [1989] R. J. Q. 2309 (C.A.). *Contra: Ouellet, supra* note 85.

87 *Wertheim* v. *Chicoutimi Pulp Co.* [1911] A.C. 301.

88 Baudouin, *supra* note 12 at para. 770.

Neither the report of the Revision Office of the civil Code nor the first draft of the Code contained this proviso. [89] After having hesitated, the makers of the new civil Code of Quebec have kept the requirement that the seller must have known of the defect or have had reason to suspect its presence in order to obtain damages. The result of it is that a fault is needed for damages in case of breach of warranty but not for the other remedies.[90] This requirement goes against the system of obligations in Quebec law. That system is quite different from the Swiss law system where a fault is either a fraudulent intention or a form of negligence. In Quebec law, there is a contractual fault when the debtor has not conformed to the contractual obligations he has assumed. To establish a fault one must know the exact nature and intensity of the obligations. Obligations are divided into three categories: these are **means** (or **diligence**), **result** and **warranty** obligations. [91] When the debtor faces a **means obligation,** breach is established if the creditor can prove that the debtor did not do his best compared to reasonably prudent and diligent person placed in the same circumstances. The debtor can escape liability resulting from the breach of a **result obligation** by proving that the occurrence that caused the breach was beyond his control. The debtor cannot escape liability for a breach of the **warranty obligation** with which we are concerned here. Not only does that obligation comprise the promise of a result but it also guarantees the creditor against the absence of that result. For that reason, all warranty remedies should be available to the buyer whether or not the seller knew of the defect. Furthermore, as we have seen, the courts bypass this requirement by awarding the cost of repair or the diminution in value (which is a form of damages) in the context of price reduction.

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89 See D. Cayne "The Buyer's Remedies in Damages for Latent Defects in the Province of Québec" (1976) 54 Revue du Barreau canadien 105 at 111ff. for an analysis and criticism of this requirement.

90 Jobin, *supra* note 8 at paras. 156ff.

91 See P.-A. Crépeau, *L'intensité de l'obligation juridique ou des obligations de diligence de résultat et de garantie* (Cowansville, Qué.: Yvon Blais, 1989); Baudouin, *supra* note 12 at paras. 759-763 and 798-799.

These arguments partly explain why the Revision Office of the civil Code wanted to suppress the requirement found in the Code Civil du Bas Canada that for the award of damages in case of breach of warranty the seller must have known about the defect. Unfortunately the new Civil Code did not follow their advice.

Discussion

In all the systems we have examined, expectation damages can be claimed for any breach of contract, including breach of warranty. Damages can be claimed alone or with another remedy. Only Quebec law has maintained an unfortunate difference between damages claimed because of a breach of contract and breach of warranty damages. The latter are subjected to a more severe notion of fault which affects the balance between all the warranty remedies.

The Swiss Code of obligations' rules on warranty remedies do not offer that remedy to the buyer, but the federal Tribunal applies the general expectation damages provisions to warranty remedies anyway. What the federal Tribunal has done is the reverse of what Roman commentators did: it has included the *actio empti* in the aedilician actions but has subjected it to their time limits. That case law rule goes against the legislator's idea that warranty rules are self-sufficient. It is also opposed by a number of commentators. Their opinion leads to an unfair result given that for any other contract breach, even a much less serious one, the buyer would get damages. The federal Tribunal's rule is not only fair, it also shows that Swiss courts are prepared to try to harmonise warranty and general sale remedies.

The Roman law heritage is still very much alive in the warranty remedies of positive compensation. Reduction of price is only found in the warranty remedies. But its meaning has been twisted because it has lost its Roman law quality of determining what the buyer would have paid had he known about the defect. Roman law did not possess a developed notion of the principle of synallagma. In the late classical period, it wanted to incorporate reduction of price in the *actio empti* which was a purely compensatory action not a synallagmatic one.

Now, the reduction of price remedy is aimed at restoring the balance of the contract that was affected by the breach. It takes into account the fact that the buyer has made a good or a bad bargain. Only Swiss law and the Vienna Convention offer that remedy. As we have seen, the award of the cost of repair or of the objective diminution in value of the object sold found in Quebec law and in the Uniform Commercial Code are only a form of specific performance or of expectation damages.

Swiss law and the Vienna Convention do not offer the reduction of price remedy for any other sale contract breach. [92] This distinguishes clearly warranty remedies from breach of contract remedies. Although Quebec law does not provide the buyer of a defective object with a true synallagmatic reduction of price remedy, it does offer a general reduction of price remedy to the buyer for any contract breach. Swiss law has a general synallagmatic remedy in the resolution of article 109 CO but has not adopted the lesser measure of relief offered by a reduction of obligation remedy.

As we saw above, reduction of price restores the contract balance that was destroyed by the non-conforming goods whereas damages compensate the buyer for the defective performance. In Swiss law and in the Vienna Convention both these remedies are available to the buyer. This cumulation of remedies which do not have the same goals has confusing results in terms of the kind of compensation that results. The question arose for the Vienna Convention when civil law and common law commentators debated the effects of those two remedies. The Vienna Convention buyer, it was rightly argued, can choose in every case of warranty breach which remedy is more advantageous to him. When he has made a bad bargain or when the market price of the goods has risen since the contract was concluded, damages will be more advantageous (if the market price is taken as the basis of calculation). In the opposite situation, the reduction of price will be more advantageous. [93] In the Vienna Convention the choice is unrestricted because the mere breach of the contract enables the other party to claim damages. But it was argued that in situations where the breach of warranty is beyond the seller's material control under article 79 CISG the buyer could only claim a reduction of price. The point was raised by Huber [94] who gives the example of a case where technical knowledge is not developed enough for the seller to do something about the defect. This reasoning would comfort the civil law view that when there isn't some kind of fault of the other party, no damages can be awarded. [95] This argument is somewhat puzzling in regard of the fact that most common law lawyers would not view warranty as being capable of becoming

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92 Partial invalidity in Swiss law sometimes goes some way towards the effects of a proportional reduction of each parties remedies. See article 20 II CO and, for instance, ATF 107 II 216 which corresponds to JT 1982 I 66.

93 Bergsten, Miller, *supra* note 66 at 260-263.

94 Huber, "Die UNCITRAL-Entwurf eines Uebereinkommens über International Warenkaufverträge", (1979) 43 Rabels Zeitschrift 165 at 413.

95 *ibid.*

impossible or frustrated. [96] The Quebec law approach to damages and warranty breach is very unsatisfactory as we have seen. But its general theory goes towards solving the problem of fault requirement by its consideration of the nature and intensity of obligations. This comforts the common law position on the matter which is that no fault is necessary for the seller to be liable in damages where the warranty duty is breached. Anyhow, even if one adopts Huber's point of view, the problem remains because the buyer is not prevented from choosing between reduction of price and damages when the seller is guilty of fault. [97] That way, the aim of the reduction of price remedy that is to restore the balance of the contract may be undermined in many cases. This criticism can be directed at the Vienna Convention as well as at the federal Tribunal's interpretation of the warranty remedies. The only meaningful role the remedy of reduction of price has left to play in these two legal systems is in a situation where a court decides that the requirement of fault or its equivalent barrs any remedy in damages. [98]

The Uniform Commercial Code and the Quebec civil Code have chosen to offer the buyer the same remedies for warranty and for contract breach. They went about it in different ways but the remedies offered are all a form of expectation damages and of specific performance. No synallagmatic remedies come into play. This avoids the problem of combining remedies that do not have the same goal. The choice between expectation damages and specific performance at the expense of the seller does not allow the buyer to seek the most interesting money gain. In both legal systems the courts have rules restricting that choice.

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96 See B. Nicholas, "Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods" in Galston and Smith, eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods,* Conference held by the Parker School of Foreign and Comparative Law, (New York: Columbia University 1984) at c. 5, 13.

97 In Swiss law there is of course a fault requirement for the award of damages. But although there is an important theoretical difference between strict and fault liability the practical difference is not so great. In civil law countries the concept of fault is very important but as it is usually presumed and that it includes all forms of negligence or lack of care, there seems to be little room left for situations not covered by both the Vienna Convention strict liability and the civil law fault liability.
G. Eörsi "A propos the 1980 Vienna Convention on Contracts for the International Sale of Goods" (1983) 31 American Journal of Comparative Law 333 at 354- 355 summarizes the problem very clearly.

98 Bergsten, Miller, *supra* note 66 at 275 argue that reduction of price serves also the purpose of encouraging a buyer who has made a bad bargain to claim that remedy rather than seek to avoid the contract.

III. NEGATIVE COMPENSATION REMEDIES

In this subsection it will be even more difficult than in the preceding one to compare Swiss law to our three systems. We will be comparing "camels with horses" [99], the camel, with all its exotism (!) being Swiss law. This area is the one where Swiss law is most different from the other systems we are comparing it to. What we are examining is the ending of the contract situation. Of course there are interesting comparisons to make between the mechanism used by every legal system to put an end to the contract. But again, our goal is to see what differences exist between Swiss and other law systems in their treatment of warranty and breach of contract remedies.

Negative compensation remedies are those that are designed, in Swiss law, to restore the buyer in the situation he would have enjoyed had the breached contract not been concluded. In that category, we can find rescission or termination of contract as well as reliance damages (*dommages-intérêts négatifs*).

Here we shall start with the presentation of the other systems we are comparing Swiss law with because they all clearly illustrate in the same way a trend towards harmonising warranty and contract breach remedies.

A. Other systems

In other systems we have a variety of equivalents to the Swiss law *résolution.* In addition, putting an end to the contract and claiming compensation for the breach is generally not a negative compensation but rather a positive compensation remedy that implies an award of expectation damages. But these other systems do not make any difference between warranty and general sale remedies. Quebec law, the Vienna Convention and the Uniform Commercial Code all have the same remedies and rules on remedies for ending the

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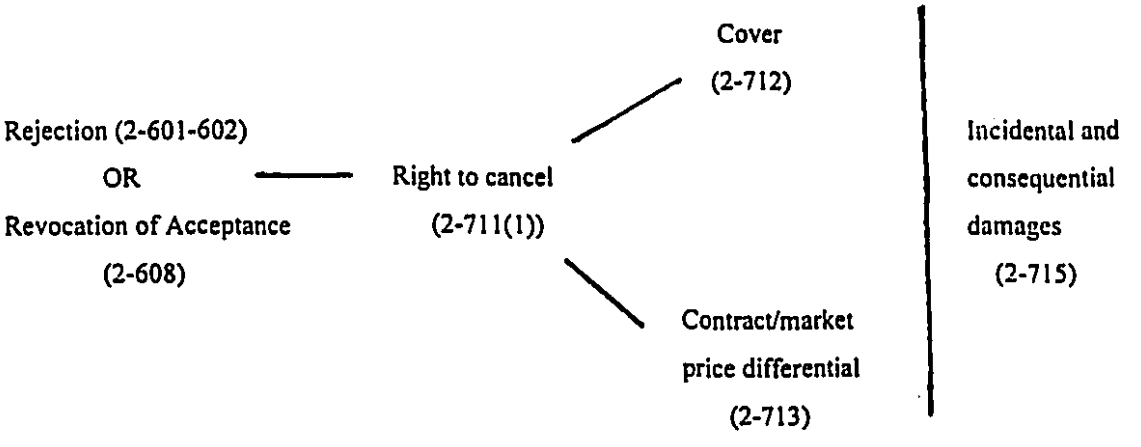
99 J. Honnold, "The New Uniform Law for International Sales and the UCC: A Comparison" (1984) 18 International Lawyer 21 at 28.

contract and compensating the buyer be it for breach of warranty or for any other kind of contract breach.

1) Uniform Commercial Code

The Uniform Commercial Code does not treat avoidance for breach of warranty differently from avoidance for breach of contract of sale. It is the intensity of the breach that determines the availability of that remedy not its quality. For contract **as well as for warranty breach**, the remedies of cancellation and damages combine as follows:



Section 2-711(1) UCC provides that the buyer can cancel the contract after having rejected the goods (sections 2-601, -602 UCC) or revoked acceptance (section 2-608 UCC). That will be the case if the breach is substantial. [100] That article says "The right to cancel should eliminate any duty to make further payments on the price". Furthermore, under the Uniform Commercial Code, rejection or revocation combined with cancellation

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100 From reading sections 2-601 and 2-609 UCC, the law seems to say that the rejection of the goods is possible if the goods are just slightly different from what was provided in the contract. The revocation of acceptance on the other hand can only be done if the non-conformity is "substantial". But the courts tend to interpret the two articles in the same way. As J. White and R. Summers, *Handbook of the law under the Uniform Commercial Code*, 3d ed. (St Paul, Minnesota: West Publishing 1988) at 304-305report "... the law would be little changed if 2-601 gave the right to reject only upon "substantial" nonconformity. Of the reported Code cases on rejection, none grants rejection on what could fairly be called an insubstantial nonconformity.".

allows for recovery of the purchase price (2-711(1) UCC) and consequential damages for breach of warranty (2-715(2)(a) UCC). Once the contract is cancelled, the buyer has the choice between buying substitute goods on the market and claiming the difference between their price and the contract price (cover) or directly asking for the difference between the contract and the market price. In addition, the buyer can claim compensation for all the expenses and losses the breach has caused him. There is no election of remedy in the common law sense, i.e. choice between consequential damages and cancellation of contract with a recovery of the price. Both can be obtained

According to Swiss contract law theory, the three remedies that emerge after cancellation of the contract under the Uniform Commercial Code are a form of **positive** compensation in the wider sense. Cover belongs to the specific performance remedies category and contract/market differential and consequential damages are forms of expectation damages.

2) Vienna Convention

Article 49 of the Vienna Convention sets out all the applications of avoidance:

> (1) The buyer may declare the contract avoided:
> (a) if the failure by the seller to perform **any of his obligations** under the contract or this Convention amounts to a fundamental breach of contract; or
> (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed buy the buyer ...or declares that he will not deliver within the period so fixed. (Emphasis added.)

This shows that avoidance is applicable to cases of non-delivery and to fundamental breaches, whatever the type of breach. That way, warranty breaches are treated in the same article as any other breach.

Avoidance and damages remedy all breaches of the contract of sale the same way. Except for non-delivery, the type of breach is irrelevant and only its intensity matters. When the seller has committed a "fundamental" [101] breach of the contract the remedy of avoidance is available to the buyer regardless of the type of breach committed:

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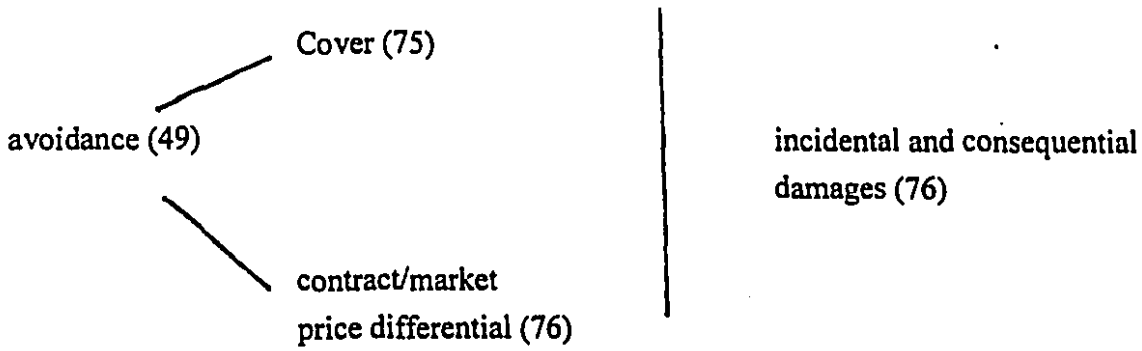
101 The concept of "fundamental breach" is defined in article 25 CISG (emphasis added):

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to



The remarks made about the Uniform Commercial Code remedies also apply to the Vienna Convention. All remedies following avoidance of the contract have a positive compensation aim. [102]

3) Quebec civil Code

The new civil Code of Quebec offers a general remedy that ends the contract. Article 1604 C.C.Q., paragraph 1 gives the creditor of a contractual obligation (see article 1590 C.C.Q.) the right to resolve the contract. Paragraph two restricts this remedy to cases where the default of the debtor is not "... of minor importance". This remedy is applicable to warranty breaches as well as to any other contract breach. As we have already seen, no warranty remedies are provided in the warranty rules. Therefore the general contractual remedies apply.

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expect under the contract, unless the party in breach did not foresee, and a reasonable person of the same kind in the same circumstances would not have foreseen, such a result.

Eörsi, *supra* note 97 at 336ff says quite rightly that such a vague concept cannot be explained otherwise than with an *idem per idem* definition. One could attempt to define it by listing all the possible cases of fundamental breach but of course this is impossible. Despite the abondance of criteria contained in article 25 CISG, it seems it will be up to the courts to define what a fundamental breach is in practice.

102 This is disputed by some authors for article 74 CISG on consequential damages. See Neumayer, Ming, *supra* note 41 at para. 1 ad art. 74, pages 487 et 488 who say that compensation following avoidance consists of the award of reliance damages. Yet the Vienna Convention expressly gives the party avoiding the contract a cover or contract/market differential remedy. Both remedies undeniably provide positive compensation. This indicates very clearly that the Vienna Convention follows the Uniform Commercial Code's principles on compensation and not the Swiss or the German law approach.

As we saw earlier, in Quebec law all damages are expectation damages. Their assessment is mostly up to case-law in Quebec. This has the advantage of flexibility but it can also be the source of uncertainty. [103] The civil Code does not talk of cover or contract/market differential but it is likely that they could be a measure of the positive compensation given to the buyer. In most cases the measure of damages should be the same for breach of sale and breach of warranty.
But again, we must stress that article 1728 C.C.Q. adds a knowledge requirement for the buyer to claim damages from the seller who has delivered defective goods.

B. Swiss law

Contrary to the above legal systems, the Swiss Code of obligation has one set of rules for termination of the contract following a breach of warranty and another for termination following any other contractual breach. Unfortunately, and again because of the special status of the warranty rules, the remedies of article 205 and 208 CO do not obey the same rules as general contract remedies.

1) Sale remedies

Article 109 of the obligations Code says:

> *1. Le créancier qui se départ du contrat peut refuser la prestation promise et répéter ce qu'il a déjà payé.*
> *2. Il peut en outre demander la réparation du dommage résultant de la caducité du contrat, si le débiteur ne prouve qu'aucune faute ne lui est imputable.*

This article deals with general sale remedies as well as with any other bilateral contract remedies. It gives the buyer two remedies for breach of contract by the seller: *résolution* and reliance damages.
In Swiss law, *résolution* has a very precise meaning although the Code of obligations does not give a definition of it [104] and some authors mix up the terminology from time to

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103 Judges are not always very strict in applying the expectation measure of damages as they do not know of the distinction between that measure of damages and the reliance measure.

104 The Code of obligations uses the term *résiliation* intead of *résolution*. However, nearly all authors

time. This concept has two main effects [105]: it puts an end to the parties' obligations that have not been executed and it transforms the contract into a liquidation of the effects of the contract relationship. [106] In other words, the contract comes to an end at the time of the declaration of *résolution* but what has been done until then stays valid. This means, for instance, that the property of the object of the sale has definitely been transferred to the buyer. The seller cannot claim to be the owner anymore; he only has an obligational right to the restitution of the property. [107] That obligational right, like all the other rights to restitution of the performed obligations, rests on the liquidation relationship that the *résolution* creates. That relationship retains the characteristics of a synallagmatic contractual bond because each party can retain its restitution performance if the other party does not want to execute his. [108] The final goal of the *résolution* is to undo the effects of the contract and to place parties, performancewise, in the situation they enjoyed before the contract was made. [109]

The damages that accompany the *résolution* are reliance damages ("... *dommage résultant de la caducité du contrat*"). That means not only that the buyer will have to be compensated for his expenses and losses but also for any profit he would have made on another contract had he not entered the breached one. He must be put in the situation he would have enjoyed had the breached contract not been made. From a practical point of view that might be difficult to prove. But this offers the buyer a complete compensation that is often equivalent to that of expectation damages.

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and the courts agree that it is a mistake of the legislator. The German version of the Code uses the word "*Rücktritt*" which confirms that the French version contains a mistake. See P. Engel, *Traité des obligations en droit suisse*, (Neuchâtel, Switz.: Ides et Calendes, 1973) at 494.

105 Stanislas, *supra* note 21 at 21.

106 See Neumayer, Ming, *supra* note 41 at para. 1 ad art. 81.

107 ATF II 61 255 which corresponds to the JT I 1936 143. I. Cherpillod, *La fin des contrats de durée*, (Lausanne, Switz.: CEDIDAC, 1988) at 78; *contra*: apparently ATF II 109 26 which corresponds to the JT I 1983 at 260; Cavin, *supra* note 29 at 96.

108 The defense of *non adimpleti contractus* found in article 82 of the Code of obligations applies to the restitution relationship, see ATF II 83 18, argument n° 7 which corresponds to the JT I 1957 392, argument n° 7.

109 See article 109 I CO.

2) Warranty remedies

Although it talks about a *résiliation*, Article 205 I CO sets out the buyer's right to a *résolution* of the sale if the seller has breached his warranty duty. That concept is exactly the same as the one found in article 109 CO and in all the other *résolutions* found in the Code. [110] Article 208 CO that provides the restitution and damages remedies is a little less easy to analyse:

> *1. En cas de résiliation de la vente, l'acheteur est tenu de rendre au vendeur la chose avec les profits qu'il en a retirés.*
> *2. Le vendeur doit restituer à l'acheteur le prix payé, avec intérêts,et, ... ,les frais de procès et les impenses; il indemnise, en outre, l'acheteur du dommage résultant directement de la livraison de marchandises défectueuses.*
> *3. Le vendeur est tenu d'indemniser aussi l'acheteur de tout autre dommage, s'il ne prouve qu'aucune faute ne lui est imputable.*

The last two paragraphs of this article have attracted a lot of criticism. First, paragraph 2 allows the buyer to claim damages even when the seller has not committed a fault. This is against general contract law theory. Secondly, these two paragraphs distinguish between damages directly or indirectly caused by the seller. Those two categories of damages (direct and indirect) were supposed to be completely eradicated from our Code in 1911 but the legislator forgot a few instances where it appears. Direct and indirect damages are difficult to separate from one another in the present as well as in the previous system and this has given rise to controversies. In order to give a modern interpretation to these notions some authors and the federal Tribunal [111] have contended that direct damages are equivalent to reliance damages and indirect damages to expectation damages. [112]

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110 Stanislas, *supra* note 21 at 80, 117-118.

111 ATF II 79 376 which corresponds to JT I 1954 381.

112 For a full discussion of that problem see Stanislas, *supra* note 21 at 136ff.

Discussion

All three systems we are comparing Swiss law with not only give the buyer the same remedies for breach of warranty and breach of contract but they also subject them to the same rules, with the unfortunate exception of Quebec law.

Swiss law, on the other hand, has again two different sets of rules for both types of breaches. Furthermore, the remedies given by these two sets of rules obey different principles. It is the warranty remedies that stand out as containing peculiar rules. One of them is the absence of a fault requirement for the damages remedies in article 208 CO. This is against the theories underlining Swiss contract law. [113] Certainly, the reliance damages of article 109 CO are not available to the buyer if the seller has not committed a fault. The another legal heresy found in the warranty remedies stems from the caselaw and doctrinal interpretation of direct and indirect damages contained in article 208 II and III CO. The Swiss legal system distinguishes clearly between the expectation interest (*intérêts positif*) and the reliance interest (*intérêt négatif*). The former is measured by comparing the actual financial situation of the aggrieved party with the situation he would have enjoyed had the breaching party correctly performed the contract. This measure of damages should only be awarded in situations where the contract is valid and has been maintained (neither terminated nor rescinded). [114] Reliance interest compensates the buyer for damages incurred because of his faith in the (continuing) validity of the contract. [115] This measure of damages is measured by comparing the actual financial situation of the aggrieved party with the situation he would have enjoyed had the breached contract never been made. [116] This means that the buyer will have to be compensated for his expenses and losses but also for any loss of profit he would have

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113 The only exception are the moratory interests that the creditor can seek from the debtor who is late in delivering the object of the sale, see article 102 CO.

114 Engel, *supra* note 104 at 484; Stanislas, *supra* note 21 at 39

115 Engel, *supra* note 104 at 495; Stanislas, *supra* note 21 at 45 who adds that "*...le comportement dommageable ne réside pas ici dans la violation d'un contrat, mais dans la tromperie ou l'éveil de la confiance en la validité d'un contrat efficace.*".
This type of interest is similar to the common law reliance interest.

116 ATF II 90 285 which corresponds to the JT I 1965 130.

made had he not entered the terminated contract. [117] Reliance interest rests on the logical premise that the contract is not standing anymore. [118] Article 208 CO, just as article 109 CO, applies to a situation where the contract is put to an end. Therefore the damages it provides can only restore the aggrieved party in the situation he would have enjoyed had there been no contract. Article 208 CO's direct and indirect damages must both be a form of reliance damages. This theoretically correct conclusion still leaves us with two categories of damages which do not exist in general rules on contract remedies. This is a very unsatisfactory situation.

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117 Stanislas, *supra* note 21 at 48ff.

118 The Code of obligations also gives reliance damages in cases where the contract is void or rescinded or even where the parties failed to conclude a contract. Generally, in all cases where there is no contract, only reliance damages are available.

CONCLUSION

The legal history of warranty rules has played an important role in the confusing characteristics of Swiss warranty remedies that are separate and different from breach of contract remedies.

In Roman law, warranty remedies did start out as a special and punctual police regulation. But even then the praetor used a civil law tool, the stipulation he made compulsory, to set up a warranty duty. And gradually the warranty duty became one of the seller's contractual duties through the requirement of good faith. The aedilician actions acquired a contractual character that enabled them to be absorbed by the *actio empti*. This remedy system would have provided a simple basis for a law on the contract of sale: whatever the breach, damages and termination of the contract would be the only remedies. Damages would take the form of reduction of price (the difference between the contract price and the price the buyer would have paid had he known about the breach) and of additional incidental and consequential damages if the seller was at fault. Rescission of the contract would remedy a breach rendering the seller's performance meaningless. That legal achievement was the logical development of rules on warranty remedies. Unfortunately, because of Justinian's traditionalism and of the confusion created by the multiple types of opinions dating from different periods in the Digest, the late classical Roman law evolution was not recogrised in the Middle Ages. Instead, a second set of aedilician remedies was created despite the existence of the ones the *actio empti* had absorbed. The movement of natural law tried to rationalise this area of the law by applying a principle developed by the late scholastics. Their idea was that in a synallagmatic contract all inequalities in the parties' performances had to remedied as breaches of contract. Delivery of defective goods was, of course, considered an instance of inequality. However, they did not find a solution to eliminate the uneasy coexistence of warranty and breach of contract of sale remedies. In the 19th century breach of warranty was still considered a breach of contract but the idea of performance equality was gone. Finally, the 1911 Swiss Code of obligations reverted to the Roman law

conception of warranty remedies that dated from the Edict. The legislator considered the warranty duty as a legal duty which had nothing to do with breach of contract rules. That explains why warranty rules are totally separate from other contract of sale rules. It also explains why warranty remedies all obey different principles from those that govern contract remedies.

However, the modern tendency of legal systems is to assimilate and simplify remedies. The Uniform Commercial Code and the new civil Code of Quebec are a good example of that trend. In both cases warranty and breach of contract of sale remedies are the same. They offer the same compensation measure and are of the same nature. The Uniform Commercial Code is, strangely enough, very close to the late classical Roman law conception because nearly all the remedies it provides are damages remedies. The Vienna Convention offers a choice of different kinds of remedies that are nearly the same for all contract breaches save for the reduction of price remedy. Furthermore, in the three systems we compare Swiss law to, the rules on remedies are mostly grouped in the same articles or sections of the law.

The Swiss Code of obligations contains a set of separate rules for warranty remedies. These rules were meant to be comprehensive and rule warranty remedies exclusively. They contain remedies that are different from general remedies for breach of contract and also similar remedies but with different effects. Furthermore, some remedies contained in the general rules do not find a match in the special rules. The overall impression those remedies give is that they are totally contrary to the general principles of contract remedies: they provide damages without fault; they distinguish between direct and indirect damages and offer the buyer a unique reduction of price remedy. One can wonder whether the nature of the warranty obligation really justifies a different *régime*. Other legal systems show that they do not. The only reason for the separate treatment of warranty rules is their historical evolution. This was clearly recognised for eviction remedies. Separate rules on eviction had a meaning in Roman law where the seller had no obligation to transfer ownership and where the good faith buyer of goods that did not belong to the seller could not acquire ownership. In modern Swiss law, the problem of eviction can be easily dealt with through the rules on contract breach. And in practice they are because those general rules are more advantageous to the buyer. Despite this, the legislator has incorporated the Roman law rules on eviction on the Code of obligations. [119]

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119 See H. Schönle, "Remarques sur la responsabilité causale du vendeur selon les art. 195 al. 1 et 208 al. 2 CO" 1977 Semaine Judiciare 465.

Let us now suppose the warranty remedies in Swiss law were all eliminated and let us examine how a warranty breach could be dealt with using only the general contract remedies.

For specific performance it would be easy to do away with the special warranty remedies. The delivery of substitute goods is an obvious form of specific performance for generic goods. The seller, when delivering faulty goods or goods of a different type, has not delivered the goods the parties had in mind. Article 71 CO that deals with individualisation of generic goods expressly says that the debtor must deliver an object of average quality. Courts would not need to distinguish anymore between the delivery of a wrong type of goods and the delivery of defective goods. Quebec law goes in that direction because it considers a defective performance as an absence of performance. The remedy of repair is also a natural extension of the principle that each party must perform its duties in kind despite all the controversy in Swiss literature. The Quebec civil Code recognises this principle as self evident.

Another form of specific performance could result from the application of article 98 CO. The principle of performance of the seller's duty by a third party at the expense of the seller is generally set out in this article. Applied to the contract of sale, it would mean that whether there is a contract or a warranty breach, the buyer could purchase substitute goods on the market or have a third party repair the goods. All these specific performance remedies, that are solely taken from general rules on contract, are even more powerful than those contained in the warranty rules. Furthermore, they apply to all contract breaches, whatever their type, in the same way.

Positive compensation remedies show another weakness of the Swiss Code of obligations warranty remedies. The federal Tribunal decided that warranty remedies did not provide sufficient positive compensation; consequently it imported the general contract breach remedy of expectation damages. If the warranty remedies were eliminated, the expectation damages remedies would naturally apply. Delivery of defective goods is without any doubt a form of defective performance covered by article 97 CO. The Uniform Commercial Code shows that expectation damages can take a wide variety of forms, such as market/contract differential, and adequately compensate the buyer.

Abandoning warranty remedies would mean that there would be no more reduction of price remedy. We saw that reduction of price if offered as an unrestricted alternative to expectation damages lead to unfair results. The buyer could get favourable compensation

by choosing between the two remedies according to the circumstances. So if reduction of price was dropped, expectation damages would be the only remedy in this category. Unfortunately in that situation a problem would arise because in Swiss contract law, damages can only be claimed if the debtor is at fault. Fault is defined as intent to breach or as negligence. Such a narrow conception of fault would often leave the buyer of defective goods with no positive compensation remedy. To counter this argument there are two alternatives:

- either Swiss law should import the Quebec law general remedy of reduction of correlative obligation and really consider it as a synallagmatic remedy. This would be in conformity with the strong synallagmatic nature of some remedies in Swiss law. The resolution remedy of article 109 CO is a pure form of synallagma and is available to the parties in the absence of fault. This is also the case of the *exceptio non adimpleti contractus*;
- or Swiss law should import the Quebec law notion of obligation breach and fault. This would mean that for warranty obligations, the mere breach would amount to a fault.

The first alternative has the advantage of respecting the general principles of Swiss contract law where synallamatic remedies are important. But it does not solve the problem of the unrestricted choice of the buyer between reduction of price and damages where the seller is at fault unless synallagmatic remedies become restricted to cases where the seller is innocent of the breach. The creation of a general synallagmatic remedy of reduction of correlative obligation would demand some adjustments to apply smoothly to all bilateral contracts. This could create more problems than it solves.

The second alternative would also shake general contract law theory. But a new conception of what a contractual duty encompasses would make Swiss law evolve towards a general rationalisation. It might eliminate some of the need for detailed provisions on nominate contracts. This new definition of contract breach and contractual fault would mean that the seller could be liable in damages even without a fault. The need for the remedy of reduction of price would then disappear. Indeed expectation damages or specific performance by a third party compensate the buyer very adequately in case of a warranty breach.

There could also be a combination of the two alternatives as in the new Quebec Civil Code but with real synallagmatic remedies and no special requirement for damages following a breach of warranty.

The negative compensation remedies show how the separation of warranty remedies from general contract breach remedies created acute problems. Although the remedies provided by each set of rules are similar, their effects are different. Warranty remedies obey rules that are contrary to Swiss contract law. The award of damages in article 208 II CO absent a fault of the seller is a notorious heresy. So is the doctrinal and judicial conception that article 208 CO distinguishes between reliance and expectation damages in a case where the contract is put to an end. It is amazing that the legislator has given such strange effects to a remedy that is found in the general part of the Code of obligations. And there are no rational reasons for having done so. Article 109 CO grants the remedy of resolution of the contract even if the debtor has not committed a fault. Reliance damages, as all damages in Swiss law, necessitate a fault of the debtor. That general remedy appears perfectly adequate to compensate the buyer aggrieved by the delivery of seriously defective goods save for the fault requirement. However if we adopt the Quebec law notion of fault, all damages remedies would be available for breach of warranty even if the seller was unaware of the defect.

Swiss law has very interesting characteristics such as the distinction between positive and negative compensation remedies and they should be retained. But a comparative study shows that there is no reason for maintaining separate warranty remedies in Swiss law. General breach of contract remedies could, with some adjustments, adequately be used for breach of warranty.

De lege lata, all warranty remedies could be interpreted as being the same as general remedies. Of course, it might mean finding imaginary omissions of the legislators such as the remedy of repair or widening the interpretation of article 98 CO on specific performance at the expense of the debtor. It might also mean making many *contra legem* interpretations, in particular for article 208 CO.

De lege ferenda all warranty remedies should be wiped away without regret and we should change our view on fault liability and on the nature of contractual duties. There would remain only the following remedies for breach of contract and breach of warranty:

CONTRACT BREACH REMEDIES	WARRANTY BREACH REMEDIES
specific performance (19, 97 and 107 CO)	- **delivery of substitute goods** (19, 97 and 107 CO) - **repair** (19, 97 and 107 CO)
specific performance by a third party at the expense of the debtor (98 CO)	- **cover** (98 and see 191 II CO) - **cost of repair** (98 CO)
Reduction of correlative obligation (?)	- **reduction of price**
expectation damages (97 CO)	- **expectation damages** (97 CO) for instance market/contract price differential (see 191 III CO).
resolution with or without **reliance damages** (109 CO)	- **resolution** with or without **reliance damages** (109 CO)

This chart is certainly not the only alternative to a Swiss legal system freed from special warranty remedies. The Swiss legal doctrine could find many other satisfactory combinations of remedies to replace warranty remedies. However this chart clearly shows that such a system could easily survive without special warranty remedies. Furthermore Swiss contract law could benefit from more rational and more up to date principles and theories on contractual liability.

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