



Piia Kalamees

Magister artium, Lecturer of Civil Law

University of Tartu

Hierarchy of Buyer's Remedies in Case of Lack of Conformity of the Goods

1. Introduction

If a buyer has received from the seller goods that do not conform to the contract, the buyer has, as a rule, recourse to several remedies. According to the Estonian Law of Obligations Act^{*1} (hereinafter referred to as the LOA), if relevant prerequisites are fulfilled, the buyer can have recourse to the following remedies:

- claim the performance of the contract through replacement or repair of the thing (LOA §222),
- withhold performance (LOA §111),
- claim compensation for damage (LOA §115),
- terminate the contract (LOA §116 (1)) or
- reduce the price (LOA §112).

The Estonian regulation of sales contracts has been largely founded on the United Nations Convention on Contracts for the International Sale of Goods^{*2} (hereinafter referred to as the CISG), but also on the German, Dutch, Swiss, Italian, etc. law provisions concerning contracts of sale of goods.^{*3} Directive 1999/44/EC^{*4} (hereinafter referred to as the Consumer Sales Directive) has served as the basis regarding contracts entered into with consumers.^{*5} At the same time, the provisions of the Consumer Sales Directive have not always been adopted solely in regard to the regulations on consumer sales but often also in regard to the provisions that are applied to all sales contracts.^{*6}

This article focuses on the question of whether the buyer has (both in cases where the buyer is a consumer and where he is not) the right to freely choose between the remedies available to him in the case of defective goods or whether his choice is limited according to the LOA. This question is of interest, above all, with regard to the attempts to harmonise the regulation of consumer rights in the European Union.

¹ Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 4.4.2011, 3 (in Estonian).

² RT II 1993, 21/22, 52.

³ 116 SE I. Võlaõigusseadus (Law of Obligations Act. Draft). Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itimid=991610001&login=proov&password=&system=ems&server=ragne11> (28.3.2010) (in Estonian).

⁴ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. – OJ L 171, 7.7.1999, pp. 12–16.

⁵ 116 SE I. Law of Obligations Act. Draft (Note 3).

⁶ See, e.g., LOA §222 (demand for performance of contract as a remedy), §223 (fundamental breach of contract by the seller).

Namely, the text of the new draft Directive on consumer rights^{*7} (hereinafter referred to as the draft Directive) published in 2008 prescribed the hierarchy of remedies of the buyer like the currently applicable Consumer Sales Directive does.^{*8} Moreover, according to Article 4 of the draft Directive, the Directive was aimed at maximum harmonisation. The issue of the hierarchy of the buyer's remedies has been excluded from the current text of the directive adopted by the European Parliament.^{*9} However the establishment by a directive of such a hierarchy in all the European Union Member States has been considered for a long time. In several Member States the latter would have brought about a reduction in the level of protection of consumer rights.^{*10}

At the same time, on 3 May 2011, the text of the draft version of an Optional Instrument^{*11} (hereinafter referred to as the Optional Instrument) was published, which the European Commission could use as a 'toolbox' in the further regulation of European contract law.^{*12} The latest text of the draft version of the Optional Instrument was published on 19 August 2011.^{*13} According to its Article 107 (3) 1), the consumer may use any remedies mentioned in the instrument without granting the seller an option to cure. Hence, it is recommended by the Optional Instrument to provide for the absence of hierarchy of the consumer's remedies and in addition to that also for the right of the consumer not to grant the seller a possibility to cure his non-performance.

This article shows that according to the LOA, both a buyer who is a consumer and a buyer who is not a consumer have in case of defective goods the right to freely choose a remedy suitable for him subject only to right of the seller to cure the non-performance. This means that the LOA lacks a hierarchy of the buyer's remedies. The hierarchy of remedies would exist if the buyer was able to use other remedies only after he claimed from the seller performance through replacement or repair (LOA §222 (1)), or granted an additional time for the performance of the obligation (LOA §114 (1)).^{*14} It will also be demonstrated below that the rights of the buyer and the seller are balanced provided that the remedies used by the buyer are not in hierarchy but the buyer's opportunity to resort to any of the remedies is limited solely by the seller's right to cure his non-performance.

2. General rule on the buyer's choice of remedy

A general rule on the freedom to choose a remedy is contained in LOA §101 (2). According to that rule, in the case of non-performance, the obligee may resort to any remedy separately or resort simultaneously to all remedies which arise from law or the contract and which can be invoked simultaneously, unless otherwise provided by law or the contract. Hence it could be concluded that a buyer who has received from the seller defective goods should, as a rule, be able to independently decide to which of the above-mentioned remedies he wishes to resort. However before assuming such a position, it must be identified if, in the case of the sale of defective goods, the law contains special provisions providing for a hierarchy of remedies. In addition it should be noted that the parties are free to agree upon the sequence of using remedies in the contract and thus the right of the buyer to choose the remedy may be subject to such contractual restraints. The latter topic is however not addressed in this article.

⁷ COM(2008) 614, 8.10.2008.

⁸ Proposal for a Directive of the European Parliament and the Council on Consumer Rights COM (2008) 614 final. Explanatory Memorandum; Proposal on Consumer Rights Directive, preamble, No. 4, p. 3.

⁹ European Parliament legislative resolution of 23 June 2011 on the proposal for a directive of the European Parliament and of the Council on consumer rights (COM(2008)0614 – C6-0349/2008 – 2008/0196(COD)). Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0293+0+DOC+XML+Vo//EN&language=EN#BKMD-21> (25.7.2011).

¹⁰ K. Lilleholt. Notes on the Proposal for a New Directive on Consumer Rights. – European Review of Private Law 2009/3, p. 338.

¹¹ A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' Feedback. Available at http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf (24.5.2011).

¹² *Ibid.*, p. 8.

¹³ Available at http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf (5.10.2011).

¹⁴ E.g., M. Schmidt-Kessel is in the same position concerning the furnishing of the notion of hierarchy with the content. The Right to Specific Performance under the DCFR. – G. Wagner (ed.). The Common Frame of Reference: A View from Law and Economics. Sellier 2009, p. 85.

The comments on the LOA note about the hierarchy of remedies that in the case of lack of conformity of a thing, the buyer can only request from the seller the performance of the contract under LOA §222 (1) and as a rule other remedies are secondary.^{*15} The EC Consumer Law Compendium sets out that Estonia has adopted the hierarchy of remedies that enables the consumer first to request only replacement or repair.^{*16} However, it remains questionable on what bases the positions described have been assumed, as the LOA contains no specific provision establishing such hierarchy.

As mentioned before, the freedom of the obligor to choose a remedy can be limited by the law itself, as provided in LOA §101 (2).^{*17} The regulation of termination of the contract (LOA §116 (1)) and reduction of price (LOA §112 (1)) in the case of sales contracts will be analysed below in order to trace any references to a hierarchy of remedies. One of the arguments supporting the existence of a hierarchy of remedies has been claimed to be the fact that the Consumer Sales Directive that served as one of the sources when drafting the relevant provisions of the LOA provides for a hierarchy of remedies in the case of defective goods.^{*18} Pursuant to Article 3 of the Directive, the buyer's primary remedies are the claim for replacement and repair, between which the consumer can choose^{*19}, and only after the replacement or repair become impossible or have not been carried out in timely manner or have brought about significant inconvenience for the consumer can the consumer resort to other remedies.^{*20} The Directive does not provide for the seller's opportunity to cure the non-performance.^{*21} This article limits itself only to the regulation of the termination of the contract and the reduction of the price, because termination and reduction of the price are secondary remedies according to the Consumer Sales Directive. At the same time, the Consumer Sales Directive does not regulate issues related to compensation for damages. Because of this and the volume of the article, the aspects of compensation for damage are not addressed here. Besides, the provisions governing the buyer's remaining remedies in the Chapter of the LOA on the sales contract lack references to the potential hierarchy of remedies.^{*22}

3. Buyer's right of termination in system of remedies

3.1. Regulation of the buyer's right of termination in LOA

According to LOA §116 (1), a fundamental breach of contract serves as a precondition for the termination of a contract. There are no other preconditions (e.g., grant of an additional term before termination) arising from LOA §116 (1).

LOA §116 (2) provides an illustrative list of circumstances considered as a fundamental breach of the contract.^{*23} LOA §116 (2) 1)–4) list the types of non-performance by an obligor that are regarded as

¹⁵ P. Varul *et al.* *Võlaõigusseadus II. Kommenteeritud väljaanne* (Law of Obligations II. Commented Edition). Tallinn: Juura 2007, p. 37 (in Estonian).

¹⁶ H. Schulte-Nölke, M. Ebers (eds.). *EC Consumer Law Compendium. The Consumer Aquis and its Transposition in the Member States*. Sellier 2008, p. 427.

¹⁷ P. Varul *et al.* *Võlaõigusseadus I. Kommenteeritud väljaanne* (Law of Obligations Act I. Commented edition). Juura 2006, p. 321 (in Estonian).

¹⁸ See M. Kingisepp. *Tarbijakaitseõigus Euroopa Liidus ja Eestis* (Consumer protection law in the European Union and Estonia). Läte 2011, p. 232 (in Estonian).

¹⁹ M. Loos. *Consumer Sales Law in the Proposal for a Consumer Rights Directive*. – *European Review of Private Law* 2010/1, p. 37; C. Twigg-Flesner. *Fit For Purpose? The Proposals on Sale*. – *Modernising and Harmonising Consumer Contract Law*. G. Howells, R. Schulze (eds.). Sellier 2009, p. 159; E. Grabitz, M. Hilf, M. Nettesheim. *Das Recht der Europäischen Union*. München 2009, Article 3, margin No. 20; R. O. Sale. *Italianische Rechtsprechung zum Gemeinschaftsprivatrecht – Der Verbrauchsgüterkauf zwischen Haftung des Verkäufers für Vertragswidrigkeit und Schutz des Verkäufers nach der Geltendmachung der dem Verbraucher zustehenden Rechtsbehelfe*. – *GPR* 2010/3, p. 146.

²⁰ M. Loos (Note 19), p. 36; C. M. Bianca, S. Grundmann. *EU Sales Directive. Commentary*. Intersentia 2002, p. 159, 168; Directorate General for International Policies. *The Potential Impact of the Consumer Rights Directive on Member States' Contract Law*, 2009, p. 25. Available at http://www.directsellingeurope.eu/public/Analysis_and_background_documents/European%20Parliament%20-%20study_ConsRights_ImpactMS_09.pdf (7.4.2011).

²¹ M. Schmidt-Kessel. *Remedies for Breach of Contract in European Private Law*. – R. Schulze. *New Features in Contract Law*. Sellier 2007, p. 195.

²² Here LOA §222 serves as an exception, providing for in its subsection 2 that when choosing between the replacement and repair of the thing, the buyer may in first place claim the repair if the given contract of sale is not a contract of consumer sale. However, the provision does not have a wider impact on the buyer's right to use different remedies.

²³ V. Kõve. *Draft Common Frame of Reference and Estonian Law of Obligations Act: Similarities and Differences in the System of Contractual Liability*. – *Juridica International* 2008 (XIV), p. 204.

fundamental. Thus, for example, according to LOA §116 (2) 2), a breach of contract is fundamental if strict compliance with the obligation which has not been performed is the precondition for the other party's continued interest in the performance of the contract, and according to LOA §116 (2) 3), if non-performance of an obligation was intentional or due to gross negligence. LOA §116 (2) 5) sets out that a breach of contract is fundamental also if the other party fails to perform any obligation thereof during an additional term for performance granted by the obligee or gives notice that he will not perform the obligation during such term. Hence, LOA §116 (2) 5) enables the obligee to terminate the contract also upon a non-fundamental breach if the obligor does not eliminate the breach during the specified term.^{*24}

Although in the event indicated in LOA §116 (2) 5), the obligee must essentially require performance of the obligation before termination of the contract, this does not serve as a general prerequisite for the right to termination. It only provides for an additional possibility for the termination of the contract in cases where grounds of fundamental breach of the contract would in normal circumstances be denied. Hence, if it is not possible to prove that the obligor has failed to perform an obligation in a manner that would allow to consider his breach fundamental as defined in LOA §116 (2) 1)–4), the obligee may nevertheless turn the obligor's breach of contract into a fundamental breach by requiring performance of the obligation within an additional term. LOA §116 (2) 5) is of considerable practical importance as it enables the obligee to free himself of the uncertainty about whether the non-performance by the obligor can be regarded as fundamental.^{*25} Taking into account that the wording of the situations of fundamental breach of contract listed in LOA §116 (2) 1)–4) are rather general, it is often advisable in practice to grant the obligor an additional term for performance before terminating contract. Despite the abovementioned, the author of this article is not of the opinion that the objective of LOA §116 (2) 5) is to establish a hierarchy among the remedies, but the idea is rather to give the obligee an additional opportunity to demonstrate the fundamental nature of the non-performance by the obligor.

In the event of fundamental breach of contract as defined in LOA §116 (2) 1)–4), the buyer should be entitled to terminate the contract by submitting a timely declaration of termination and the previous claim for performance does not serve as a prerequisite for the right of termination (there is no hierarchy between the two remedies). The buyer's immediate right of termination is in certain cases limited only by LOA §116 (4), according to which termination of a contract without granting an additional term for performance is prohibited if the damage suffered by the non-performing party in the case of the termination would be disproportionate in relation to the expenses incurred in the performance or preparation for the performance of the obligation. However, terminating the contract without granting an additional term is permitted in the event of non-performance of an obligation specified in §116 (2) 2)^{*26} or if the other party gives notice that the party will not perform the obligation thereof (the second sentence of LOA §116 (4)). Consequently, a buyer who wishes to terminate the contract must generally consider whether the termination would cause disproportionate damage to the seller in relation to the expenses incurred in the performance or preparation for the performance of the obligation. If the exercise of the right of termination would cause such damage and the situations specified in the second sentence of LOA §116 (4) are not present, the buyer must grant the seller an additional term for performing the obligation (essentially demand performance before terminating the contract). Since it can be difficult for the buyer to foresee the damage incurred by the seller, it has generally been considered advisable to grant an additional term before termination.^{*27} Yet, it has been noted in legal literature about LOA §116 (2) and (4) that the effect of the provisions on each other remains unclear.^{*28}

Based on the above, the author is of the opinion that according to the regulation of the termination of the contract contained in the general part of the LOA, the buyer is not, as a rule, obliged to grant an additional term for the seller to perform the obligation and, as a result, there is no hierarchy between the claim for performance and the right of termination. Nevertheless such a hierarchy may arise in regard to specific

²⁴ It is not, however acceptable, to allow for termination under LOA §116 (2) 5) if the breach is of inferior importance in respect of the entire contract. P. Varul *et al.* (Note 17), p. 402.

²⁵ P. Varul *et al.* (Note 17), p. 402.

²⁶ According to LOA §116 (2) 2), breach is a fundamental breach of contract if strict compliance with the obligation which has not been performed is the precondition for the other party's continued interest in the performance of the contract.

²⁷ P. Varul *et al.* (Note 17), p. 402.

²⁸ V. Kõve (Note 23), p. 204.

circumstances emerging in practice and in such cases it may be necessary to grant the obligor an additional term for performance based on LOA §116 (2) 5) or (4).

However, there is often no need for a buyer receiving goods that lack conformity to demonstrate a fundamental breach of the seller based on LOA §116. Namely, in the case of a sales contract, LOA §223 (1) and (2) complement the list provided in LOA §116 (2) with additional cases of a fundamental breach of the contract.^{*29} According to LOA §223 (1), the seller is deemed to be in fundamental breach of the sales contract also if

- 1) the repair or replacement of a thing is not possible or fails;
- 2) the seller refuses to repair or replace a thing without good reason, or
- 3) the seller fails to repair or replace a thing within a reasonable period of time after the seller is notified of the lack of conformity.

Pursuant to the third alternative of LOA §223 (1), the seller is already in fundamental breach of his obligations if he fails to give notice of his intention to cure at his own initiative within a reasonable period of time (LOA §107^{*30}). The same position has been expressed by the Supreme Court, noting that according to LOA §223 (1) it is not only the case where the claim of the buyer for repair or replacement of the goods has not been fulfilled by the seller that constitutes a fundamental breach.^{*31}

Pursuant to LOA §223 (2), in the event of consumer sale, any unreasonable inconvenience caused to the buyer by the repair or replacement of a thing is also deemed to be a fundamental breach of the contract by the seller. The situation of such significant breach of contract as described above can only occur if the buyer has demanded from the seller performance of the obligation (LOA §222 (1)) or the seller has undertaken to cure the breach at his own initiative (LOA §107).

If the breach of contract is fundamental, as defined in LOA §223 (1) or (2), then LOA §223 (3) enables the buyer to terminate the contract without granting the seller an additional term for performing the obligation. This provision once more reinforces the principle arising from LOA §116, according to which the buyer is not obliged to grant the seller an additional term for performing the obligation as a precondition for terminating the contract in the case of a fundamental breach of contract.^{*32}

Based on the above, one can assume the position that there is generally no hierarchy between the claim for the replacement or repair of the goods and the termination of the contract as remedies in the event of a fundamental breach of the contract. Provided that the preconditions for resorting to these remedies are met, the buyer can choose termination as the first remedy to be used. The buyer must naturally take into account the principle of good faith set out in LOA §6 and General Part of the Civil Code Act^{*33} (hereinafter referred to as the GPCCA) §138. This means that one cannot terminate the contract when one acts in bad faith while exercising the right to terminate.^{*34} At the same time the buyer's obligation to act in good faith when terminating the contract certainly does not make the claim to perform the obligation (LOA §222 (1)) a primary remedy and the right of termination a secondary remedy.

²⁹ P. Varul *et al.* (Note 15), p. 63.

³⁰ According to LOA §107 (1), a party who fails to perform a contractual obligation may cure the non-performance, including improving or replacing defective performance, as long as the other party has not terminated or cancelled the contract or demanded compensation for damage in lieu of performance, provided that:

- 1) cure is reasonable in the circumstances, and
- 2) cure does not cause unreasonable inconvenience or expenses to the injured party, and
- 3) the injured party has no legitimate interest in refusing cure.

According to subsection 3 of the same section, the injured party may withhold performance as of receipt of the notice of cure until completion or failure of the cure. During the time for cure, the injured party may use other remedies only if these are not inconsistent with the cure.

³¹ CCSCd, 3-2-1-11-10, paragraph 11. – RT III 2010, 11, 80 (in Estonian).

³² See also P. Varul *et al.* (Note 15), p. 64.

³³ Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; RT I, 06.12.2010, 12 (in Estonian).

³⁴ P. Varul *et al.* (Note 17), p. 402.

3.2. Buyer's right to terminate in CISG, DCFR^{*35}, Consumer Sales Directive, German Civil Code^{*36} and Optional Instrument

The above position is also supported by the sources serving as the basis for the regulation of the termination of the sales contract in the LOA. For example, CISG Article 49 (1) a) provides for the buyer's opportunity to avoid the contract if the object of the contract is defective. According to this, the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations amounts to a fundamental breach of the contract. The wording of the provision, or the provision in conjunction with the other provisions of the CISG, does not suggest that the buyer should have previously claimed replacement or repair of the goods. Hence, the CISG is also subject to the rule that the termination may be the first remedy to be used by the buyer^{*37}, while the seller can limit the opportunity of the buyer to resort to it only by exercising his right of cure (CISG Article 48).^{*38}

Chapter 4 of Part A in Book IV that governs contracts for sale in the DCFR does not provide for major differences compared to the general regulation of remedies in the DCFR.^{*39} Article III.-3:502 (1) of the DCFR gives grounds for termination; according to it, the creditor may terminate the contract if the debtor's non-performance of a contractual obligation is fundamental. In the case of deficiencies that represent a fundamental breach of the contract, the buyer can resort to termination of the contract as a primary remedy and need not first claim replacement or repair or grant an additional term for the performance of the obligation. Hence, the rule is that the buyer can choose any remedy if the necessary preconditions exist.^{*40}

The regulation of BGB §440^{*41} and Articles 3 (3) and (5) of the Consumer Sales Directive that served as the basis for drafting the relevant provisions on the contract of sale in the LOA differ from those described. The main difference here is that pursuant to both the Consumer Sales Directive^{*42} as well as BGB §440^{*43} the previous claim for the replacement or repair of the goods and the failure to satisfy the claim by the seller generally serves as a precondition for the buyer's right of termination.^{*44} Thus termination is a secondary remedy according to the Consumer Sales Directive as well as the BGB. However as the Consumer Sales Directive requires minimum harmonisation^{*45}, the regulation of the LOA diverging from the Directive in favour of the buyer is allowed with regard to consumer sales and in accordance with the EU law.

The above once more confirms the author's opinion that pursuant to the LOA, the buyer who received non-conforming goods need not as a rule claim performance before exercising the right of termination if the breach is fundamental. Namely, in the BGB and the Consumer Sales Directive, the hierarchy of remedies arises directly from the wording of the provisions concerned. As demonstrated, the wording of the LOA does not point to such a hierarchy. Hence, the approach chosen in the LOA is similar to that of the CISG^{*46}, and according to this, the buyer usually has the freedom to choose between different remedies.

Article 115 of the Optional Instrument does not prescribe the previous claim for performance as a precondition for the exercise of the buyer's right of termination either. Unlike the regulation of the LOA,

³⁵ C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Interim Outline Edition.* München: Sellier 2009.

³⁶ *Bürgerliches Gesetzbuch*, adopted on 18.8.1896. – RGBL., p. 195.

³⁷ P. Schlechtriem, I. Schwenzer. *Commentary on the UN Convention on the International Sale of Goods (CISG)*. 3rd ed. Oxford University Press 2010, Article 45, comment 12; T. Bachmann. *Die elektive Konkurrenz.* Berlin: Duncker & Humboldt 2010, p. 238; A. Mittmann. *Einheitliches UN-Kaufrecht und Europäische Verbrauchsgüterkauf-Richtlinie.* Peter Lang 2004, p. 135.

³⁸ K. Lilleholt (Note 10), p. 338; B. S. Markesinis, H. Unberath, A. Johnston. *The German Law of Contract. A Comparative Treatise.* 2nd ed. Hart Publishing 2006, p. 389.

³⁹ M. Loos (Note 19), p. 27.

⁴⁰ *Ibid.*, p. 28.

⁴¹ P. Varul *et al.* (Note 15), p. 63.

⁴² M. Loos (Note 19), p. 37; E. Grabitz, M. Hilf, M. Nettesheim (Note 19), Article 3, margin No. 20.

⁴³ H. P. Westermann. *Münchener Kommentar zum BGB.* 5. Aufl. München: Verlag C. H. Beck 2008, §440, margin No. 3, 5.

⁴⁴ *Ibid.*, §434, margin No. 47; H. Amann, G. Brambring, C. Hertel. *Der Schuldrechtsferorm in der Vertragspraxis.* München: Verlag C. H. Beck 2002, p. 114; S. Lorenz. *Selbstvornahme der Mängelbeseitigung im Kaufrecht.* NJW 2003, 1417; U. Verwey. *Die Käufrechtsbehelfe des UN-Kaufrechts im Vergleich zu denen des neuen internen deutschen Handelskaufsrechts aus Sicht eines deutschen Warenexporteurs.* Peter Lang 2005, p. 72.

⁴⁵ H. Schulte-Nölke, M. Ebers (eds.) (Note 16), p. 427.

⁴⁶ H. Sivesand. *The Buyers Remedies for Non-Conforming Goods. Should There be Free Choice or are Restrictions Necessary?* Vol 2. Sellier 2005, p. 127.

according to Article 115 (2) of the Optional Instrument, the consumer may terminate the contract in case of non-conformity of the goods, unless the non-conformity is insignificant. In case of non-consumer sales, subsection 1 still provides for fundamental breach as a precondition for termination. Thus under the Optional Instrument in the case of a consumer sale, the buyer enjoys a considerably wider opportunity of terminating the contract than permitted by the legislation and model act described above.

The absence of hierarchy between the buyer's right of termination and the claim for performance as described above helps appropriately balance the rights of the buyer and the seller. For example, it is possible that a fundamental breach by the seller is so serious that the buyer has lost trust in the seller. In such a case, it is reasonable to enable the buyer to terminate the contract immediately without compelling him to submit an additional claim.^{*47} The buyer may also incur additional damage or inconvenience over time while he is waiting for the replacement or repair.^{*48}

4. Buyer's right to reduce the price in LOA's system of remedies

The general regulation concerning the reduction of the price is in LOA §112. According to subsection 1, a party may reduce the price, if the party accepts defective performance. This section does not require the obligee to grant an additional term (LOA §114) for the obligor to perform the obligation before reducing the price. Yet, it has been established that the obligation to grant an additional term may in certain cases arise from the principle of good faith (LOA §6, GPCCA §138).^{*49} However, granting an additional term for the performance of an obligation is not, as a rule, a precondition for the obligee to reduce the price.

When it comes to reducing the price, an additional regulation^{*50} is provided by LOA §224, according to which the buyer may not reduce the purchase price:

- 1) if the seller repairs the thing or replaces it (clause 1);
- 2) if the buyer unreasonably refuses to accept the proposal of the seller concerning the repair or replacement of the thing (clause 2), or
- 3) upon the purchase of a used thing which is sold by public auction (clause 3).

According to legal literature clauses 1 and 2 essentially preclude the reduction of the price by the buyer if the seller is willing to repair or replace the non-conforming goods and does it within a reasonable period of time.^{*51}

LOA §224 2) precludes the buyer's right to reduce the price if the seller has offered cure (LOA §107). Clause 1 precludes the buyer's opportunity to reduce the price if the seller has cured the non-performance or the buyer has claimed replacement or repair and the seller has satisfied the relevant claim. Hence, the provision does not oblige the buyer to claim replacement or repair of the goods before reducing the price. In other words, the wording of LOA §224 does not presume that the buyer has claimed the replacement or repair of the goods prior to the reduction of the price. However, proceeding from the above, one must agree with the position taken in the comment on the LOA that the seller's right to replace or repair (to cure within the meaning of LOA §107) the non-performance has priority over the right of the buyer to reduce the price.^{*52}

The opinion that the buyer need not claim replacement or repair of the non-conforming goods before reducing the price is also supported by CISG Article 50 that serves as an example for drafting the relevant provisions of the LOA. Pursuant to the second sentence of Article 50, the buyer's right to reduce the price is precluded if the seller cures any failure to perform his obligations or offers cure and the buyer refuses it without good reason. This means that even if the buyer has made a declaration of price reduction along with the notice of lack of conformity of the goods, the seller may still replace or repair the goods.^{*53} Therefore,

⁴⁷ M. Loos (Note 19), p. 41.

⁴⁸ *Ibid.*, p. 40.

⁴⁹ P. Varul *et al.* (Note 17), p. 374.

⁵⁰ P. Varul *et al.* (Note 15), p. 65.

⁵¹ *Ibid.*

⁵² In relation with the contractor's liability for work that lacks conformity with the contract, this has been stated by the Supreme Court in its decision 3-2-1-148-08, paragraph 12. – RT III 2009, 10, 73 (in Estonian).

⁵³ P. Schlechtriem, I. Schwenzer (Note 37), Article 50, comment 7.

CISG Article 50 does not impose the previous claim for replacement or repair as a precondition for reduction of price (Article 46 (2) and (3)).⁵⁴

Just as in the LOA, price reduction is not a secondary remedy in the DCFR either. As in Estonian law, the right to price reduction in the DCFR is limited only by the seller's right to cure the non-performance (through replacement or repair of the goods).⁵⁵ The regulation found in the Optional Instrument is generally similar. Article 121 of the Optional Instrument does not impose on the buyer the obligation to claim performance before reduction of the price. The regulation of the BGB on the other hand differs from the above by setting out the priority of the claim for performance over the right of price reduction.⁵⁶ The relevant regulation of the BGB, however, has not served as a source for drafting LOA §224.⁵⁷

The regulation according to which the price reduction is not a secondary remedy must be regarded as appropriate. In such a case, the buyer retains the opportunity to keep the defective goods, if he so wishes (and if the seller does not wish to cure his non-performance) and start to use them immediately without having to claim the repair or replacement of the goods, which can be time-consuming.

5. Impact of the seller's right to cure on buyer's right to terminate the contract and reduce the price

From the seller's point of view, the buyer's freedom to choose without limitations a remedy suitable for him brings about a degree of uncertainty and can disproportionately damage the seller's rights. As demonstrated before, according to the Consumer Sales Directive⁵⁸ and BGB⁵⁹, the seller is protected against the negative consequences that could be inflicted on him through granting priority to the claim for performance. In both instruments, the legislator has aimed at keeping the contract unchanged, i.e. as it was concluded between parties, for as long as possible (*pacta sunt servanda*).⁶⁰

This has also been the goal of the Estonian legislator when drafting the LOA⁶¹, but the means to achieve the goal have been different. Namely, the LOA enables the seller to cure non-performance (LOA §107).⁶² According to that, the seller who has delivered defective goods can replace or repair the non-performance as long as the buyer has not terminated the contract or claimed damages in lieu of performance. LOA §107 (1) 1)–3) and (2) impose additional limitations on the exercise of the right to cure. Allowing cure for the obligor is an expression of the general principle of good faith⁶³ and like in the LOA it has also been provided for in the CISG⁶⁴ and DCFR.⁶⁵

If the buyer wishes to reduce the price based on the defects of the goods sold, his right to resort to the remedy is limited by the seller's right to cure his non-performance (LOA §224).

The relationship between the seller's right to cure and the buyer's right to terminate the contract is different. As noted above, LOA §107 (1) provides that the seller may cure the non-performance, as long as the buyer has not terminated the contract. Thus, at the moment the buyer has terminated the contract on the grounds of the defects of the goods, the seller is deprived of the right to cure the non-performance.⁶⁶ However, as long as the buyer has not made a declaration of termination (but has, for example, notified the

⁵⁴ T. Bachmann (Note 37), p. 232; P. Schlechtriem, I. Schwenzer (Note 37), Article 47, comment 2.

⁵⁵ C. von Bar, E. Clive, H. Schulte-Nölke (eds.) (Note 35), p. 1341.

⁵⁶ H. P. Westermann (Note 43), §441, margin No. 1; T. Bachmann (Note 37), p. 233; B. S. Markesinis, H. Unberath, A. Johnston (Note 38), p. 510.

⁵⁷ P. Varul *et al.* (Note 15), p. 65.

⁵⁸ E. Grabitz, M. Hilf, M. Nettesheim (Note 19), Article 3, margin No. 15.

⁵⁹ B. S. Markesinis, H. Unberath, A. Johnston (Note 38), p. 514.

⁶⁰ E. Grabitz, M. Hilf, M. Nettesheim (Note 19), Article 3, margin No. 20; B. S. Markesinis, H. Unberath, A. Johnston (Note 38), p. 514.

⁶¹ P. Varul *et al.* (Note 17), p. 341.

⁶² See Note 29.

⁶³ P. Varul *et al.* (Note 17), p. 341.

⁶⁴ Article 48.

⁶⁵ Article III.-3:202.

⁶⁶ P. Varul *et al.* (Note 17), p. 343.

seller of the defects under LOA §220), the seller as a rule has the right to cure his non-performance. Also, according to Estonian law, the buyer's right to terminate the contract can depend on the seller's right to cure through the notion of fundamental breach of contract set out in LOA §223 (1) and (2). As indicated in Section 3.1 of this article, the seller can in certain cases preclude the buyer's opportunity to rely on fundamental breach of the seller's obligation if the seller cures the non-performance during a reasonable period of time.

Hence, the LOA usually prioritises the seller's right to perform his obligation according to the contract. By granting the seller the opportunity to cure the breach the buyer's recourse to different remedies is limited. Unlike claiming performance and granting an additional term for performing the obligation, in the case of cure of the breach the initiative to eliminate the breach originates from the seller.^{*67} That is why the seller's right to cure does not, in the opinion of the author of the article, introduce hierarchy to the system of buyer's remedies. Due to the nature of right to cure, it cannot be considered interchangeable with the use of a remedy by the buyer.^{*68}

For example, let us imagine a situation in which the buyer buys goods that turn out to be defective and informs the seller of the defect (LOA §220). The notice about the defect does not contain any other information. By submitting the notice, the buyer has in fact given the seller an opportunity to cure the non-performance but has not claimed performance from him (replacement or repair). In order to consider the claim of performance submitted, the buyer's relevant expression of will would be required. However, this cannot be identified merely from a notice about defects. Consequently, there is no hierarchy between the buyer's remedies in the LOA, yet the buyer's right to choose any remedy is as a rule limited by the seller's right to cure his non-performance.

The consumer sales regulation provided in the Optional Instrument differs from the description presented above. Article 110 (2) provides for the seller an opportunity to cure his non-performance. At the same time, according to Article 107 (3) 1), the seller's right to cure is precluded if the failure concerns a consumer sales contract. However, if the buyer is not a consumer, the seller has been granted an opportunity to cure his non-performance (subsection 2). Thus, in the case of a consumer sale, the consumer is pursuant to the Optional Instrument absolutely free to opt for any remedies of those specified in Article 107. The author of this article believes that this may have increased the level of protection of consumer rights but the seller has been forced to a considerably unfavourable position. This is especially true, considering the fact that according to the Optional Instrument, a consumer is entitled to terminate the contract already in the case of an insignificant breach of the contract (see Section 3.2 of this article).

The opportunity to cure after the failure to perform an obligation gives the seller as a rule in the case of non-performance an opportunity to perform his obligation and thereby preclude the buyer's right to resort to different remedies. The author of this article finds that the system is justified and appropriately balances the rights of the buyer and the seller.^{*69} It would be disproportionate to impose on the buyer an obligation to submit claim for performance against the seller before using other remedies because the seller has failed to perform his obligation. However, if the buyer is allowed to resort to any remedy, this can considerably damage the seller's interests.^{*70} Hence, it is appropriate to limit the buyer's rights, for example, through granting the seller the right to cure.^{*71} The advantage of the right to cure over prioritising the claim for performance is the fact that it compels the seller to act quickly to cure the non-performance, which also brings prompter legal clarity for the buyer about whether the seller intends to perform his obligation or not.^{*72}

Through cure, the seller has an opportunity to limit the buyer's options to use remedies but he must do it at his own initiative. Since he is also the party in breach of the contract, it should be in his own interests to do anything to perform his obligation as required (cure the non-performance).^{*73} At the same time, the permission to cure should not bring about considerable damage to the interests of either parties (including

⁶⁷ P. Huber. CISG – the Structure of Remedies. *Rechts Zeitschrift für ausländisches und internationales Privatrecht*. Bd. 71. 2007, p. 21.

⁶⁸ M. Schmidt-Kessel (Note 14), p. 194.

⁶⁹ In relation to the DCFR, the same position has been assumed by C. von Bar, E. Clive, H. Schulte-Nölke (eds.) (Note 35), p. 812.

⁷⁰ V. Mak. Performance-Oriented Remedies in European Sale of Goods Law. *Article Publishing* 2009, p. 184.

⁷¹ H. Sivesand (Note 46), p. 117.

⁷² *Ibid.*

⁷³ V. Mak (Note 70), p. 202.

the reduction in the level of protection of the rights of a buyer who is a consumer) because both parties have the performance of the contract as their primary interest. Permitting cure is also economically justified.⁷⁴

6. Conclusions

The analysis of the LOA provisions contained in the article showed that according to the regulation of a sales contract, the remedies that the buyer could use in the case of lack of conformity are not in hierarchical relationship to each other. There is no hierarchy among the buyer's remedies regardless of whether it is a consumer sales contract or any other sales contract.

The buyer's freedom of choice does not unreasonably damage the seller's rights either. Namely, according to LOA §107, the seller as a rule has the right to cure his non-performance as long as the buyer has not terminated the contract with the seller. By this, the Estonian legislator has provided as a rule for the seller an opportunity to limit the buyer's choice of remedies if the seller so wishes. Pursuant to LOA §107 (3), the buyer may usually not use other remedies apart from withholding performance as long as the seller cures his non-performance within the framework prescribed by law (above all, during a reasonable period of time after giving notice of his intention to cure). The regulation described thus grants the seller an opportunity to perform his obligation after the initial failure to do so.

It may be concluded that both the buyer's and seller's interests have been taken into account when drafting the regulation of the sales contract in the LOA and that the interests have been successfully balanced through a system of remedies, complemented by the seller's right to cure. Keeping in mind the developments of the European law specified at the beginning of the article, it would thus not be correct to impose on the buyer an obligation by all means to claim performance from the seller (also through the obligation to grant an additional term) before resorting to other remedies, as it had been prescribed by the draft directive on consumer rights for a long time. The demand for granting an additional term for performance as a prerequisite for using remedies is justified in legal systems in which the obligor is not entitled to the opportunity to cure (e.g., BGB). At the same time the value of the solution offered in the Optional Instrument, according to which a buyer who is a consumer could terminate the contract without granting the seller an opportunity to cure, should be seriously considered. This would ensure a great freedom of choice for the consumer but would probably leave the sellers' interests unprotected to a considerable degree.

⁷⁴ *Ibid.*, p. 149.