MYKOLAS ROMERIS UNIVERSITY

LAW FACULTY

DEPARTMENT OF BUSINESS LAW

SIMONA ŠARKUTĖ

THE ROLE AND LEGAL SIGNIFICANCE OF CONTRACTUAL ASSUMPTIONS, PROMISES AND WARRANTIES

Master Thesis

Supervisor

Paulius Zapolskis

Consultant

Doc. dr. Egidijus Baranauskas

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(signature)

Supervisor

Paulius Zapolskis

_____

(signature)

Reviewer

_____

(signature)

Author

Simona Šarkutė

_____

(signature)

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INTRODUCTION

Scope of the thesis. The thesis represents a legal analysis both of the role and legal significance of contractual assumptions, promises and warranties trough the angle of their interrelation within the contract and the consequences of their breach. The thesis is based on the research of incorporation of contractual terms into sales of goods contracts. Mere conditions and other straightforward clauses are not sufficient to represent parties' intentions in complex trade contracts. Besides, long duration negotiations take place prior the conclusion of the contract which calls for the embedment of parties' intentions, determination and willingness to enter into the prospect contractual relationship. These complex pre-contractual and contractual relations demand the incorporation of derivative terms, and thus contractual assumptions come in handle. Moreover, parties need assurances concerning the quality of goods which are best provided by the use of warranties. The comparison of both contractual assumptions and warranties with the mere promise, which is expressed as a condition in a contract, is pursued. The thesis is focused on the clarification of a distinction between the promise, warranty and a contractual assumption as well as the effect of these terms towards each other and towards contractors' rights and obligations. The promissory value of contractual terms, in particular warranties and assumptions, is used as one of the principal basis for the determination of the terms' significance to the very contract as well as to the reciprocal obligations between the contractors. As a cause of the contractual complexity the problem of uncertainty occurs when some derivative or innominate term without the ascertained promissory value is breached. Therefore the term analysis approach is reconciled with the breach analysis approach in order to determine the legal significance of contractual assumptions, promises and warranties.

The value of the thesis.

Theoretical: this work provides with the analysis and interpretation of The International Convention on Contracts for the International Sale of Goods (hereinafter – CISG), UNIDROIT Principles of International Commercial Contracts (hereinafter – Principles) and Uniform Commercial Code (hereinafter – UCC) thus the problematic aspects of the research objectives are highlighted.

Practical: an exhaustive analysis of the role and significance of contractual terms and comprehension of their interrelation is highly important in order to create an efficient sale contract and to diminish the risk of fraudulent or underconsidered counterparty's actions.

Research problems. Two problems are to be distinguished within this work. **First**, the promissory nature of warranties and contractual assumptions is variable, therefore their role in comparison with other contractual terms in sales contracts is unclear. **Second**, the significance

of contractual assumptions, promises and warranties through the viewpoint of establishment of liability and application of remedies is uncertain. Thus, the necessity occurs to determine the scope of liability, and applicable remedies.

Research objects. There are three objects within this thesis: **first**, the role of warranties and contractual assumptions as contractual terms of promissory nature through the viewpoint of their relation with other contractual terms, **second**, the significance of warranties and contractual assumptions to the breaching party's liability and the remedies subsequent to this breach from the angle of comparison with promises, **third**, the determination of the efficiency of warranties taking into account the misleading sellers' practice.

Research subject matters. With regard to the first object following subject matters are primarily discussed in this thesis: the concept of warranty and contractual assumptions in the international regulation of sale of goods and purposes of its application, possible forms of warranties and contractual assumptions that can be discovered within the international rules as well as in well developed domestic regulations, research of the available grounds for the distinction of a warranty from other contractual terms.

As concerns the second subject matter, the focus is fixed upon these issues: a breach of warranty as a different cause of action in order for the liability to arise, the grounds for the latter distinction, the establishment of liability according twofold warranties' origin, the scope of liability and applicable remedies regarding the extent of the significance of warranties to the overall contract, the limitation of liability conditioned by contractual privity and legal imperatives, the research of the possible grounds in order to determine the legal significance of contractual assumptions as well as the grounds for liability and remedies in case they are breached.

Aims and tasks of the thesis. There are two main aims raised in this thesis. **First**, to explore the relation between warranties, contractual assumptions and promises and their role in the contract. **Second**, to determine the significance of contractual assumptions, warranties and promises. Following tasks are to be completed to achieve these aims:

1. to determine the role of contractual assumptions and warranties regarding their qualities as akin to these of promises;
2. to determine the significance of a breach of contractual assumptions and warranties as well as its impact on the right to terminate a contract on a basis of non-performance using the comparative approach to a breach of a promise;
3. to determine the kind of liability arising from a breach of a warranty and distinguish differences through a comparison with a breach of condition which is considered to be a promise;

4. to determine the grounds for liability for a breach of contractual assumptions;

5. to determine differences between the remedies applicable for a breach of warranty and a breach of a promise.

Accordingly, a **hypothesis** is raised in this thesis: warranties and contractual assumptions are collateral contractual terms, less significant comparing to promises.

Scope of the previous research and bibliography. The concept of warranties is discussed in the writing of highly qualified publicists. The present thesis mostly refers to legal writings of: Beale, H. G., Schoenbaum, J. T., McMeel, G., Gabriel, H., Peel, E. and Richards, P. Legal studies and reviews of different organizations are also used pursuant to the research, e.g. Harvard Law Review, Michigan Law Review, Columbia Law Review and Modern Law Review. The basic legal sources for the interpretation of the role and significance of contractual assumptions, promises and warranties are CISG and Principles. The CISG is chosen because it governs international trade transactions in many countries and plays a supporting role in resolving questions that the parties have not themselves already agreed on. The Principles are another important source of law of international commercial contracts. Unlike the CISG, the Principles are not a binding legal instrument, rather, they are an international restatement of contracts. However, they are an outstanding achievement and are highly influential. The CISG and Principles conciliate and complete each other. Besides, in order to conduct an in-depth analysis of the warranty it is purposive to determine the role and significance of a warranty clause not only in international but also in national law. Worth notice, American law of warranty has old traditions and consistent relevant court practice. Besides, it has consolidated the warranty theory within the section 2 of the UCC. Therefore the UCC and its exhaustive commentary on warranty theory avail to interpret the role and significance of warranties on the international stage as a supplement to the CISG and the Principles. The CISG and the Principles commentaries also take an important role among the other sources mentioned above. Moreover, the official web page of the Pace Law School, comprising many articles, researches and case law regarding the CISG and the Principles are used as a source of analitical material when writing this thesis. A considerable number of court decisions were analyzed too.

Methods of the research. In order to provide an exhaustive analysis of the problems raised within this research and to fulfill the aims and tasks of this research the methods used are as following: theoretical (systematic analysis, comparative, analogy) and empirical (analysis of international an domestic legal sources).

Organization of the thesis. The thesis is divided into three parts. The first part analizes the role of a warranty and its relation with other contractual terms. Therefore, the concept of warranty is defined and its relation with contractual assumptions, promises and other

contractual terms is determined. The second part deals with the significance of warranties and promises through the spector of partial or full non-performance. Grounds for liability are compared and possible remedies are determined in order to ascertain the significance of different contractual terms. The third part is appointed to determine the possibilities to exclude liability for a breach of warranty and a breach of contract in order to evaluate the efficiency of a warranty clause.

1. THE ROLE OF WARRANTY AND ITS RELATION WITH OTHER CONTRACTUAL TERMS

1.1. Concept of Warranty

Warranty, within the scope of this thesis, is regarded as a concept of the commercial law. Considering that the main functions of the commercial law are to implement the distribution of commodities and to ensure fairness in the commercial dealings, which are necessary to such distribution. A warranty as an instrument of the law of contracts, serves both purposes[1]. Insofar as it acts as a legally binding representation of the bargain, to which the parties have agreed, it serves chiefly the former purpose. Insofar as it is implied by law to protect the unwary buyer, it serves chiefly the latter.

The word warranty has been described as one of the most ill-used expressions in the legal dictionary[2]. In many older cases, it was used in the sense of condition and today it is very frequently used simply in a term of contractual undertaking or promise[3]. Regarding the development of the warranty concept, its status in relevance with its promissory value is not straightforwardly clear. In essence at its bradest simply means a promise[4]. It may be a promise as to its existing fact or constituting state of affairs, but it is also used in respect to the quality of the goods to be rendered under a sales contract.

Regarding the contracts of sale of goods, a warranty, properly understood, explains almost the whole range and scope of the seller's duties regarding the qualities of goods. Indeed, it can be truly said that without the grasp of the law of warranty, the central aspects of the law of sale of goods cannot really be mastered[5]. As warranty is considered to be a distinct concept in comparison to other promises introduced into the contract, the consequences of its breach are also different. Notwithstanding its mode of incorporation into the contract, either it is incorporated impliedly or expressly, its significance depends on some particular features arising from the interpretation of the warranty clause in the light of the overall contract.

A warranty is defined as "an agreement with reference to the goods which are the subject of a contract of sale but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not for a right to reject the goods and treat a contract

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[1] *Warraties, Disclaimers and the Parol Evidence Rule//* Columbia Law Review. Vol. 53, No. 6. // http://www.jstor.org/stable/1119204; access time: 2010-11-12. P. 858.
[2] Soyer, B. *Warranties in Marine Insurance.*- London: Cavendish Publishing Limited, 2006. 2nd ed. Chapter I, *Warranties in General.* (hereinafter – Soyer). P. 3.
[3] Beale, H. G. (Ed.) *Chitty on Contracts. Volume I. General Principles.*- London: Sweet & Maxwell, 2004. 29 edn. (hereinafter – Beale). P.722.
[4] McMeel, G. *The Construction of Contracts. Interpretation, Implication and Rectification.*-Oxford: Biddles Ltd, King's Lynn, 2007 (hereinafter – McMeel). P. 398.
[5] Stoljar, S. J. *Conditions, Warranties and Descriptions of quality in the Sale of Goods//* The Modern Law Review. Vol. 15, No. 4. // http://www.jstor.org/stable/1090928; access time: 2010-06-10. (hereinafter – Stoljar). P.425.

as repudiated[6]". The main purpose of the introduction of this definition was to make a distinction between the condition precedent and a collateral undertaking or a promise. However, a warranty is also defined as "an obligation, breach of which will sound in damages, but it would be wrong to regard warranties as less important provisions than conditions[7]". Thus in many modern commercial transactions, and in particular in sales of goods, warranty may be the most fundamental of obligations, but it may still be intended that they should only sound in damages. Thus warranties' role and significance in sale of goods transactions is changeable and cannot be straightforwardly determined.

At the first sight it may seem that a warranty is some sort of special, separate contract referring to the quality of the goods and ancillary to the main purpose of the contract of sale. But it is also clear that it cannot be special or separate contract in a strict sense of those words, because of the rule of law that no fresh consideration is required for such a contract, provided the warranty is made after the contract of sale[8]. It follows that a warranty is just one of the numerous representations or promises rendered by the seller to the buyer and which the seller has to perform in consideration to the buyer's obligation to pay the contract price. An affirmation or a representation may amount to a warranty provided that it is intended as such. This is to say that it is intended to form a part of a contract.

The incorporation of the content of representations made by the parties into warranties contained within the terms of the contract is one of the ways of holding parties to their representations made during pre-contractual negotiations. A warranty is essentially an assurance that a proposition of fact is true. When negotiating sale contracts, a buyer generally seeks broad warranties from a seller that the goods bargained for will satisfy the purchaser's needs and will be supplied with due care, skill and diligence. Observing the situation from the seller's attitude, he generally seeks to limit such warranties and make them conditional upon the buyer's assurance that he uses the product according to the provided instructions. A warranty is an excellent tool for risk allocation, and they should be seen as such.

[6] Beale, H. G. *Chitty on Contracts. Volume II. Specific contracts.*- London: Sweet & Maxwell, 2004. 29 edt. (hereinafter – Beale II). P. 1309.
[7] McMeel (n 4), P. 398.
[8] Stoljar (n 5). P. 426.

1.2. Warranty Type as Indicator Defining its Role

The warranty in sales contracts, properly understood, explains almost the whole range and scope of the seller's duties regarding the quality of goods. There are different types of warranties, each of them having its one role in the contract. The role of a specific warranty helps to determine the scope of protection. Some degree of protection is rendered by law. However, some of it is left for the contractors themselves to decide. This brings to the necessity to distinguish the warranty types and to determine the scope of their operation.

The topic of the thesis requires analysis of international legal tools in order to determine the role and legal significance of contractual terms in complex international sale contracts. Following the CISG, it does not provide with any expressly distinguished types of warranties. Article 35 of the CISG sets out the basic obligations of a seller regarding the quality of goods. Therefore the implied warranty of conformity of goods can be assumed. Moreover, the stipulation "where the parties have agreed otherwise[9]" enables to distinguish the existence of an express warranty entitling the parties to agree on the particular features, qualities and quantities, of goods. Besides, it establishes the principle that the contract description is the primary source of the seller's obligations for the quality of the goods[10]. That means that the contractual privity is respected by the CISG and implied terms are considered to be inferior to express contractual statements. Therefore, all warranties incorporated into the contract are respected by law, and parties are allowed to enjoy the contractual freedom and to agree on express warranties conformed to a particular situation as well as contractors specific needs. However, if parties did not consider it necessary to stipulate some particular express warranties, they are still protected by law in a form of implied warranties setting out multipurpose requirements.

Under the Principles, the obligation to deliver goods that conform to the contract description is derived from the general obligation to perform[11] at a reasonable quality and a duty to achieve a specific result[12]. Within the Principles provision regarding quality of performance, it is possible to distinguish both an implied and an express warranty which should be provided by the contracting party. The relevant Principles provision expressly states that "were the quality of the performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less that average in the circumstances[13]". As it appears from the wording of the latter provision, the expression that "the

[9] *United Nations Convention on Contracts for the International Sale of Goods*. 1980 (hereinafter – CISG). art. 35(1).
[10] Gabriel, H. *Contracts for the Sale of Goods: a Comparison on a Domestic and International Law*.- New York: Oceana Publications, Inc. Dobbs Ferry, 2004 (hereinafter – Gabriel). P.119.
[11] *UNIDROIT Principles of International Commercial Contracts 2004* (hereinafter – Principles). art. 5.1.6.
[12] *Ibid*, art. 5.1.4.
[13] Principles (n 11), art. 5.1.6.

quality is neither fixed" lets to assume the recognition of the express warranty. It leads to the basic principle of the Contract Law that the parties have their contractual privity and freedom arising from it, through the application of which, the parties can agree to incorporate necessary warranties into their contract. More precisely, the seller can provide a buyer with the warranty, and it is on a buyer to decide whether he assumes these warranties to suffice. On the other hand, the provision under the question provides with an implied warranty in case any express warranties are not provided by the seller or if they are insufficient. An implied warranty according to the latter Principles provision means that the quality of goods is referred to the average condition that the goods of a kind must satisfy. This implied warranty excludes the possibility of a seller to misuse and protects a buyer in case any warranties concerning the condition of goods were not incorporated into the contract.

Consistent with the CISG, the UCC sets out a framework for the seller's obligations for the quality of goods. The CISG, sets out these obligations as series of duties without placing labels on them. The UCC, on the other hand, uses basic Common Law terminology, and the seller's obligations for the quality of goods are designated warranties. The UCC section 2 provides with three qualitative warranties: express warranty and two implied warranties – warranty of merchantability and warranty of fitness for particular purpose. Also it provides for one non-qualitative warranty – an implied warranty of title. The latter warranty does not have any relation to the qualitative features of the goods sold, therefore it is distinguished.

The attribution of a warranty to a particular type mostly depends on the mode of incorporation of a warranty into the contract. Consequentially, terms that arise from the terms of the agreement are considered to be express warranties, and these obligations that arise as a matter of law in a form of presumptions are treaded as implied warranties[14]. Hence, express and implied warranties are distinguished on basically the same criterion pursuant all the legal instruments in question – CISG, Principles and UCC.

[14] Gabriel (n 10), P. 121.

1.2.1. The Role of Express Warranties

The main function of an express warranty is to allocate the risk between a seller and a buyer concerning the defects in goods which occur after the delivery of the goods to the buyer. Worth notice, that an express warranty is created by the contracting parties, and adopted for their specific contractual relationship. Following, it is important to determine, whether the protection of an express warranty is applied on behalf of the buyer or on the seller. The answer to this question is polysemous. Therefore the purpose of express warranties is interpreted considering different theories: i) exploitation; ii) signal; iii) investment.

According the *exploitation theory*[15], an express warranty is defined as a mean applied by a producer or a seller with the attempt to limit or eliminate the liability falling under him, including the possibility to claim direct damages, as a consequence that the goods sold are inappropriate to be used for a particular purpose, and thus exploiting the buyer's weaker position in negotiations[16]. This theory is often applied by the automobile producers in the way of standard warranties limiting the producer's liability for the sale of non-conforming goods.

The *signal theory* is more beneficial to the buyer as it emphasizes that the essential aim of an express warranty is to oblige the seller to provide the buyer with an information about the quality of goods[17]. Following this theory it is interpreted that a buyer who wishes to test the qualitative features of goods would suffer irrationally higher additional costs and loses too much time. The duty to inform creates the possibility to interpret the warranty limitation clauses on behalf of a buyer. Moreover, in the United States a Magnus-Moss Warranty Act (hereinafter – Magnus-Moss) was created, with its foregoing aim of assurance that an express warranty provides a buyer with the sufficient information concerning the quality of goods. Besides, one of the aims of the creation of this statute was to avoid cases when a seller seeks to mislead a buyer of the protection which is assured to him by implied warranties. Magnus-Moss does not impose a duty upon a seller or a producer to provide a buyer with an express warranty but regulates the content of the thereof. It also distinguishes warranties into full and limited according to the price of the goods sold. Full warranty, according to Magnus-Moss, means that the protection rendered by a warranty works in full ambit recognized by the statute. In order to consider a warranty as being full, the following conditions have to be satisfied: i) the warranty does not limit the duration of an implied warranty; ii) not only the first but also subsequent buyers are provided with protection of a warranty; iii) when the goods were not successfully repaired within the particular number of rational attempts, the goods have to be replaced or refunded; iv) does not

[15] Ramsay, I. *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*.- Oregon: Oxford and Portland, Hart Publishing, 2007 (hereinafter – Ramsay). P. 610-613.
[16] *Ibid.*
[17] *Ibid.*

create any duties to a buyer without implementation of which the warranty does not come into effect, except the duty to inform of a necessity of a warranty service or other duty which is proved by a seller to be rational[18]. A limited warranty gives a signal to a buyer that the warranty rendered does not comprise at least one of the above mentioned requirements. It is quite clear that an express warranty does perform an information function, because yet from the title of a warranty a reasonable buyer can decide on the level of risk that he assumes concerning the quality of goods[19]. This theory is basically adopted to the consumer protection as its fundamental principle is to attract a buyer's attention in order for him to be more careful when signing a contract with a better skilled seller.

Investment theory explains that a warranty is an efficient mean for allocation of losses when the matter or a warranty is related with a possibility to foresee damages[20]. In case a producer or a seller has a possibility to foresee losses as a consequence of sale of defective goods, the provisions of a sales contract are formed attempting to direct the risk of those losses towards the person who could reduce that risk with the least possible costs; and in the situation the losses are already suffered – to cover by minimal costs. In situations when it is difficult to foresee such damages, a seller is tending to limit its liability by the means of incorporation of a contractual clause excluding his responsibility for defective goods.

The theories of warranties are very usefull in order to achieve a better perception of the warranty concept and its nature. However, it is purposive to make a futher research and to determine how the express warranty is regulated by international and domestic legal tools.

Following the Principles regulation, it possesses a provision conferring a right to the contracting parties to incorporate an express warranty into their agreement. It entitles the parties to agree on certain contractual terms of quality of performance[21]. In the light of the sales contract the article 5.1.6 of the Principles entitles the contractors to agree on certain quality of goods.

With a reference to the CISG, the ambit of an express warranty also depends on the agreement of the parties[22]. That means that the contracting parties may agree to create some certain qualifying conditions the goods have to satisfy in order to be conforming. It means that the goods may be of some special condition, higher or worse quality, thus an average goods test would be either insufficient or too demanding to treat them as conforming. Moreover, the goods

[18] Ward, P. C. *Federal Trade Commission: Law, Practice and Procedure*.- New York: Law Journal Press, 2005. P. 10-42,43.
[19] Ramsay (n 15).
[20] Priest, G.L. *Theory of the Consumer Product Warranty//* Jale Law Journal, 1981, No. 127// http://www.jstor.org/stable/pdfplus/795882.pdf?acceptTC=true; access time: 2010-12-06 (hereinafter – Priest). P.1297.
[21] Principles (n 11) art. 5.1.6.
[22] CISG (n 9)

must possess not only the qualities impliedly or expressly agreed, but also these which the seller assures by use of sample or model. The provision with a sample or model is considered to be an express warranty, because notwithstanding the standard of average goods, which is usually assured by the mean of an implied warranty, the contracting parties agree on particular features of goods which the provided sample or model possesses. Goods provided as a sample or model thereby becomes an agreed standard for the substance of a contract[23]. The parties do not have to contractually agree on a sample or model in order to make it compulsory. While a sample is taken from the goods to be delivered, a model is supplied to a buyer for his examination where the goods themselves are not available. Where a seller has provided a sample, he warrants that the goods possess all of the qualities of that sample. In case of a model, the contract needs to be interpreted in order to establish which qualities of the goods are illustrated by the model and have therefore been contractually agreed[24], because a model may represent all or only a part of the features of the goods.

Regarding UCC, express warranties are those which arise from a promise of one party agreed to by the other[25]. In other words, promises and affirmations of facts about the goods must be made to the buyer to become an express warranty. Notwithstanding, seller's statements, commendation or opinion does not create a warranty. Courts often consider the following to determine whether a statement constitutes a promise: the specifity of a statement; the context in which the statement was made; the nature of the defect; the parties' relative knowledge and sophistication; the language employed by the seller; the statement was written or oral[26]. Thus in order to recognize the statement provided by a seller as an express warranty it is obligatory to prove that it was considered as a promise.

As well as an affirmation of fact or promise made by the seller, the express warranty is created by a description of the goods, or sample and model of the goods. In the section 2-313 of the UCC it is determined in an unambiguous manner that no formal words are necessary for an express warranty to arise, because it may be created by any affirmation of fact or a promise made by a seller, which is a basis of a bargain[27]. Hence a seller providing a buyer with a sample or model of particular goods makes himself bound as giving a promise that all the goods that will be delivered are to correspond to this sample or model. Any sample, model or description of goods which forms part of a bargain is recognized as an express warranty even though a seller

[23] Schlechtriem, P., Schwenzer, I. *United Nations Convention on Contracts for the International Sale of Goods (CISG)1980*. - New York: Oxford University Press. 2005 (hereinafter – CISG Commentry). P. 423.
[24] CISG Commentry (n 23).
[25] Uniform Commercial Code (UCC)// http://law.justia.com/ohio/codes/2006/orc/jd_130227-53ef.html; access time: 2009-11-23. (hereinafter – UCC Comments). Section 2-313.
[26] Gabriel (n 7), P. 122.
[27] UCC Comments (n 25), section 2-314.

has not expressed his intention to create such a warranty. Thus the UCC interpretation of an express warranty reconciles to this of the CISG.

1.2.1.1. Distinction Between Express Warranty and Remedial Promise

Section 2-313 of the UCC introduces the concept of a remedial promise to distinguish promises made by the seller about how the goods will perform (express warranties) and promises that the seller makes about the seller's performance[28]. A remedial promise "means a promise by the seller to repair or replace the goods or to refund all or part of the price upon the happening of a specified event[29]". Remedial promises have been separated from promises about the goods themselves in order to fix a statute of limitations problem which occurred when courts erroneously considered a remedial promise to be a warranty and thus allowed the statute of limitation to begin running from the time the goods were tendered and not from the time the seller failed to perform the duty to take the remedial action[30]. Thus, a remedial promise creates an obligation for a promise to be performed upon the happening of the specified event, and a cause of action for a breach of this obligation accrues when the performance due to the remedial promise is not performed.

1.2.2. The Role of Implied Warranties

Implied warranties are defined as "warranties which arise by operation of law and consist of non-promissory express warranties, which the courts imply from the seller's representations, and implied by law warranties, which the courts create by descriptions and facts other than the seller's representations[31]". In case defects in quality of the goods were not delibearated between the contracting parties, it is considered that the seller provides with the assurance of the quality of goods[32]. In other words, a warranty in question is treated as an affirmation of the quality of the goods sold which is made by the seller on behalf of the buyer having no reliance with intentions of the parties and it exists no matter whether it was approved by a particular contractual provision or not. The fact that the contractual freedom is being limited requires a futher research in order to determine the necessity of implied warranties.

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[28] UCC Comments (n 25), section 2-313(4).
[29] Uniform Commercial Code// http://www.law.cornell.edu/ucc/2/; access time: 2009-12-04. (hereinafter – UCC).
[30] Gabriel (n 10), P.123.
[31] Beel II (n 6), P.1302.
[32] Epstein, A. *Sales and Sports Law. Sale of Goods//* http://heinonline.org/HOL/Page?handle=hein.journals/jlas18&div=7&g_sent=1&collection=journals; access time: 2010-10-23. (hereinafter – Epstein).

A theory of a warranty as a mean of information highlights the function of an implied warranty. A seller assures in writing, orally or by action that the quality of the goods sold is not worse than assured by law and a buyer accepts the goods in reliance of the seller's assurance. A warranty designs the perception of the buyer of the expected quality of goods and on the same time the seller is urged to provide the buyer with the information concerning the defects of goods that are known by the seller (duty to inform).

Within the theory under examination it is emphasized that a seller does not have any duty to inform a buyer of the features of the goods that he is not aware of. For instance, in case the buyer did not inform the seller of the purpose for which the goods will be used, the seller does not have to provide with the information of fitness for particular purpose. Besides, the seller is not obliged provide the buyer with an implied warranty if the circumstances evidence that the buyer did not rely or was not ought to rely on the seller[33]. That means that the concept of reliance plays an important role when deciding the scope of liability of the seller in case of provision of an implied warranty.

According to the opinion of the exponents of the theory of ordinary circumstances[34], the quality of goods standard, which is established in the implied warranty, is an ordinary contractual condition, more precisely, forms a part of a sale-purchase contracts. A seller expects that the quality of goods is in compliance with the legal provisions even though they are not incorporated into the contract. The ordinary circumstances theory is relevant in the CISG determination of the quality of goods. Taking account to the article 35 of the CISG, the requirements that are set out for the goods to be in accordance with the contractual conditions are formed on the basis of the ordinary circumstances theory.

With a reference to the theory of imposition of contractual conditions, an implied warranty is incorporated into a contract without regard to the will of the parties. The mere fact that the goods are sold presuppose the duty to provide with a warranty[35]. This theory supposes a conclusion that an implied warranty is outside the scope of the parties' contractual freedom.

The courts have to adopt the theory which seems to fit best regarding the context of the overall contract. Besides, courts are allowed to combine several theories in order to adopt a decision that reflects the very intention of the parties which was the root of the consideration to enter into the contract.

The theories are an efficient tool to ascertain the scope of implied warranties. Nevertheless, it is important to distinct and to determine the features of different types of implied warranties in order to assess the scope of a buyer's protection which is rendered by law.

[33] Ramsay (n 15), P. 629-630.
[34] *Ibid.*
[35] *Ibid.*

According to different legal instruments that are researched and interpreted within this thesis, it is possible to distinct two types of an implied warranty –an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. Both of these warranties are designated to set out minimum requirements that are necessary for the goods to comply with in order to be conforming. Notwithstanding, each of them have its one scope of protection of buyer's interests.

1.2.2.1. Warranty of Merchantability

According to the commercial law doctrine, both international and domestic legal acts, two types of qualitative warranties can be distinguished as forming part of an implied warranty of conformity of goods. One of them is an implied warranty of merchantability.

The UCC stipulates that a seller is obligated to deliver goods that are fit for the ordinary purpose for which the goods are to be used. This is an implied warranty of merchantability[36]. In order for the goods to be merchantable, they have to be free of latent defects and fit for the ordinary purposes for which such goods are used[37]. Worth notice, an implied warranty of merchantability can be made only by merchants. A merchant is a person who "deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the products or goods involved in the transaction[38]". Pursuing a transaction of sale of goods, a merchant, who is a seller of goods of a kind, will be charged with the implied warranty of merchantability unless it had been effectively disclaimed[39]. Although section 2-314 of the UCC highlights several qualitative requirements that have to be satisfied in order for the goods to be merchantable, the core of an implied warranty of the merchantability the assurance that goods fit "for ordinary purposes for which such goods are used[40]". This requirement of fitness for a particular purpose has to be satisfied at the time of delivery of goods. If goods fail to comply with this standard at the time of their delivery, the implied warranty of merchantability is considered to be breached, because it relates to the condition of the goods at the time they are delivered to the buyer[41]. The warranty does not extend to the future performance of the delivered goods, because, according to the court practice, "an implied warranty of merchantability applies to the condition of the goods at the time of sale and is

[36] Gabriel (n 10), P. 125.
[37] UCC (n 29), section 2-314.
[38] *Ibid.*
[39] Davis, T. *UCC Breach of Warranty and Contract claims: Clarifying the Distinction*// http://www.baylor.edu/content/services/document.php/116813.pdf; access time: 2009-12-02 (hereinafter – Baylor Law Review). P. 787.
[40] Epstein (n 32).
[41] *Powers v. A. Honda Motor Co.*, 2003// http://caselaw.findlaw.com/id-supreme-court/1346107.html; access time: 2010-02-12.

breached only if the defect in the goods existed when the goods left the seller's control[42]". Besides, in another court decision the court stated as following: „to recover for breach of the implied warranty of merchantability, a plaintiff must prove that a merchant sold goods; that the goods were not merchantable at the time of sale; that the plaintiff or his property was injured by such goods; that the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury; and that the plaintiff so injured gave timely notice to the seller[43]". Thus, even an implied warranty or merchantability is designated to protect the buyer, there are many obstacles to start a claim against the seller for breach of this type of warranty. These obstacles can be treated as implied exemption clauses and are created in order to prevent the abuse from the side of the buyers and assure the balance of the contractors' rights and obligations. Besides, these requirements render a duty to the buyer to be careful, act with diligence and in compliance with principles of good faith and co-operation[44]. These principles are fundamental regarding the interpretation of commercial contracts. According to the UCC interpretation, every contractor has an imposed obligation to act in good faith during the performance or enforcement[45]. Good faith regarding merchants means „honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade[46]". Moreover, if the contract or any clause of a contract is found by a court to be unconscionable, the court may refuse to enforce the contract[47].

Regarding the CISG regulation, it does not expressly distinguish a requirement of merchantability. In spite of that, following the description of an implied warranty of merchantability in the UCC and relevant court practice, it is possible to determine the scope of the merchantability requirement within the CISG. As the main feature of an implied warranty of merchantability is fitness for ordinary purposes, the CISG provides that the goods conform to the contract if they "are fit for purposes for which goods of the same description would ordinarily be used[48]". Following, in the absence of contrary agreement (express warranty regarding the quality of goods or stipulation of their specific purpose) the goods must be fit for an ordinary use. If the goods are not fit for all, but merely for some, purposes for which goods of that type are ordinarily used, a seller must inform a buyer of that fact. The fitness of the goods for other purposes for which they are ordinarily used is to be decided by reference to the

[42] *Lipinski v. Martin J. Kelly Oldsmobile, Inc.* 2001// http://caselaw.findlaw.com/il-court-of-appeals/1064339.html; access time: 2010-02-12.
[43] *Seaside resorts, Inc. v. Club Car, Inc.*, 1992// http://caselaw.findlaw.com/sc-court-of-appeals/1347861.html; access time: 2010-02-13.
[44] Principles (n 11), art. 1.7, 5.1.3.
[45] UCC (n 29), section 1-203.
[46] *Ibid.*, section 2-103.
[47] *Ibid.*, section 2-302.
[48] CISG (n 9), art. 35 (2) (a).

objective view of a person in the trade sector concerned. Depending on the type of product involved, technical instructions regarding both its operations and use must be supplied, and any warnings regarding product safety guidelines must be clearly stated. Even incorrect assembly of instructions can constitute a lack of conformity with the contract[49]. Thus the buyer has to be provided with all the necessary and comprehensive information concerning the use of the goods.

A doubt may occure regarding the question of whose standard – that of the seller's or that of the buyer's state – is relevant in order to determine which characteristics the goods must satisfy in order to be fit for their ordinary purpose. Actually, according to the CISG, the question of the relevant standard is the matter of the interpretation of the contract. The primary question is whether a particular purpose within the meaning exists[50]. Worth attention, that in case a buyer and a seller are in different states, it is important to take account into the quality standards applied for a particular type of goods in those states. If standards in the buyer's state are higher than those in the seller's state, the buyer must draw that fact to the seller's attention.

Another important issue to mention which arises from the CISG provisions is qualitative characteristics applicable for the goods by pubic law of the state where the goods are directed to be used, bearing in mind, that the seller is aware of the destination state of the goods. If the seller has been made aware of the country in which the goods will be used, then the seller must not only accommodate the characteristics required for the actual use of the goods in this country, but also to observe the applicable public law provisions. If the issue is concerned with a particular public law standard in the country in which the goods will be used that the seller neither knew nor could have been aware of, then it will not usually be demonstrable that the buyer relied, or was reasonably able to rely, on the skill and judgment of the seller[51]. Thus the buyer has a duty to provide the seller with the information. It seems to be fair regarding the principle of good faith, because it would be unreasonable to expect that the seller is an expert of law of any jurisdiction.

1.2.2.2. Warranty of Fitness for a Particular Purpose

Another form of an implied warranty in addition to the warranty of merchantability is a warranty of fitness for a particular purpose. The question whether this warranty is provided in a particular individual case is basically a question of fact, which has to be determined regarding the circumstances of the particular contract. UCC gives the definition of a warranty of fitness for a particular purpose :"where the seller at the time of contracting has a reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's

[49] CISG Commentry (n 23). P.417.
[50] *Ibid.*
[51] *Ibid.*

skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose[52]". That means that the seller is obliged to deliver goods that are fit for a particular purpose if he is or may be aware of that purpose. However, if the seller did not have any possibility to know, the seller cannot be considered to be in breach of a warranty of fitness for a particular purpose.

Following the adequate CISG provision of fitness of goods for a particular purpose, it should be emphasized that the seller is only responsible for the fitness of the goods for a purpose other than the purpose for which they would ordinarily be used, if that purpose has been expressly or impliedly made known to him, the buyer relied on the seller's skill and judgment, and it was reasonable for him to do so. If the buyer applies the goods to a use for which they were not intended under the contractual agreement, then the seller will not be liable for any non-conformity. However, it is sufficient that the seller had a reason to recognize the purpose for which the goods would be used[53]. Hence if a seller had a reason to know he is strictly obliged to deliver goods which are fit for that particular purpose.

The Official Commentary of the UCC provides with the interpretation of the reason to know: „reason to realize the purpose intended or that the reliance exists". A concept of a particular purpose differs from the ordinary purpose for which the goods are used. A particular purpose is a specific use by the buyer which is understood as typical to the nature of his business whereas the ordinary purposes for which goods are used is envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. Thus a warranty of fitness for a particular purpose may be breached even if the goods are fit for their ordinary purpose if they nevertheless fail to satisfy the buyer's particular purpose[54]. In other words, the buyer does not need to prove that goods are defective in order to recover for breach of warranty of fitness for a particular purpose since a product is merchantable yet unsuitable for a buyer's particular purpose.

Thus the attribution of an implied warranty to a warranty of merchantability or to the warranty of fitness for a particular purpose depends on the qualitative features of the goods. However, a situation may occur when these features are not so easily distinguished or there is even no need to artificially decide on a particular type of an implied warranty. Hence this is a situation when all qualities of goods have to co-exist.

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[52] UCC Comments (n 25), section 2-315.
[53] CISG Commentry (n 23), P. 422.
[54] *Walter D. Weir and Janet D. Weir v. Federal Insurance Company*, 1987// http://ftp.resource.org/courts.gov/c/F2/811/811.F2d.1387.83-2080.83-2057.html; access time: 2010-05-19. No. 83-2057.

1.2.3. Co-existence of Implied Warranty of Merchantability and Fitness for a Particular Purpose

A finding that the goods are defective is likely to result in a breach of both the warranty of merchantability and of fitness for a particular purpose if the latter warranty has arisen. Following the court practice, when the goods failed to meet industry standards and conform to the buyer's particular needs, both the breach of implied warranty of fitness and merchantability were recognized as breached[55]. The provisions of the UCC Article 2-315 on the conflict of express and implied warranties must be considered on the question of inconsistency between warranties. In such a case any question of fact which warranty was intended by the parties to be applied must be resolved in favor of the warranty of fitness for a particular purpose as against all other warranties except where the buyer has taken upon himself the responsibility of furnishing the technical specifications[56]. That means the buyer assumed the risk to provide with an appropriate discription. In case the goods were not conforming to buyer's needs, but were in compliance with a provided specification, it is considered as a fault of a buyer and the seller's liability is excluded.

The description plays an important role when deciding whether there was a breach of a warranty or not. Therefore, to our regard, it is worth clarification what actually stands behind the notion of description of goods. It is probably clear, that any contractual condition drawing the descriptive features of goods has a power of proof. Despite of it, sometimes contracts do not comprise such conditions. Following legal conscience, it cannot mean that the object of the bargain does not need to satisfy any quality requirements. The Official Comment of the UCC expands the ambit of possible ways to make a description. It stipulates that a description can be provided through some technical specifications, blueprints and in other similar manner, bearing in mind it can even be a more accurate description than mere words. Moreover, past deliveries may set a description of quality, either expressly or impliedly by a course of dealing. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith requires the sample to be fairly drawn. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for, unless it is accompanied by an unmistakable denial of such responsibility. Nevertheless, it should be born in mind that all descriptions should be in compliance with the applicable trade usages and general rules of the merchantability[57]. As a description is considered to be a specified standard in order to assess whether the goods are fit for a particular purpose, a buyer's attention should be played at the

[55] *Custom Automated Mach. V. Penda Corp.,* 1983.
[56] UCC Comments (n 24), section 2-315 (2).
[57] Principles (n 11), art. 5.1.2.

provision with correct specifications as far as inaccurate specifications can lead to the exclusion of a seller's liability.

1.2.4. Warranty of Title

Following the CISG regulation on warranties, it maintains the distinction between the conformity of the goods with references to defects in quality and defects in title[58]. The warranty of title is an assurance provided by a seller for the buyer that the goods sold are free from any right or claim of a third party[59]. The CISG provision regarding warranty of title obliges the seller to deliver goods to the buyer that are free from any right or claim of a third party unless the buyer has agreed to take the goods subject to the claim. This obligation is important at the time of delivery and not at the time of a contract formation[60]. The time perspective of the obligation prevents the seller to transfer the title to a third party after the contract was already concluded with a buyer.

A warranty of title diverges from qualitative warranties, because it is "traceable to the history of the goods[61]" whereas qualitative warranties are pointed to the future. Although a distinction between defects in quality and defects in title is of limited importance considering possible remedies, it becomes particularly important regarding exclusion of liability on account of the buyer's awareness of lack of conformity[62]. The fact that the buyer could not have been unaware of a lack of conformity in title, releases the seller from liability, whereas the seller's liability for defects is excluded only if the buyer consented to take the goods subject to third party claims. Thus a buyer in respect to the warranty of title is less protected than regarding qualitative warranties.

Regarding the Principles [63] and the UCC[64], the principle and ambit of a warranty of title is the same. Within the Principles there is an implied obligation that the goods must be free of third party claims unless the agreement between the parties indicates the parties have agreed otherwise. Thus normally a buyer expects the goods that are free from third party claims. The UCC expressly obliges the seller to deliver the goods that are in compliance with a warranty of title.

[58] CISG (n 9), art. 41.
[59] *Ibid.*
[60] Gabriel (n 10), P. 140.
[61] CISG Commentry (n 23), P.412.
[62] *Ibid.*
[63] Principles (n 11), art. 5.1.1, 5.1.2.
[64] UCC (n 29), section 2-312 (1).

1.3. The Role and Legal Significance of Warranties as Pre-Contractual Promises

The balance of rights and obligations between a seller and a buyer is quite clearly determined when the contract is concluded and warranties are expressly included into the contract. Also, the role of an implied warranty is quite well determined. However, it is important to determine the effect of warranties given by the seller to the buyer in the pre-contractual stage. The issue is worth analysis as it is not a theoretical artificially created problem, but a case taking place in a real contractual practice and causing odds between the parties when interpreting particular contractual provisions.

The question whether a pre-contractual statement is considered to be a contractual term is often put in terms whether a statement was a mere representation or a warranty. That means that the promissory value of a statement has to be evaluated. Thus the real intention plays the main role. Moreover, that intention has to be objectively ascertained. In cases it is clear to both parties that the statement is a key to the decision to enter into a contract[65], the court will consider the importance of the truth of the statement as a pivotal factor in finalizing the contract. Thus a pre-contractual statement will only be treated as having contractual effect if the evidence shows that parties intended this to be the case. Intention is a question of fact to be decided by looking at the totality of the evidence[66]. Thus it is possible to assume that a warranty which was provided during pre-contractual negotiations is intended to be incorporated into the contract, if it induced a party to enter into the contract. Moreover, the fact wether a warranty was intended depends on the conduct of the parties, on their words and behavior rather than on their thoughts. It would suffice if an intelligent bystander would reasonably infer that a warranty was intended[67]. When a seller states a fact, which is or should be within his own knowledge, intending that a buyer should act on it and a buyer is ignorant of that fact, it is easy to infer a warranty. If, however, a seller states a fact and makes it clear that he has no knowledge but has got his information elsewhere, it is not easy to imply a warranty. A futher important factor is the laps of time between the statement and the making of the formal contract[68]. The longer the interval, the greater the presumption is that the parties did not intend the statement to have contractual effect in relation to a subsequent deal. Furthermore, much depends on the precise words that were used. If a seller expresses as statement as his belief, it is clear that no warranty was rendered. On the other hand, it he provides with a statement that sounds as a warranty and assumes responsibility for that statement then it can be treated as a warranty.

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[65] *Bannerman v White*, 1861// http://www.e-lawresources.co.uk/forum/viewtopic.php?f=33&t=123; access time: 2010-12-05.
[66] McMeel (n 4), P. 399.
[67] Diane Rowland, Elizabeth MacDonald. *Information technology law*. -Cavendish Pub Ltd, 2005. P.129.
[68] McMeel (n 4), P. 399.

Concluding, if it seems that a representation was made in a course of dealing for a contract, for the very purpose inducing a party to act on it, and it actually induces to act on it, that is *prima facie* ground for inferring that the misrepresentation was intended as a warranty[69]. Thus the most important issues that have to be considered in order to decide whether a pre-contractual statement can be determined as a warranty forming a part of a contract are as following: the intention of the parties, the lapse of time between the statement and the conclusion of a contract, the statement's relevance regarding the core element of the consideration and the manner in which such a statement was rendered. However, sometimes even these rules are not sufficient enough in order to prove that a particular statement constitutes a warranty.

Principles of interpretation of a contract are essentially problematic in cross cultural context. For instance, in Common Law countries some specific rules are applied. For example, the Four Corners doctrine instructs a United States judge to stay within the four corners of a contract when interpreting a written contract in order to ascertain the intent of the parties[70]. The only way to make the U.S. judge to look beyond the limits of a written contract is to demonstrate that the terms of a written contract are ambiguous. However, the dispute between the parties regarding the interpretation of the terms not necessarily considers the terms of a contract to be ambiguous[71]. Thus it is very difficult to prove that the warranties given in pre-contractual stage make a part of a particular contract. Such a strict attitude towards interpretation of contractual terms diminishes the significance of any pre-contractual statement which was not introduced into the final contract, including any promise, warranty or other representation made by the contractors.

The Parole Evidence Rule is another well established principle in Common Law jurisdictions which bars introduction of any prior or contemporaneous written or oral agreements to vary the terms of a written contract[72]. In order to invoke the protection of this doctrine, many contracts typically contain a standard merger of integration clause that expressly states that the written contract is the final intent and that it merges all prior or contemporaneous agreements between the parties. This rule will usually bar the introduction of any oral promises prior to the formation of a contract that contradict the "terms of a written contract which is valid

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[69] Beale, H. G., Bishop, W. D., Furmston, M. P. *Contract - Cases ans Materials.*-Oxford: Oxford University Press, Inc. P. 327.

[70] *Shell Rocky Mt. Prod. v. Ultra Res., Inc.*, 2005.

[71] *Alack v. Vic Tanny Int'l of Mo., Inc.*, 1996// http://caselaw.findlaw.com/mo-supreme-court/1125907.html; access time: 2010-12-14.

[72] Chunlin Leonhard. *Beyond the Four Corners of a Written Contract: A Global Challenge to U.S. Contract Law*// Pace International Law Review// http://works.bepress.com/chunlin_leonhard/1/; access time: 2010-12-01. Vol. 1.

on its face"[73]. Therefore, it is difficult, if not impossible, to introduce evidence of the oral promises if such a merger clause exits in a contract. As usually stated, the Parole Evidence Rule requires including a warranty into the final writing if the parties intend to rely on it[74]. Hence the contractors have to be very careful, think of all possible promises made in pre-contractual stage and introduce them as part of a final agreement.

However, a commercial agreement is typically a result of an involved and dynamic negotiations process. From the point of a high-speed commercial life it is almost impossible to achieve that every single document of the overall process of bargaining would be commercially or legally intelligible without the knowledge of a subsequent performance. Thus, if the bargain to which the parties have agreed is to be enforced and if their objective intent is to be fulfilled, reference should be made not only to the final writing but also to the negotiations and agreements which preceded it[75], the trade practices to which the parties adhered, and the parties' actions subsequent to the contract execution[76]. The importance of the objective intent of the parties is also altered in the Principles provision which stipulates, that the contract shall be interpreted according to the common intention of the parties[77]. Following this rule of interpretation, the pre-contractual negotiations should be important within the perception and interpretation of a final agreement.

Recognizing the social changes brought on by an increase of international transactions and the use of standard form agreements, Professor Kim proposed, among others, that the traditional formalistic contract principles "such as the Parole Evidence Rule and the For Corners Rule" would be abandoned, because the true intention of the parties should be focused on, the contracting parties should be allowed to present evidence of prior negotiations as well as surrounding circumstances in order to prove the true intent of the parties[78]. Hence, there are some intentions among the United Stated academic authorities to extend the scope of a contract interpretation. The occurrence of a more flexible interpretation of the contractual frame provides with a possibility to make an assumption that strict and sophisticated Common Law rules are also tending to adjust to the evolving contractual behavior. This change would prevent the abusing contractors to benefit from their counterparties by the mean of exploitation the cultural

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[73] *Parrish v. Jackson W. Jones*, 2006// http://caselaw.findlaw.com/ga-court-of-appeals/1290152.html; access time: 2010-12-1.
[74] *Federal Truck & Motors Co. v. Tompkins*, 1921// http://www.jstor.org/pss/1119204; access time: 2010-12-01.
[75] *New York Trust Co. v. Island Oil. And Transp. Corp*, 1929// http://leagle.com/xmlResult.aspx?xmldoc=192968934F2d655_1469.xml&docbase=CSLWAR1-1950-1985, access time: 2010-12-01.
[76] *Thompson v. Baltimore and O.R.R.*, 1945// http://bulk.resource.org/courts.gov/c/F2/385/385.F2d.766.18700.html; access time: 2010-12-01.
[77] Principles (n 11), art. 4.1.
[78] Corbin, L.A. *The Interpretation of words and the Parole Evidence Rule//* http://heinonline.org/HOL/Page?handle=hein.journals/clqv50&div=23&g_sent=1&collection=journals; access time: 2010-12-04. P. 163.

differences between different legal systems. If the courts would take a more flexible approach towards the contractual composition and enable the wider ambit of evidences from the pre-contractual stage, more disappointed parties would be able to protect their rights.

1.4. Warranty in Relation with other Contractual Terms, Difficulties of Distinction

1.4.1. Contractual Promises: Conditions and Warranties

Where promises and statements are made in connection with a contract of sale, it may be necessary to determine into what category they should be put. The necessity of distinction occurs because the consequences of a promise or statement not being made good or being untrue may vary in accordance with the category of contractual terms to which it is attributed[79]. Therefore, in order to determine the role and legal significance of a warranty, it is purposive to ascertain its status regarding contractual promises and other terms that are not regarded as having promissory value.

According to the doctrine of Contract Law, contractual terms could be divided either into tree groups - conditions, warranties and other terms, or into two groups – conditions and other terms. In the latter case warranties fall within the second group. This categorization of contractual terms is conditioned by different degree of importance of contractual clauses. A condition is a promise in respect of which the parties have agreed, whether by express words or by implication, that any failure of performance by one party, irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to treat the contract as discharged[80]. A warranty is defined as an agreement with reference to goods which are the subject of the contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated[81]. It is thus minor promise within the contract, for which the promisor answers strictly, but normally only in damages. Nevertheless, it should be distinguished from genuinely separate or collateral warranty, which is a promise contained in a separate contract with its own consideration, and which may override terms of the main contract or otherwise create liability independently of the main contract. The distinction between warranties and conditions is not an easy task for the courts. Whether the stipulation in a contract is a condition or a warranty depends in each particular case on the very construction of the contract. The stipulation may be a condition, though called a warranty and, oppositely, a stipulation

[79] Beale II (n 6), P.1309.
[80] Beale (n 3).
[81] Atiyah, P. S., Adams, J. N., MacQueen, H. The Sale of Goods.-Harlow: Henry Ling Ltd. 2005. 11 edt. P. 97.

designated a condition may be held not to be so[82]. Hence it is important to ascertain the variables upon which the particular status of the contractual term can be determined.

The distinction between conditions and warranties was originally based on two factors. One was the intention of the parties, expressed in the contract. Hence the question to which category a particular statement is attributed is treated as a matter of construction[83]. If a contract states that a particular term is a condition, that term will generally be so regarded; and the same is true where the contract expressly states that termination will be available for a breach of the term[84]. Notwithstanding, in case a term is to be breached in a way which will cause only trifling loss, the court may hold that such a breach does not justify the termination even though the term is called a condition in the contract[85]. The courts tend to rely on the will of the contractors where that intention can be ascertained. However, in this respect the intention of the parties is not discoverable from the words used. Thus, the courts relied on the general requirement of the substantial failure in performance. If the performance of a promise "goes to the very root of the contract[86]" then it is treated as a condition. If a contractual term relates to a "substantial ingredient in the identity of the thing sold[87]" it will also be classified as a condition, and the breach of it entitles the victim to terminate on the basis that it is irrational and unjust to force a party to performe what is substantially different from the thing it agreed on.

A warranty, in comparison to a condition, concerns some less important or subsidiary element of a contract. Its breach does not entitle a victim to terminate, on the basis that a minor breach can be adequately remedied by the payment of money[88]. Ordinarily, a breach of warranty merely gives the injured party a right to sue for damages only[89]. On the other hand, a condition is regarded as a major term, which is more likely to be the very root of a contract. If a party of a contract makes a breach of a condition the consequence is serious since it entitles the other party not only to sue for damages but also to terminate the contract. The injured party, however, even in a case of breach of a condition, has an option to affirm a contract and simply claim damages if it wishes so. This kind of term is known as a "*warranty ex post facto*" in legal practice.

When a contractual term is breached and one contractor is disappointed because of the other, the type of a contractual term is decided upon the impact of the unfulfilled term on the overall contract. Thus the test of an essential purpose is applied. For instance, if there were two

[82] *Wickman Machine Tool Sales Ltd v. L. Schuler AG*, 1974// http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd980520/total02.htm; access time: 2010- 11-04.
[83] *Glaholm v. Hays*, 1841// http://www.garretwilson.com/education/institutions/usf/law/contracts/cases.html; access time: 2010-11-04.
[84] *Harling v. Eddy*, 1951// http://a-level-law.com/contract/contents/terms_lecture1.htm; access time: 2010-11-04.
[85] Peel, E. *The Law on contract*.- London: Sweet and Maxwell, 2007. 12th ed. (hereinafter – Peel). P. 882.
[86] *Ibid.*
[87] *Couchman v. Hill*,1947// http://law.anu.edu.au/colin/Lectures/terms_id.htm; access time: 2010-12-12.
[88] Peel (n 85).
[89] Richards, P. *Law of Contract*. - Glasgow: Bell&Bain, Ltd, 2006 (hereinafter – Richards).P.140-141.

identical contracts drawn up, and the same contractual term was breached, the attention is directed to the consequences that this breach gave rise to. If we assumed that in one situation the breach of a term has caused damages that made the whole contract to lose its purpose, then the breached term would be held as a condition, and that breach will give rise to a right to terminate a contract with a cause of action of a breached condition[90]. As an opposite, if a term is regarded as merely ancillary to the main purpose of a contract, it is amounted solely to a warranty[91]. Hence, the breach of a term considered as a warranty does not frustrate the purpose of a contract, and the contractual relationship continues introducing the right to remedy the breach or to finish what was not sufficiently performed.

1.4.2. Contract Terms Attributable either to Conditions or Warranties

The law itself may determine an indication of the importance of the contractual terms. In cases where no expression of a status of a particular term has been granted by the parties, courts tend to call this kind of terms as innominate, elsewhere known as intermediate terms. The significance of an innominate term depends more on the effect to the contract in case the term is breached rather than on its promissory value. In many situations when a dispute arises it is not so important to attribute an express or implied term to conditions or warranties, because there are many contractual undertakings of a more complex character which cannot be easily categorized as being conditions or warranties[92]. All that can be predicted from such undertakings is "that some breaches will, and others will not, give rise to an event which would deprive a party not in default of substantially the whole benefit which was intended by him to obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided expressly in the contract, depend on the nature on the event to which the breach gives rise and do not follow automatically form a prior classification of the undertaking as a condition or a warranty[93]". Where the term is found to be an innominate, the rights of an innocent party in the event of a breach are determined by application of a test whether he has been deprived of the whole benefit of a contract or not. If the result of a test shows that the disappointed party actually is deprived of the benefits or the breach was fundamental, the breached term is rendered as a condition, if not – as a warranty. In particular, it means that the breach of a contractual term which was provided as a promise is suppose to deprive the innocent party from the substantial part of its benefit or to be fundamental in order to treat it as condition.

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[90] *Poussard v. Spiers and Pond*, 1876.
[91] Latimer, P. *2009 Australian business law*.- CCH Australia Limited, 2008 (hereinafter – Latimer).P. 402.
[92] *Hong Kong Fir Shipping Co. V. Kawasaki Kisen Kaisha Ltd, 1962//* http://netk.net.au/Contract/Hong.asp; access time: 2010-05-02.
[93] *Ibid.*

Worth notice, in the case of innominate terms the situation of legal uncertainty arises, because the contracted parties cannot be sure whether a breach of a particular term constitutes a breach of the essential term or only of a warranty which is treated as ancillary. This situation deprives the parties of urgent decisions, because only a court can help to nominate the status to a particular term in breach. The court has to decide objectively whether the breach is as substantial as to deprive a party of a benefit or it is possible to cure it by less drastic remedies. In case the breach is determined as fundamental or depriving a party not in default to get the substantial part of the expected benefit it is considered that the breached term is a condition, a statement of the highest promissory value.

1.4.3. Difference between Contractual Warranty and Representation

According to the contract law doctrines distinguishing only two groups of contractual terms, representations and warranties form a part of the ancillary contractual terms. In jurisdictions recognizing three groups of contractual terms, warranties and representations are attributed to separate groups. However, the relation of these concepts has developed. A warranty may be both a promise and a representation[94]. Its dual nature became obscure by a rather complicated historical development. Although the newly originated warranty was perceived as an agreement, requiring special words for its creation, an entirely new chapter has started in the eighteen century. Then Holt C.J. stated that a vendor's statement as to a title would be an actionable warranty even though it was not made in special words for its creation[95]. Thus a novel type of a warranty arose: it extended the contractual liability of the express warranty by making unnecessary special words of undertaking; it also created a purely tortious liability where the seller has made affirmations or representations as to title which induced a buyer to buy[96]. With the flow of time the contractual aspect of a warranty was brought into relief, its delictual nature became very blurry.

Perhaps almost every contract has representations and warranties, which are basically the underlying matters or facts as they are being presented in terms of the contract. For instance, when selling something, the seller represents himself to be the owner, who has the legal authority to sell the property. He warrants that the property is as he represents it to be.

In order to answer to the question of a distinction whether a particular contractual term is a warranty or a mere representation, first of all, the attention shall be paid at the time perspective. In particular, the representation is defined as an account or statement of facts, allegations, or arguments presenting everything from its past to its current status. In particular, a

[94] Williston. *Representations and Warranties*// Harvard Law Review, 1913. Vol. 27, No. 1.
[95] *Medina v. Stoughton*, 1700// http://www.jstor.org/pss/1090928; access time: 2010-05-04.
[96] Stoljar (n 5), P. 427.

representation is defined as "a presentation of fact - either by words or by conduct - made to induce someone to act, especially to enter into a contract[97]". Notwithstanding, representations of fact do not constitute a promise even though they form a sufficient part of the inducement to enter into the contract[98]. Thus the liability in tort arises in case of misrepresentation, whereas a breach of warranty usually is recognized as sounding in contract and may constitute a ground for a contractual liability to arise.

Differently than representation, a warranty generally moves from the present to the future (except warranty of title). The warranty puts the duty upon the seller to perform in compliance with the terms of the contract. When a contract comprises the terms "representations" and "warranties" together, they together blend the past, the present, and the future. Each contract is different, but the language is basically the same.

The test of a contractual promise still appears to be applied in order to determine whether the term was intended to be a warranty or a condition. Besides, it is purposive to consider the consequences of attributing the statement to either category before doing so[99]. However, the distinction between warranties and conditions is not the sole dilemma for the courts. As a consequence of a contractual development, many complex intermediary contractual terms tend to be created. Therefore, it becomes increasingly difficult both for contracting parties and courts to determine the contractual value of such terms as well as their impact to the contractors' obligations.

1.4.5. The Role and Significance of Contractual Assumptions

As far as considering standard sale contracts in which the quantity and price of goods are straightforward items that the parties can readily agree on in the course of negotiations, the role and significance of contractual terms is quite clear. At the other end of the spectrum, there are some complex sales contracts that are subject to many issues and variations that could take months or years to work out. Questions of exact price and quantity may also be difficult to determine. In some of these transactions, the buyer seeks to obtain a particular overall result but is not quite sure what quantity and combination of goods and series will be necessary in order to achieve it. For its part, the seller is willing to sell but is not sure what the price will be and cannot determine the price until well into negotiations or until the project is underway. Thus it is important to determine what terms are to be used to reflect intentions of the parties and oblige them to act in good faith.

[97] Garner, B. (Ed.) *Blacks's Law Dictionary.* – St. Paul: West, a Thomson business, 2004. 8 edn.
[98] Beel II (n 6), P. 1310.
[99] Beale II (n 6), p. 1311.

As it was considered in the previous parts of the thesis, contractual terms are either considered to be promises or not. However, when trying to choose a right contractual term to embody real intentions of the parties, mere promises (conditions), warranties or representations do not suffice. Therefore, some contracts possess contractual assumptions, which are derivative and mixed contractual terms, construed of a promise which is covered either by ancillary promise, or warranty, or representation, or several statements of different promissory value. Thus it follows that the promise covered by other statement is conditional. For instance, pre-contractual negotiations may include a conditional offer or conditional acceptance[100], expressing the intention to conform to the needs of the buyer or a wish to enter into the contract but still dependent on the external circumstances which are not yet clear. According to the CISG, a statement constitutes an offer if a proposal for a conclusion of a contract addressed to one or more specific persons is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance[101]. The Principles provides with a substantially identical definition[102]. However, the Principles allows contracting parties to conclude a contract with an open term[103]. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. Article 2.1.2. of the Principles sets out two requirements: first, that an offer indicate the parties' intention to be bound in case of acceptance, and, second, that an offer be sufficiently definite. The requirement that the proposal indicate the intention of the offeror to be bound in case of acceptance demonstrates that such an intention must be indicated to the party to whom the proposal is addressed[104]. In case when an offer indicates several options that can later become an object of a bargain, the compliance with the requirement of definitiveness is interpreted in a broader sense. Alternative contractual offers should be interpreted according to the noticeable intention of the offer's wording and following common sense[105]. For instance, one counterparty wishes to provide the opportunity to the other to select one of the types of the goods defined in the offer at the time of the acceptance of the offer and therefore gives an alternative offer. This alternative offer may be recognizes as a contractual assumption. In particular, a seller gives an offer to sell the goods having the features conforming to those set out in the contractual assumptions. Following, a seller's granting "power" to the buyer, essentially entitles a buyer to make its

[100] Schoenbaum, J. T. *International business transactions. Problems, cases and materials.*- New York: Aspen Publishers, 2005 (hereinafter - Schoenbaum). P. 224.
[101] CISG (n 9) art. 14.
[102] Principles (n 11) art. 2.1.2.
[103] Principles (n 11) art. 2.1.14.
[104] Amato, P. *U.N.Convention on Contracts for the Intrnational Sale of Goods – the Open Price Term and Uniform Application: an Early Interpretation by the Hungarian Courts//* http://www.cisg.law.pace.edu/cisg/text/e-text-55.html; access time: 2010-12-02.
[105] Op. Cit. 100.

selection until some undetermined point of time. The seller's duty is to become able to provide with any goods set out in the conditional offer and wait for the buyer's acceptance of one of the options thereof. As far as seller's offer is alternative, a buyer has to determine which of the listed offers he chooses[106]. However, a party who negotiates or breaks off negotiations in bad faith is liable for losses caused to the other party[107]. That is that a party enters into or continues negotiations when intending not to reach an agreement with the other party[108]. Thus the parties are entitled to act in good faith, are not supposed to abuse their positions and escape the relationship without a sufficiently important reason.

Sometimes pre-contractual agreements or contracts possess a promise to pay a certain amount of money or to make a discount for a timely conclusion or performance of a contract. This sum is considered to be a contractual premium given to the counterparty in case he signs or performs the contract before the deadline. Usually, this contractual premium is covered by several contractual assumptions conditioning the timely conclusion or performance. Following the court practice[109] for a more in-depth perception of the issue, the seller, trying to induce the buyer to conclude a contract prior the acceptance of the particular alternative provided by the offer (timely acceptance was the contractual assumption to a conclusion before the expiry of a deadline) attempted to treat the buyer's statement delivered during the negotiations as an acceptance in order to speed-up the conclusion for its own benefit in order to get the bargain. As far as the buyer did not provide with the declaration indicating one of the alternatives that he chose but only with a declaration that he chooses an alternative possessing a specific feature which conform to some alternatives listed in the offer, a buyer does not make himself bound, because an essential condition is not created[110] (in order to conclude a contract the parties have to agree on particular goods for a particular price). That means that according to specific surrounding circumstances the requirements for the implementation of a contractual assumption can be as high and strict as for a fundamental condition or promise conditioning the conclusion of a contract, e.g. in case the assumption is the very acceptance of an offer, it has to be in compliance with the requirements which the Contract Law sets out for an acceptance. Adequately, all the contractual assumptions, their role and significance has to be interpreted according to the parties intention and main principles provided by the Contract Law.

The parties delay the conclusion of a contract and pursue long negotiations when they have an intention to get involved into the bargain, but are not sure about the precise

[106] *Ibid*, P. 225.
[107] Principles (n 11), art. 2.1.15 (2).
[108] Principles (n 11), art. 2.1.15 (3).
[109] *United Technologies International Pratt & Whitney Commercial Engine Business v. Malev Hungarian Airlines,* 1992// http://cisgw3.law.pace.edu/cases/920925h1.html; access time: 2010-12-09.
[110] *Ibid*.

circumstances which are considered to form the core of the agreement. Thus they entrench their intention into the letter of intent or some other kind of pre-contractual document and set out the frame of future contract, thus including the circumstances shaping their intentions. However, it is possible that parties skip the pre-contractual document stage and form a binding agreement, though still possessing assumptions akin to conditional promises. Contractual assumptions may be an efficient tool to determine the obligations of the parties or a frame of performance. For instance, counterparty may provide with a promise to act in compliance with the conditions set out in a form of contractual assumptions or to achieve a specific result in order the circumstances will be as determined by the parties within those assumptions.

Interpreting the case when parties undertake to use reasonable efforts to bring the event about (without absolutely undertaking that his efforts will succeed), two possibilities shall be taken into consideration: whether the very intention of the parties is to achieve a specific result; or the use of best efforts in order to achieve it is more important. The theory of different obligations may help to determine the significance of a particular contractual assumption. He distinguishes two obligations: *obligation de moyen* and *obligation de resultat*. The Principles also invokes it as a duty to achieve a specific result and duty of best efforts. In case parties have drawn up the assumptions, implementation of which was based on the principle of *obligation de moyen*[111], the party is obliged to use its best skill, act with necessary diligence and use the best efforts in order to achieve the result. Thus the liability to the party which has undertaken to bring the event about may only occur in case the exercise of skill, care, attention and best efforts are promised, but not confered[112]. For instance, parties concluded a sales contract possessing a condition that the buyer is obliged to buy the goods if he obtains a necessary license but, unfortunately, a buyer is not successful and did not obtain it. Thus principal obligations to buy and sell will not take effect if no license is obtained[113]. However, if a party who should have made reasonable efforts has failed to do so, he will be liable in damages unless he can show that any such efforts, which he should have made would (if made) have necessarily been unsuccessful[114]. Hence the account has to be taken to the scope of the committed efforts in order to evaluate whether they were appropriate and sufficient.

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[111] Working Group for the Preparation of Principles of International Commercial Contracts. Fourth session. Draft chapter on Conditional Obligations// http://www.unidroit.org/english/documents/2009/study50/s-50-113-e.pdf; access time 2010-12-09. (hereafter - Fourth session). P. 5.

[112] *The International and Comparative Law Quarterly//* http://www.jstor.org/pss/756558; access time: 2010-12-04. Vol. 12, No. 4, Oct., 1963.

[113] Fourth session (n 110).

[114] *Overseas Buyers Ltd v. Granadex SA*, 1980// http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/jones/2008/cv_08_04998DD21oct2009.pdf; access time: 2010-12-03.

Continuing interpretation, if the principle of the *obligation de resultat* is prevailing, the party who was obliged to achieve a specific result without the reference to the means employed fails, the only possibility to escape the liability is to prove *force majeure*[115]. Thus if it is determined that the obligation to achieve a specific result prevails, it is really difficult to escape the liability.

Where it is not clear whether *obligation de resultat* or *obligation de moyen* is at issue, or in situations where both obligations are overlapping, it is important to determine, what principle prevails: either that of the *obligation de resultat* or that of the *obligation de moyen.* The importance of this determination lies in the necessity of attribution of the damages suffered if the result is not achieved. The account should be taken to the way in which the obligation is expressed in the contract, the contractual price and other terms of a contract, the degree of risk normally involved in order achieve the expected result and also the ability of the other party to influence the performance of the obligation[116]. Thus courts have to evaluate the surrounding circumstances in order to determine the leading obligation.

Taking into account the overall interpretation of the role and significance of contractual assumptions it is clear that they are quite complex creatures both of the imperatives of the Contract Law and its basic principle - contractual freedom of the parties.

[115] Mikelėnas, V. *Private law: Past, Present and Future*.- Vilnius: Justitia, 2008. P.140.
[116] Principles (n 11) art. 5.1.5.

2. THE SIGNIFICANCE OF WARRANTIES AND PROMISES THROUGH THE ANGLE OF NON-PERFORMANCE

The role and legal significance of a warranty through the angle of its relation with other contractual terms, including conditions which are considered to be terms of the highest promissory value and intermediary terms patterned by fluctuating contractual importance, was determined. Thus it is now possible to state that the role of contractual assumptions can be determined by the scope of its qualitative. Thus the further research will be focused on the comparison of the significance of promises and warranties in order to find out the effect on the parties obligations when they are breached. The best mean to determine the significance of a contractual term is to evaluate the impact of its breach to the overall contract. Hence the remedies applicable for a breach of warranty by the mean of comparative analysis with the breach of a promise.

2.1. Remedies for non-performance

Regarding the CISG and the Principles provisions the remedies are designated to the discrepancies of a contractual performance without any specification regarding a breach of warranty. Contrasting, the remedies available under the UCC are distinguished on a basis of a fact of acceptance of the goods. Thus, the UCC provides with distinct rules designated to the remedies for a warranty breach.

Regarding the CISG, the disappointed buyer is entitled to require specific performance[117]. Worth notice, that the courts are not required to grant specific performance as a CISG remedy unless the applicable national law provides with specific performance as a remedy under the circumstances[118]. This means that specific performance is a possible remedy if the applicable national law recognizes it; and if the national law does not conflict with a provision of the Convention. Regarding that Common Law is generally more restrictive than Civil Law, the CISG regulation clearly favors the Civil Law perspective[119]. This is the best example of the CISG attempt to achieve a compromise and reconcile two legal regimes. However, specific performance has a significant disadvantage of swift resolution. This is a consequence of the absence of a requirement to perform within the reasonable time, even the parties are obliged to act in accordance with the basic principle of good faith.

However, regarding the CISG, the buyer is not allowed to ask for specific performance if he has elected another remedy which is inconsistent with specific performance, such as

[117] CISG (n 9) art. 46 (1).
[118] *Ibid.*, art. 28.
[119] Gabriel (n 10), P. 148.

avoidance and price reduction[120]. There were many discussions and reluctance from the Common layers' side towards the incorporation of a remedy of price reduction into the CISG. However, it was introduced[121]. This remedy is unfamiliar to common law lawyers as it is different from an award of damages. Yet, it results in a pecuniary compensation. Following an article 50 of the CISG "if the goods do not conform to the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time…" This remedy is exclusively available to the buyer if the goods do not conform to the contract. Other types of a breach of contract will be sanctioned by expectation damages only. Under the rules of the CISG, the buyer may use damages[122] together with or alternatively to the reduction of price remedy[123]. In particular, those damages consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of a breach[124].

Another possible remedy under the CISG is a request to repair or replace non-conforming goods[125]. Both remedies have to be performed within the reasonable time. However, the buyer's right to obtain delivery of substitute goods is limited to instances when the non-conformity results in a fundamental breach of contract. Hence it is more difficult to apply this remedy in case of a breach of warranty when the warranty is breached as a consequence of a minor or not fundamental non-conformity of the goods. In spite of that, the remedy of repairing of non-conformity is limited only with the requirement of timely notice.

Thus the conclusion may be done, that the easiest obtainable remedy for a breach of warranty under the CISG is a repairing of non-conformity. Other remedies are available as well, but it is required to prove that the breach of warranty caused a fundamental breach of a contract in order to acquire a right to claim for specific performance or the substitution of the goods.

Regarding the Principles regulation on remedies, it provides with a general right to specific performance, which could be applicable for a breach of warranty as a cause of non-conformity[126]. However, the specific performance is limited when performance is impossible in law or in fact, or when it is possible but to do so is so burdensome or expensive that it would run counter to the general principle of good faith and fair dealing to require performance, or when the party may reasonably obtain performance from another source, or when the performance is

[120] CISG Commentry (n 22), art. 62.
[121] Bergsten, E. Miller, A. *The remedy of the reduction of price*// http://www.cisg.law.pace.edu/cisg/biblio/bergsten.html ; access time: 2010-12-07.
[122] CISG (n 9), art. 74.
[123] *Ibid.*, art. 45.
[124] *Ibid.*, art. 28.
[125] *Ibid.*, art. 46 (2), (3).
[126] Gabriel (n 10), P. 149.

of an exclusive personal character, or the time for performance has passed but the obligee has failed to demand performance within the reasonable time[127]. In addition to the specific performance, repair and replacement of a specific performance is also a possible remedy with limitations that are applicable for a specific performance[128]. Besides, additional expenses caused to the buyer for non-conformity are to be born by the seller without prejudice to any other remedies. Hence Principles remedies for non-conformity are general right to specific performance, repair and replacement of a specific performance. As the remedy of specific performance is usually applicable for a breach of a promise constituting the core of a contract, in case of a breach of warranty most veracious remedies are repair and replacement of a specific performance.

Regarding the UCC, the buyer's remedies for a breach of contract are delineated in the section 2-711. A rejection and revocation of acceptance are among the options identified therein. In this regard, section 2-711 refers to the remedies available "where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance[129]". A buyer who effectively rejects the goods and a buyer with a substantively valid right to revoke are deemed to have not finally accepted the goods. Moreover, a buyer who revokes acceptance possesses the same rights and duties of a buyer who rejects[130]. Another circumstance enabling a disappointed buyer to be relegated to a breach of contract rather than a breach of warranty action is where the seller fails to deliver pursuant to time period set forth in the parties' agreement and the buyer cancels the contract[131]. The principle in use is the same – a buyer did not accept the goods, therefore he is entitled to claim for a breach of contract. Thus regarding the UCC, a buyer is entitled to claim remedies for a breach of warranty solely if he retains the goods and does not consider a contract as repudiated.

[127] Principles (n 11) art. 7.2.2.
[128] *Ibid.*, art. 6.1.3.(2).
[129] UCC (n 29) section 2-711.
[130] Baylor law review (n 39), P.792.
[131] *Ibid.*, P. 794.

2.2. The Evaluation of Remedies Applicable for Different Cause of Action: Contract Breach v. Warranty Breach

Regarding the fact that the UCC, differently than the CISG and Principles, possesses separate rules for damages for a breach of a warranty and a breach of contract, we take it a as basis for the following research.

When drawing a line between a breach of contract and a breach of warranty, one of the most important and significant difference can be emphasized on a basis of a fact of delivery of goods. When a seller fails to deliver the goods, its action is treated as a breach of contract. In order to get a right to start a claim for a breach of warranty the buyer has to satisfy the requirement of acceptance of goods, because according to the UCC provision and the subsequent court practice, a breach of warranty claim is only available to a buyer who has finally "accepted the goods but discovers that the goods are defective in some manner"[132]. Contracting, legal consequences are different when a seller fails to make the delivery. This situation is treated as a breach of contract. Consequently, remedies that are available for a breach of contract are different from those that may be applicable in case of a warranty breach. Hence it is clear that the UCC recognizes a breach of contract and a breach of warranty as a different cause of action.

Worth notice, a breach of warranty is an action affirming a contract. In case of a breach of warranty, a buyer retains the goods. This means, that a buyer does not seek to claim for a breach of a contract. Besides, he does not attempt to prove that contractual obligations assumed by the seller were not performed but that they were performed unduly. Thus the buyer gives a "second chance" to the seller to perform his contractual duties in their entirety.

[132] *Paul Mueller Co. v. Alcon Labs. Inc*., 1999// http://caselaw.findlaw.com/tx-court-of-appeals/1163971.html; access time: 2010-10-21. 993 S.W.2d 851,855. (hereafter – Mueller case)

2.2.2. Difficulty to distinguish Breach of Warranty from Breach of Contract

Taking into account that rejection and revocation are akin to rescission[133], it is unclear what cause of action a buyer can use when he accepts the goods but later finds that the goods were defective at the time of acceptance and subsequently revokes the acceptance. Noting a fundamental difference between a breach of warranty action and rejection and revocation, a court stated: „a party may not at the same time successfully pursue both the remedy of rescission and that of an action for damages as they are inconsistent, first resting upon a disaffirmation and the second resting upon an affirmation of the contract[134]". Damages for breach of warranty are not available to buyers who have revoked acceptance[135]. A buyer has a substantive right to revoke where it has accepted the goods premised either on the assumption the defect in the goods would be cured, and the goods would become of the condition as were bargained for, or the defects were difficult to discover either because of the nature of the defects or of the assurances provided by the seller. Thus, assuming that the buyer's acceptance is reasonable and he has complied with the requirements to give timely notice to the seller about the non-conformity[136], the buyer is entitled to return the goods to the seller.

In order to determine what kind the cause of action exists, courts apply different tests. The test for a breach of warranty is often characterized as an objective test. The facts that fall under examination of a breach of warranty are as following: i) in a case of an express warranty the goods fail to conform to an affirmation of fact or promise; ii) in a case of an implied warranty of merchantability the goods fail to be merchantable[137]. As an opposition, in case of a contract breach the test comprises of objective and subjective elements. In particular, there has to be the objectively determined non-conformity, and that non-conformity has to make a substantial impairment to the value of goods to a particular buyer. In case of attempted revocation, the threshold issue is whether the goods possess non-conformity which substantially impairs their value to the buyer[138]. Resolution of this factual issue requires the application of two-part test which considers both the buyer's subjective reaction to the alleged defect (taking into account the buyer's needs, circumstances and reaction to a nonconformity) and the objective reasonable of this reaction (taking into account the goods' market value, reliability, safety and usefulness for purposes for which similar goods are used, including efficiency of

[133] *Prince v. LeVan*, 1971// http://ftp.resource.org/courts.gov/c/F2/649/649.F2d.416.78-3089.78-3088.html; access time: 2010-09-30.
[134] *Baker v. Wade*, 1997// http://openjurist.org/769/f2d/289/baker-v-wade-e; access time: 2010-09-28.
[135] *Kelly v. Olinger Travel Homes, Inc*.// http://caselaw.findlaw.com/or-court-of-appeals/1055001.html; access time: 2010-09-30.
[136] CISG Commentry (n 23), art. 39.
[137] Baylor Law Review (n 39). P.797.
[138] *Ibid.*

operation, cost of repair and the seller‘s ability or willingness to seasonably cure the nonconformity[139]“. Thus in case of a breach of warranty there is no requirement of a substantial impairment of the goods. The buyer is entitled to claim remedies for a breach of warranty if there is a non-conformity, even a slight one, between the qualities of the goods agreed which were assured by the seller in a form of express warranties, or in the absence of an express warranty – by implied warranty of fitness for a particular or ordinary purpose.

In case of breach of contract, revocation of acceptance is possible, requiring both the return of the goods and the cancellation of contractual terms. In this respect, both parties suffer damages arising as a loss of benefit which was expected from a bargain. The basic principle applicable in order to assess the damages which occurre as a consequence of a breach of contract is to place the injured party in the same position it would have been in if the contract had been carried out. Such damage is often called as an expectation loss. Alternatively, the injured party may decide not to claim for loss of profits but for the expenses incurred because of the reliance on the contract to be performed[140]. These costs are called as reliance loss and may arise when the profits the parties expected to materialize from a contract are too speculative or uncertain. On the other hand, when we speak about a breach of warranty, the damages are assessed according to the principle “to put the party into the same position it would have been if the product was of a quality that was bargained for[141]”. Hence the damages for a breach of warranty are designated to cover the loss which was caused solely because of the non-conformity of the goods, but not related with the consequences of a breach of contract.

To make a conclusion, the complexity of a warranty and its nature triggers difficulties when determining whether it was warranty or contractual breach. However, it is possible to distinct a different cause of action according to the fact whether the goods are in the buyer’s possession or are rendered back to the seller.

2.2.2. Remedies after Acceptance: Evaluation of the Possibility to Claim for Breach of Contract

Following the UCC regulation, the buyer is entitled to damages when qualitative warranties rendered by the seller on behalf of a buyer are breached. The section 2-714 of the UCC gives a provision concerning the damages available for a disappointed buyer. The title of this provision already presupposes one of the conditions that have to be satisfied in order to acquire a right to claim for damages: “buyer‘s damages for breach in respect to accepted

[139] *Garry Wayne Robinson v. Allen*, 2010// https://efile.gasupreme.us/efile/viewFiling?filingId=8d548f4a-36af-11df-9287-4b7a6a6d0540; access time: 2010-10-13.
[140] Richards (n 89), P. 346.
[141] Baylor Law Review (n 39).

goods[142]". The requirement of the acceptance of goods has to be satisfied in order to benefit the right to claim damages. Therefore it is important to ascertain the requirements applicable for acceptance.

A final acceptance occurs when a buyer has sought neither to effectively reject the goods nor rightfully revoked the acceptance. Thus a buyer who has accepted non-conforming goods and who complies with other conditions necessary in order to claim damages (e.g. reasonably notifies the seller of a breach of warranty) is considered to have a right to claim damages for a breach of warranty. When the buyer is recognized as having a right of a warranty breach claim against the seller, it is necessary to evaluate the damages. The buyer's damages are measured according to the general rule, provided by the section 2-714 of the UCC, and are evaluated regarding the time and the place of acceptance of goods. The damages are evaluated according to difference at the time and date of acceptance between the value of the goods accepted and the value they would have had if they would had been as warranted. So it means that the damages are estimated according to the price of accepted non-conforming goods and the price that the goods would have had if they were in compliance with the warranty clause. When a buyer accepts the non-conforming goods, the UCC entitles him to claim not only the direct but also incidental and consequential damages[143].

Continuing, an action for a breach of warranty cannot occur earlier than after acceptance. In other words, the breach of warranty claim is available to the buyer who has finally accepted the goods, but later discovered that goods are defective in some manner. According to the court statement "were acceptance has occurred, a cause of action for breach of contract is available if the buyer's acceptance is subsequently revoked. A buyer can revoke his acceptance if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances[144]". Hence a buyer who fails to discover the non-conformity and whose acceptance was reasonably induced by the seller's assurances may revoke acceptance where the non-conformity substantially impairs the value of a product, provided that such "revocation occurs within a reasonable time[145]". The elements that have to be proved in order to revoke the acceptance are as following: reasonably induced acceptance, substantial impairment, timely revocation. A seller may be found to have given assurances based on either circumstantial evidence or the seller's explicit language. Revocation will be available whether or not the seller made assurances in bad faith if the seller has assured the buyer explicitly. The

[142] UCC Comments (n 25), section 2-714.
[143] UCC Comments (n 25), section 2-714.
[144] *Mueller case* (n 131).
[145] *North American lightening, Inc. v. Hopkins Manufacturing Corp*.// http://openjurist.org/37/f3d/1253/north-american-lighting-inc-v-hopkins-manufacturing-corp; access time: 2010-12-05. 37 F.3d 1253, 37 F.3d 1253, No. 93-1789, United States Court of Appeals, Seventh Circuit.

question whether the value of the product has been impaired is determined subjectively from the perspective of a buyer. However, the feature of a substantial impairment is determined regarding objective evidences. The reasonable time for revocation depends on the nature, purpose and circumstances of the transaction. In particular, the available period for revocation may be extended where the seller gives continuous assurances and where the seller fails, after repeated attempts, to repair defects the buyer complains about[146]. This provision protects a disappointed buyer from the seller's abusive procrastination.

2.3. The Liability Following the Breach of Warranty

A warranty action is neither a pure contract nor a pure tort action but has attributes of both. It had its origin in the tort, but with lapse of time the warranty action began to be based on a contract theory. Therefore in case of breach of warranty it would be consistent to apply remedies that are usually applicable for a breach of contract. However, obligation is often imposed on a seller not because he has assumed it voluntarily, but because the law attaches such consequences to his conduct irrespectively to the existence of a contract. In many cases, especially where the parties to an action on a warranty are not the immediate seller and the immediate buyer, considering warranty as a contract is somewhat a fiction. Thus in case the obligation originated in law, the seller is liable for delict rather than for a breach of contract. Following, if the obligation to conformity was agreed by the parties then the breach of this obligation gives rise to a contractual liability. As a result, some courts have held that an action in tort may be maintained for a breach of warranty without proof either of intentional misrepresentation or of negligence[147]. On the other hand, particular tendency occurs in a court practice that they tend to interpret the breach of warranty as sounding in contract. The contradiction occurs which has to be clarified.

The interpretation of a warranty breach as sounding in contract may lead to confusion between the breach of a warranty and breach of a contract. This most frequently happens when courts attempt to separate a contract based warranty action from a tort action, and in particular when they want to apply the economic loss rule. The latter situation arises when an aggrieved buyer seeks to recover in tort (negligence or strict liability) under circumstances where the only injury that is complained for is a failure of a product to perform in accordance with a contract, injuring only a product itself and causing purely economic loss. The Court stated that "the distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest upon the "luck" of the plaintiff in

[146] UCC Comments (n 25), section 1-204(2).
[147] Hotchkis, P. B. *Warranty: Tort and Contract Characterization: Statutes of limitation//* California Law Review// http://www.jstor.org/pss/3480756; access time: 2010-11-23. Vol. 43, No.3., 1955. P. 549.

having an accident causing physical injury[148]". The distinction rests rather on the understanding of the nature of the responsibility the seller must undertake in distributing its products. When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving party to its contractual remedies are strong. The tort concern for safety is reduced when injury is only to the product itself[149]". Hence the liability arising from the non-conforming goods which were damaged or impaired by the defect they possessed as a cause of the seller's action or is considered to be contractual.

Courts also tend to treat the damages occurred to a product as a cause of an accident, through an abrupt, as giving rise to a contractual liability rather than tortious, because the resulting loss due to repair costs, decreased value and loss of profit is „essentially a failure of a purchaser to receive a benefit of its bargain – traditionally a core concern to the contract law[150]". Damage to a product itself is understood as a warranty claim, because such damage means that the goods did not meet the expectations of a buyer or that its quality was not as it ought to be. Besides, the analysis of a "defect" within the actions of a breach of implied warranty originates in contract law, which directs its attention to the buyer's disappointed expectations whereas "defect" analysis in strict products liability actions is explained as originating in tort law, which traditionally has concerned itself with social policy and risk allocation by means other than those dictated by marketplace[151]. In addition, in "given the availability of warranties, the courts should not ask tort law to perform a job that contract law could perform better[152]. This better performance means that the damages are purely economic, resulting from the non-conformity of the goods, therefore it is possible and less complicated to take a contract as an evidence of the contractual statements of both parties with determined rights and obligations, and solve the occurred dispute according to the terms of a contract.

Breach of warranty claims arise from a transactional nature between buyer and seller, therefore the aim of available remedies for a breach of warranty is to seek to protect the disappointed buyer's expectations. The situation is different when the damage occurs because of the actions of a third person, which is in neither way contractually bound by the contract concluded by the particular buyer and seller. From the point of tort law view this would leave the contracting parties unprotected against infringements of their contractual rights, merely because the party causing the rise to defects is not bound by that contract. This would be

[148] *Seely v. White Motor Co.*,1965// http://scocal.stanford.edu/opinion/seely-v-white-motor-co-27248; access time 2010-10-22.
[149] *Ibid.*
[150] *East River Steamship v. Transamerica Delaval*, 1986// http://supreme.justia.com/us/476/858/case.html; access time: 2010-10-22.
[151] Baylor Law Review (n 39). P. 798.
[152] *Ibid.* P. 780.

inconsistent with the necessity of a market economy for a contractual stability[153], and therefore none of the Continental jurisdictions take this restrictive approach. Moreover, they seem to admit that third parties have duty in tort to respect contracts to which they are not parties[154]. As their duty rises from the tort law, consequently, it is consistent to treat them as liable in tort. Besides any breaches of an implied warranty in absence of any express warranty may result the rise of tortious liability.

Thus it is possible to make a conclusion, that the twofold origin of a warranty makes difficulties of distinction whether the seller's liability for non-conformity is tortious or contractual. However, liability for non-conformity is contractual rather than in tort if the non-conformity led to pure economic loss or it originated from the parties' agreement. The liability in tort arises in the absence of any express warranty or when the non-conformity is a consequence of a third party's action based on the absence of contractual relation.

[153] Danforth J., *Tortious interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity//* Columbia Law Review// http://www.jstor.org/pss/1122206; access time: 2010-09-28.
[154] W. H. van Boom, Koziol H., Witting C.A., *Pure Economic loss. Tort and Insurance Law, Vol. 9.* European Centre of Tort and Insurance Law.-Vienna: Springer-Verlag Wien New York, 2004. P. 17.

3. POSSIBILITIES TO EXCLUDE LIABILITY FOR BREACH OF WARRANTY

3.1. Awareness of the Buyer

Though the CISG provision on conformity of goods is more concentrated on the protection of buyer's interests and attempt to exclude seller's abuse and fraudulent behavior, it also provides some means for exclusion of seller's liability, and in this way, creating a balanced relationship between the contracting parties with the rational allocation of risk.

One of the means when a seller can escape liability for non-conformity of goods is when at the time of a conclusion of a contract the buyer knew or could not have been unaware of the lack of conformity[155]. The expression "Could not have been unaware" denotes more than gross negligence. Liability is not excluded for lack of conformity. The wording amounts to a reduction of burden to prove the actual knowledge, which can otherwise be hardly proven. A particular lack of conformity that ought to be apparent to the buyer is determined in relevance with the buyer's objective position[156].

A buyer's position in respect to the inspection of the conformity of the goods largely depends on the particular situation. Many circumstances are taken into account, such as "the nature of the goods, the skill and experience of each party and the reasonabless of an examination by the buyer[157]". If a seller combines a request to examine with a reference to possible defects in the goods, then, in any event, the buyer loses his rights to claim for non-conformity in respect with defects which would have been obvious upon such an examination, even if does not perform it. However, a seller cannot escape liability for a lack of conformity merely by offering the buyer an opportunity to examine the goods. If a buyer has examined the goods before the conclusion of a contract, he cannot later on claim seller's responsibility for recognizable defects[158]. The law imposes a duty on the buyer to be diligent and act with care. Besides, the fact that the buyer has inspected the goods could be coherent to the agreement on the qualities of goods in a form of an express warranty.

[155] CISG (n 9), art. 35(2).
[156] CISG commentry (n 23), P.427.
[157] *Ibid*.
[158] *Ibid.*

3.2. Failure to Give Notice of Non-Conformity

The seller is not liable for the non-conformity of goods if the buyer did not act in accordance with the CISG article 39, which states that "the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it[159]". The article does not specify any specific form for the notice. However, the parties can specify the form required. The notice needs to be specific enough to inform the seller of the nature of the non-conformity[160]. Besides, it must be given within the reasonable time under the circumstances. Moreover, it is important to highlight that the time for notice commences when the buyer discovered, or ought to have discovered the non-conformity[161]. Generally this would be at the time of delivery[162]. However, the seller is not entitled to escape liability "if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer[163]". Besides, notwithstanding the provisions of paragraph (1) of article 39 the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice[164].

Regarding the Principles, there is no such a duty imposed on a buyer to inform of non-conformity of goods. The only mean of the similar effect can be the general principle of good faith and fair dealing[165] that could create an obligation to inform another contracting party within the reasonable period.

The UCC as well as the CISG imposes an obligation on a buyer to notify a seller of defects in the goods or other breaches. This requirement is contained in two sections: i) when a buyer rejects or revokes acceptance based on a breach[166]; ii) when a buyer accepts the goods and seeks damages for a breach[167]. Hence the duty to inform exists in the case of breach of warranty as well as a breach of contract.

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[159] CISG (n 9), art. 39.
[160] Gabriel (n 10), P.136.
[161] Uncitral CLOUT case no 378. Tribunale di Vigevano, Italy, 12 July 2000// http://cisgw3.law.pace.edu/cases/000712i3.html; access time: 2010-12-05.
[162] Uncitral CLOUT case No 82. Oberlandesgericht Düsseldorf, Germany, 10 February 1994// http://cisgw3.law.pace.edu/cases/940210g2.html; access time: 2010-12-05.
[163] *Cit. op.* 159, art. 40.
[164] *Cit. op.* 160, P.137.
[165] Principles (n 11), art. 1.7.
[166] UCC (n 25), section 2-508.
[167] *Ibid.* Section 2-607(3).

3.3. Disclaimers of Warranty

The achievement of the basic objectives of commercial law is sought not only in the enforcement of warranties, but also of disclaimers and the parole evidence rule, both of which are designed to exclude fraudulent claims. As legal devices to promote fair and easy commercial intercourse warranties on the one hand and disclaimers on the other may pull on the opposite directions, and to the extent that the latter are improperly extended, the effective utilization of warranties is unjustifiably diminished.

CISG does not adhere to any formalistic rules with respect to disclaimers of warranties. However, it provides with the presumption that the goods are fit for the purpose for which goods of the same description would ordinarily be used and are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract[168]. However, this presumption is subject to an express agreement among the parties to the contrary[169]. Therefore the only question is whether the disclaimer is a part of the agreement between the parties, arguably tough, yet ultimately fair standard[170]. Ultimately, merchants understand that they could get caught on either side of the equation and would prefer a rule that discourages results based on formalistic legal rules.

Regarding the UCC, it provides with a liability exclusion clause where a disclaimer is established. Moreover, the UCC provides with a general rule that the terms have to be construed as consistent with each other whenever it is reasonable to do so. The evidence that one can use to establish both an express warranty and its disclaimer is subject to the parol evidence rule. In case it is unreasonable to apply such a disclaimer to one's obligation, the disclaimer will not be given effect[171]. The CISG does not have any provision for this conflict, and the agreement would be subject to interpretation of the purpose of divining the parties' intent.

A merchant may, by conforming to prescribed requirements, affirmatively disclaim the implied warranty of merchantability, unless such disclaimer is unconscionable. The disclaimer may be oral or written. If in writing, the disclaimer must mention merchantability and be conspicuous, although the statute provides that the warranty may also be disclaimed by such commonly used terms as "with all faults", "as is", or other language calling the exclusion to the buyer's attention or making it plain that there is no implied warranty. The implied warranty can also be disclaimed by a course of dealing or course of performance between the parties or by trade usages.

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[168] CISG (n 9), art. 35(2)(a), (b).
[169] *Ibid*.
[170] Cook, S.V. *CISG: From the Perspective of the Practitioner*// http://www.cisg.law.pace.edu/cisg/biblio/cook.html#r26; access time: 2010-12-07.
[171] Gabriel (n 10), P.127

Warranties may be disclaimed expressly in the agreement or the courts may imply a disclaimer from a conduct of the parties. There is an express disclaimer when the parties agree in their contract that there exist no warranties other than those expressly stated in the agreement[172] or that the final writing contains their entire agreement[173]. Illustrative of an implied disclaimer is that which arises when a buyer has inspected, or has had the opportunity to inspect, the product he has bought. Such an inspection negates any warranty which would normally arise by operation of law with reference to any defects which the inspection should have unearthed[174]. The implication of a disclaimer in this situation rests on the principle that the buyer by inspecting the article has shown that he is no longer relying on the seller's representations but on his own judgement[175]. Naturally the buyer could protect himself by inserting a pertinent warranty in a written contract[176]. That means that a reasonable buyer having doubts about certain qualities of the goods has to agree on additional assurance.

Implied warranties arise by operation of law. Hence these warranties are in a contract because the law stipulates they are to be there. The law is thus reflective a society's demand for such protection. A court stipulated that an express disclaimer of an implied warranty is against public policy[177]. Even if the contracting parties do not know of the very existence of such warranties, they are still a part of the contract.

When goods are brought by description to a dealer in such goods, an implied warranty of merchantability arises obliging a seller to provide goods of a quality at least equal to that exhibited by other goods of the same nature[178]. Subsequently, sellers and manufacturers have reacted to this imposition of strict liability by inserting disclaimer clauses which purport to release them from liability based upon implied warranty. Disclaimer clauses have been uniformly recognized to be within the capacity of contracting parties although judicial disfavour has resulted in increasingly narrow construction of disclaimer terms. A court has stipulated that an implied warranty may not be abrogated by contract provisions that no warranties have been

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[172] *Ford Motor Co. v. Cullum*, 1938// http://www.jstor.org/pss/1071109; access time: 2010-12-09.
[173] *Hopkinsville Motor Co v. Massie*, 1929// http://docs.justia.com/cases/federal/district-courts/kentucky/kyedce/2:2008cv00073/56697/49/; access time: 2010-12-09.
[174] *Warranties, Disclaimers and the Parol Evidence Rule//* 53 Columbia Law Review, No. 858, 1953// http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/clr53&div=74&id=&page=; access time: 2010-04-11.
[175] *Salzman v. Maldaver*, 1946// http://mi.findacase.com/research/wfrmDocViewer.aspx/xq/fac.%2FSAC%2FMI%2F1968%2F19680731_0003.MI.htm/qx; access time: 2010-04-11.
[176] *Op. Cit*. 172.
[177] *Henningsen v. Bloomfield Motors*, Inc., 1960// http://www.kentlaw.edu/faculty/rwarner/classes/contracts/unconscionability/hennigsen/hennigsen.htm; access time: 2010-04-11.
[178] UCC Comments (n 25), section 2-313 (b).

made unless expressed[179]. In this manner the courts have balanced to afford the consumer protection against defective articles with the need to preserve some freedom to contract between seller and buyer. Besides, courts have held that disclaimer clauses are ineffective when a product is so defective as to amount to a failure of consideration[180].

Concluding, any written disclaimer of an implied warranty either of merchantability or of fitness for a particular purpose, have to be conspicuous. As an implied warranty of merchantability does not have necessarily to be in writing, in cases it is in writing, it must be conspicuous. Whether the diclaimer was oral or written, it does have to possess the word "merchantability" in order for a buyer to know that the seller disclaims or modifies a warranty or merchantability. Regarding disclaimers of an implied warranty of fitness for a particular purpose, they have to be both in writing and conspicuous, but differently than in case of the disclaimer of warranty of merchantability, there is no obligation to use a the phrase "fitness for a particular purpose".

3.3.1. Possibilities to Claim Remedies when Warranties when Contract Contains Disclaimer Clause

Sellers do not want to conciliate with the imposition of liability for non-conformity, therefore they try to find a way how to escape it. Therefore they try to incorporate a disclaimer clause into the contract. However, there is a possibility to refuse to enforce a disclaimer clause if the particular disclaimer is recognized as lacking mutual intent of the contractors.

Principle "it's there unless you throw it out" of the implied warranty of merchantability, coupled with the right (in most cases) to exclude the warranty, has led to a controversial practice. Taking advantage of the right to disclaim a warranty, some businessmen have been routinely printing disclaimers on sales receipts. Modern cash registers enable the merchant to list details of the transaction; they also enable the user to have the machine print a disclaimer (or other message) on the register tape. When confronted with a warranty claim based upon the implied warranty, the merchant defends on the basis of the disclaimer printed on the register tape[181]. Hence such a disclaimer is particularly simple and it becomes unclear whether it is sufficient in order to eliminate a warranty and whether a seller can rely on such a disclaimer. Actually, while each case must be decided on its merits, it is likely unwise to rely on a

[179] *Bekkevold v. Potts*, 1927// http://ia.findacase.com/research/wfrmDocViewer.aspx/xq/fac.%5CFDCT%5CNIA%5C1958%5C19580113_0000001.NIA.htm/qx; 2010-10-28.
[180] *Myers v. Land*, 1951// http://ftp.resource.org/courts.gov/c/F2/198/198.F2d.1012.11460.html; access time: 2010-04-11.
[181] UCC Comments (n 25), section 2-313 (b).

disclaimer made in this manner. As UCC does specifically provide for a disclaimer, it is certainly fair to ask why the disclaimer might nevertheless be held invalid by a court.

As a seller is always seeking to reduce the scope of his liability, therefore he often provides with a written disclaimer which is somehow hidden. A buyer may either see a disclaimer or not. It is almost certainly not called to his attention. From a legal viewpoint it will be argued that the seller is adding a term to the sale after the contract was made. Contracts cannot be unilaterally changed, and there is real doubt as to whether the disclaimer (or attempted disclaimer) is a part of the contract at all. The buyer neither bargained for nor expected the disclaimer and should not be bound by it[182]. Thus such a disclaimer determined as reciprocally intended by both parties.

Regarding deceiptive sellers' practice when they seek to escape or limit their liability, a requirement for written disclaimers to be conspicuous is stipulated. However, one of the justices did address the "conspicuousness" issue. The judge said "Even if disclaimers and limitations are sufficiently conspicuous to comply with the statutory language of the Uniform Commercial Code, they may still be inconspicuous in fact [emphasis added], if, by the genius of product packaging, the color, size, emphasis, or distractions on the package substantially detract from the disclaimer or limitation[183]." Thus numerous supreme courts around the country have dealt with the issue of disclaiming implied warranties. They are often invalidated. Thus, any merchant relying on the disclaimer of an implied warranty as a mean to limit his liability should be aware that his efforts may likely be of no avail.

Concluding, sellers of goods should be cautious in placing too much reliance on routine disclaimers, because according to the court practice, disclaimer may not assure the expected excusion of seller's liability. If a disclaimer is recognized being unconscionable or not corresponding to its requirements, most likelihoodly it will be recognized as being void. In this respect, the warranties ascertained on behalf of a buyer are still in force and a seller is thus entitled to remedy the discrepancies that have occurred.

[182] UCC Comments (n 25), section 2-313 (b).
[183] *Ibid.*

CONCLUSIONS

1. The real intention of the contractors determines the significance of every promise within the contract. If a promise induces the party to enter into the contract, it is considered to be fundamental.
2. The main role of a warranty is to provide a counterpart with a promise that the quality and title of the goods are as considered. If the performance fundamentally depends on satisfaction of a warranty clause, the warranty is likely to be recognized as a core of the contract.
3. *Warranty ex post facto* entitles the disappointed party even in a case of breach of condition to affirm a contract and simply claim damages in case it does not seek to repudiate the contract.
4. The role of contractual assumptions is to embed the conditions determining the possibility to implement the promise. Contractual assumptions, their role and significance in each particular situation have to be interpreted according to the parties' intention.
5. The role of contractual assumptions depends on contractors' undertakings. If one party undertakes to perform after the occurrence of a specific objective event and fails, it is liable for non-performance of a promise. However, if the occurrence of the event is equivocal, the prevailing obligation has to be determined. In case the obligation to use best efforts prevails, party in default is liable unless the best efforts are proven, whereas obligation to achieve a specific result leaves the solely possibility of proving *force majeure* as a mean to escape the liability for non-performance.
6. The remedy of specific performance is usually applicable for a breach of a promise constituting the core of a contract. In case of breach of warranty or contractual assumption which is not considered to be a fundamental promise, the repair and replacement of a specific performance are the most veracious remedies.
7. In case of rescission the disappointed party is entitled to claim either expectation loss or reliance loss. The damages for a breach of warranty are designed to cover the loss which was caused solely because of the non-conformity of the goods, but not related with the consequences of a breach of contract.

8. Liability for non-conformity is contractual rather than in tort if the non-conformity led to pure economic loss or it originated from the parties' agreement. The liability in tort arises in the absence of any express warranty or when the non-conformity is a consequence of third party's action based on the absence of contractual relation.
9. The significance of warranties and contractual assumptions depends on their role in the contract. If the parties intend them to form the core of the contract, they are considered to play the major role and are treated as fundamental conditions. As promises can be ancillary to the parties' intention to enter into the contract, warranties and contractual assumptions fundamentally leading to the conclusion of a contract are prior to any other contractual promise. Hence the hypothesis raised within the thesis cannot be accepted.

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SUMMARY

Šarkutė S. The Role and Legal Significance of Contractual Assumptions, Promises and Warranties/ Master thesis of European Business Law program. Supervisor Paulius Zapolskis, consultant doc. dr. Egidijus Baranauskas. - Vilnius: Mykolas Romeris University, Law Faculty, Business Law Department, 2010. – 60 p.

The thesis represents a legal analysis of the role and significance of contractual assumptions, promises and warranties in international sales contracts pursuant to to the International Convention on Contracts for the International Sale of Goods, UNIDROIT Principles of International Commercial Contracts and Uniform Commercial Code. to the International Convention on Contracts for the International Sale of Goods, UNIDROIT Principles of International Commercial Contracts and Uniform Commercial Code. The role of the contractual terms is determined through the angle of their interrelation within the contract and the ability to express counterparties' intentions whereas the consequences of their breach are important factors stipulating the significance. There is a variety of warranties having their own role in order to achieve an exhaustive protection of contractors interests, especially those of a buyer, and in this way to promote the reciprocal reliance to enter into the sales contract. Thus the research is conducted in order to determine the features of different types of warranties. Their diversity helps to promote fair and easy commercial intercourse and provides the contractors with certainty. Nevertheless, in complex sales contracts mere promises, warranties and representations are not sufficient to represent the whole range of parties' intentions. Therefore contractual assumptions can be incorporated either in pre-contractual or contractual documents. The research is conducted to determine their role and significance.

The significance of contractual assumptions, warranties and promises is demonstrated through the comparison of the legal consequences in case they are breached. Besides, the liability arising from the breach of warranty is two-kind, therefore, the grounds of different types of liability are analyzed. The possibilities to exclude liability and applicable measures to manage it are determined as being important elements regarding the significance of contractual assumptions, promises and warranties.

Keywords: contractual assumptions, promises, warranties, liability arising from the breach, remedies.

SANTRAUKA

Šarkutė S. Sutartinių prielaidų, pasižadėjimų ir garantijų teisinė reikšmė ir paskirtis/ Europos verslo teisės studijų programos magistro baigiamasis darbas. Vadovas Paulius Zapolskis, konsultantas doc. dr. Egidijus Baranauskas. – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, Verslo teisės katedra, 2010. – 60 p.

Remiantis Jungtinių Tautų prekių pirkimo – pardavimo konvencija (CISG), UNIDROIT tarptautinių komercinių sutarčių principais ir Junginių Amerikos Valstijų bendruoju komerciniu kodeksu magistriniame darbe atlikta sutartinių prielaidų, pasižadėjimų ir garantijų teisinės reikšmės ir paskirties tarptautinėse pirkimo – pardavimo sutartyse analizė. Sutarties sąlygų teisinė reikšmė ir paskirtis tiriama atsižvelgiant į bendrą sutarties kontekstą, sutartinių sąlygų tarpusavio ryšius, šalių galimybę atskleisti tikrąją valią bei sutartinių sąlygų pažeidimo pasekmes. Skirtingos garantijų rūšys skirtos užtikrinti visapusišką sutarties šalių, ypatingai pirkėjų apsaugą, kad būtų skatinamas šalių tarpusavio pasitikėjimas pasirašant prekių pirkimo – pardavimo sutartis. Dėl šios priežasties darbe išnagrinėjos skirtingos garantijų rūšys. Jų įvairovė padeda skatinti sąžiningą ir sklandžią komercinę veiklą ir sutarties šalių užtikrintumą. Sudarant sudėtingas tarptautines prekių pirkimo – pardavimo sutartis įprastinių pasižadėjimų, garantijų ir pareiškimų nepakanka, kad būtų atskleisti ir tinkamai įtvirtinti tikrieji šalių ketinimai. Dėl šios priežasties ikisutartiniuose dokumentuose ir pagrindinėse sutaryse šalys įtraukia sutartines prielaidas. Darbe atskleidžiama šių sutartinių prielaidų teisinė reikšmė ir paskirtis.

Sutartinių prielaidų, pasižadėjimų ir garantijų teisinė reikšmė ir paskirtis atskleidžiama įvertinant šių sutartinių sąlygų pažeidimo pasekmes. Kadangi atsakomybės, kylančios už garantijų pažeidimus prigimtis yra dvilypė, darbe nustatomi konkrečios atsakomybės pagrindai. Teisinę sutarties sąlygų reikšmę padeda įvertinti atsakomybės išvengimo galimybių ir priemonių, taikomų joms suvaldyti, analizė.

Reikšminės sąvokos: sutartinės prielaidos, pasižadėjimai, garantijos, atsakomybė, nuostoliai.