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The Seller's Liability in the Event of Lack of Conformity of Goods

1. Introduction

If the seller delivers to the buyer goods not conforming to the contract, the buyer may resort to various legal remedies. In the case of consumer sale, the law of the EU member states has been harmonised by Directive 1999/44/EC¹, under which the buyer may demand the repair or replacement of goods, to have the price reduced, or to have the contract rescinded. The directive does not regulate the issues of compensation for damages; according to its Recital 6, this directive's objective is to approximate national legislation governing the sale of consumer goods, without, however, impinging on provisions and principles of national law related to contractual and non-contractual liability.

In Estonia, issues regarding a contract of sale are governed by the Law of Obligations Act² (LOA), in which the regulation of the contract of sale mainly derives from the United Nations Convention on Contracts for the International Sale of Goods³ (CISG) and the German Civil Code⁴ (BGB). According to the LOA, strict liability is applied as a rule upon breach of contract, which means that the obligor is released from liability only in cases of *force majeure*. The legal literature in Estonia has adopted a position regarding the contract of sale that the seller who has delivered to the buyer defective goods cannot be released from liability even in cases of *force majeure*, which essentially means the seller's absolute liability.

The authors of this paper believe that such interpretation stems from the Estonian legislator not having taken account of Recital 6 upon the transposition of Directive 1999/44 — in this case, in the part that excludes the impact of the directive on the national principles related to contractual liability. There is no uniform regulation of the liability of an obligor in breach of contract in the Member States regarding either the content of damages or the standard of liability to be applied⁵, and that is why the extent of the seller's liability may vary from one Member State to another. On the one hand, it need not be acceptable from the standpoint of

¹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. – OJ L 171, 7.07.1999, pp. 0012–0016.

² Võlaõigusseadus. – RT I 2001, 81, 487; 2008, 59, 330 (in Estonian). Available in English at <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022> (30.03.2009).

³ RT II 1993, 21/22, 52.

⁴ Bürgerliches Gesetzbuch. – RGBL. P. 195.

⁵ C. von Bar, U. Drobning. Study on Property Law and Non-contractual Liability Law as they relate to Contract Law. Available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf (30.03.2009).

consumer protection; on the other hand, though, empirical studies^{*6} show that differences in the laws of the Member States may also produce problems for entrepreneurs.^{*7}

The authors of this paper are of the position that, even if the seller's absolute liability could be justified on grounds of consumer protection, such a rigid approach is still not appropriate. The paper shows that the recognition of the seller's absolute liability may at least in certain cases lead to an unjust result. For that purpose, the paper sets out to examine the standard for liability of a seller delivering to a buyer a defective movable in the Estonian and German law and in the CISG as exemplified by the following case^{*8}:

A buyer buys from the seller a two-month-old puppy. Four months after the delivery of the puppy, it becomes evident that the dog has an anomaly of the ankle in a hind leg, which would lead to excessive bowleggedness in the dog. Such an ankle can be treated in a surgery during which a metal plate is inserted in the dog's leg. The metal plate is permanent and, because of this, the dog has to be taken to the veterinarian twice a year for check-ups from that moment on. The cost of the operation exceeds the sales price of the puppy more than twofold. The buyer demands from the seller compensation for the price of the operation and the cost of the two checks each year. Does the seller have to compensate for the damages?

2. The seller's liability according to German law

In the BGB, the general issues related to legal remedies are regulated in the general part; §§ 434–435 govern the lack of conformity of a thing, and § 476 addresses the risk of accidental destruction and damage of a thing in relation to its delivery to the buyer. The legal remedies that the buyer can apply in response to a seller who has delivered defective goods are listed in § 437, found in the special part, Clause 3 of which sets out the buyer's right to demand compensation for damages according to §§ 440, 280, 281, 283, and 311a.

Section 280, contained in the general part, is central to the issue of compensation for damages; according to its Subsection 1, if the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused by the obligor, except if the obligor is not responsible for the breach of duty. According to § 276, 'responsibility' may refer to the obligor's intentional act or negligence (that is, fault-based liability), or also the obligor's higher degree of liability if the obligor has given a guarantee or assumed a procurement risk. The provision of a guarantee presumes a relevant agreement^{*9} or other circumstances based on which one may infer that the seller has given a guarantee (for example, previous advertising of the goods).^{*10} Subsection 276 (2) specifies that a person acts negligently if he fails to exercise reasonable care — for this reason, the courts apply an objective standard in evaluation of the culpability of a person, proceeding not from the usual knowledge and abilities of a particular obligor but from those of a person acting in the field.^{*11}

Three types of claims for compensation for damages are distinguished among on the basis of BGB § 280: compensation for damages along with the claim for the performance (*Schadenersatz neben Leistung*, § 280 (1)), compensation for damages caused by the obligor's delay in performance (§ 280 (2)), and damages in lieu of performance (*Schadenersatz statt Leistung*, § 280 (3)).^{*12} The buyer can request the last if the seller has not cured the goods during an additional period set by the buyer or the curing of the defect is excluded according to § 275 (for example, curing the defect is impossible). In such a claim, the obligor's liability is specified by BGB § 311a (2): if the circumstance that excludes the performance was already present at the time of entry into the contract, the obligation to compensate for damages is excluded if the obligor was not aware of the obstacle to performance when entering into the contract and is not responsible for his or her lack of awareness.

This means that a claim for the compensation of damages can be considered only after the seller is deemed responsible for the circumstances because of which the defect cannot be cured (the seller being aware of or

⁶ S. Vogenauer, S. Weatherill. The European Community's Competence for a Comprehensive Harmonisation of Contract Law – an Empirical Analysis, – *European Law Review* 2005 (30) 6, pp. 821–837.

⁷ These arguments are used to substantiate the position that in the European contract law, harmonisation should be applied besides other issues also to compensation for damage. See L. J. Smith. The Eye of the Storm: On the Case for Harmonising Principles of Damages as a Remedy in Contract Law. – *European Review of Contract Law* 2006/2, p. 242.

⁸ A decision of the Supreme Court of the Federal Republic of Germany of 22.06.2005. – BGHZ 163, 234; NJW 2005, 2852.

⁹ Ernst- Münchener Kommentar zum BGB. 5. Aufl. 2007, § 280 paragraph 24.

¹⁰ K. Riesenhuber. Damages for Non-Performance and the Fault Principle. – *European Review of Contract Law* 2008/2, p. 128.

¹¹ Ernst- Münchener Kommentar zum BGB. 5. Aufl. 2007, § 276 paragraph 55–56; K. Riesenhuber (Note 10), p. 130.

¹² R. Zimmermann. Breach of Contract and Remedies under the New German Law of Obligations. Roma 2002. Available at <http://w3.uniroma1.it/idc/centro/publications/48zimmermann.pdf> (30.03.2009); S. Lorenz. Schuldrechtsreform 2002: Problemschwerpunkte drei Jahre danach. – NJW 2005/27, pp. 1890–1892.

having to be aware of the defect and the impossibility of cure in itself do not give reason for the claim for the compensation of damages¹³).

In the case described above, the buyer claimed that the anomaly of the ankle of the dog was caused by a genetic abnormality and concluded that the defect existed already at the time of the delivery of the puppy. According to BGB § 90a, animals are not things but they are governed by provisions that apply to things. The court (the *Bundesgerichtshof*, or BGH) noted that the anomaly of the dog's hind leg could be thus regarded as a defect under BGB § 434. The court established that if the defect was indeed caused by a genetic abnormality, the seller could not cure it — it would be possible to avoid the excessive bowleggedness of the dog via a surgery but the genetic abnormality could not be removed. As a result, only the buyer's claim for damages in lieu of performance (under the *Schadenersatz statt Leistung*) could be considered and the seller has to compensate for damages only when responsible for the circumstances that render curing the defect impossible.

The court noted that, in the case at hand, it was questionable whether a seller raising dogs as a hobby was an entrepreneur as defined in BGB § 14, which would mean that the contract being disputed could be regarded as consumer sale and that would entail the seller's obligation deriving from BGB § 476 to prove that the defect appeared after the dog was delivered to the buyer. At the same time, the court noted that the issue was not decisive in the dispute since the buyer's claim for compensation for damages was excluded anyway.

The BGH established that the buyer could not demand compensation for damages from the seller because the seller was not responsible for the defect under the BGB's § 437 (3), the second sentence of § 311a (2), and the second sentence of § 280 (1). The BGH first substantiated its judgement by asserting that it had not been proven that the seller had provided a guarantee regarding genetic defects of the dog.

The BGH also established that the seller was not liable for the genetic abnormalities of the dog (§ 280 (1)) if said seller could not be blamed for negligence in breeding — in other words, provided that the seller had proceeded from breeding principles based on contemporary law and experience. The BGH concluded that, since the seller was a recognised expert in dog breeding in Germany and had decades of experience in it, selling nearly 50 puppies each year both in Germany and abroad, there was no reason to presume that the seller had acted contrary to the above-mentioned principle.

In addition, the BGH mentioned that the seller who had pursued dog raising and breeding as a hobby for 30 years prior to the case at hand did not notice the puppy's abnormality before it was delivered to the buyer and that the defect was discovered by the veterinarian (i.e., a specialist) hired by the buyer only four months later. Also, the buyer had had the veterinarian examine the puppy several times. Even if the alleged genetic problem could be detected in a puppy of two months' age via a relevant X-ray, for example, the seller could not be expected to carry out such a test without an obvious need. Hence, the BGH concluded that the seller had been unaware of the genetic problem of the puppy at the time of entry into the contract and was not liable for such unawareness (§ 311a (2)).

The BGH also briefly touched upon the fact that the buyer had, among other things, refused the opportunity offered by the seller to replace the crippled puppy with a healthy one because the buyer and his family had developed a deep emotional bond with the pet. The BGH noted that the performance (in this case, replacement) was impossible according to § 275 and the seller could not be held liable for the impossibility.

Thus, the BGH excluded the buyer's claim for the compensation for damages. In addition, the court pointed out that the buyer's interests had been already adequately protected by other legal remedies (reduction of price and rescission of the contract).

It may be concluded on the basis of the reasons cited for the judgement that according to German law, in the part regarding the seller's liability, the results would be the same in the case of consumer sale and a contract of sale in which both parties are engaged in professional and economic activities, or in the case in which both parties are consumers.

3. The seller's liability according to Estonian law

Just as in the BGB, non-performance and legal remedies are discussed in the general part of the LOA, while the specifications applying to various types of contracts regarding both the foundations of the liability and legal remedies are tackled in the special part.

LOA § 100 proceeds from a uniform definition of non-performance: non-performance is failure to perform or defective performance of an obligation, including a delay in performance. At the same time, it may be said

¹³ S. Lorenz. Rücktritt, Minderung und Schadensersatz wegen Sachmängeln im neuen Kaufrecht: Was hat der Verkäufer zu vertreten? – NJW 2002/35, p. 2501.

that types of a seller's non-performance can be distinguished¹⁴, and the seller's obligation to compensate for damages may depend on the nature of the non-performance. In the example discussed in this paper, the existence of non-performance can be identified by using LOA § 217 (on conformity of a thing), which has been founded proceeding from Article 2 of Directive 1999/44, BGB §§ 434–435, and Article 35 (paragraphs 2 and 3) and Article 41 of the CISG.¹⁵ LOA § 217 (2) lists as defects of a thing both material defects (for example, the goods not having the agreed characteristics or, in the case of consumer sale, the goods not possessing the quality usual for that type of goods) and legal defects (the claim of a third party or other rights). Although the pet involved in the example case is not a thing, § 217 must be taken as the basis for decision concerning the breach of the contract of sale because § 49 (3) of the General Part of the Civil Code Act¹⁶ (GPCCA) allows for subjecting animals to the provisions applicable to things.

The central provision governing compensation for damages is § 115, in the general part of the LOA (derived primarily from BGB §§ 280 and 281¹⁷). According to its Subsection 1, the obligee may, together with or in lieu of performance, claim compensation for damages caused by the non-performance from the obligor¹⁸, except in cases where the obligor is not liable for the non-performance or the damages for some reason provided by law are not subject to compensation, in which case the obligor's liability serves as a precondition for the claim for compensation for damages.

Unlike the principle of fault-based liability as set out in the BGB, the LOA usually proceeds from strict liability: LOA § 103 (2) prescribes that non-performance by an obligor is excused if it is caused by *force majeure* and that *force majeure* consists of circumstances that are beyond the control of the obligor and which, at the time the contract was entered into or the non-contractual obligation arose, the obligor could not reasonably have been expected to take into account, avoid, or overcome the impediment or the consequences of that the obligor could not reasonably have been expected to overcome. LOA § 103 (4) provides that in the cases provided by law or the contract, a person shall be liable for non-performance regardless of whether the non-performance is excused. LOA § 106 enables the parties to an obligation to agree in advance to preclude or restrict liability in the case of non-performance of an obligation, but the parties must take into account that agreements that unreasonably exclude or restrict liability (for intentional breach, for example) in some other manner are void. The parties may, for instance, agree on the application of fault-based liability (§ 104); in such a case, objective standards are applied to the establishment of a person's culpability: to identify carelessness or gross negligence, the behaviour of the person is compared to the care necessary.

If the seller fails to deliver the goods set out in the contract, the buyer may claim compensation for damages, except in cases where the seller is not liable for the non-performance, which means that the non-performance was caused by *force majeure* (LOA § 115, § 103 (1) and (2)). In the situation examined in the paper, in which the seller delivers to the buyer goods not conforming to the contract, the seller's liability is specified by § 218, contained in the special part of the LOA — more precisely, in Chapter 11, on contracts of sale. According to § 218 (1), the seller is liable for any lack of conformity of goods if it exists at the time when the risk of accidental loss of or damage to the goods passes to the buyer, even if the lack of conformity becomes apparent only later. The seller's liability is excluded if the buyer was or ought to have been aware of the lack of conformity of the goods (§ 218 (4)).

Since, unlike the provisions governing a contract of sale in the BGB (§ 437), the LOA does not directly refer to the provisions of the general part that would clarify the liability, we can ask what type of liability is applied with regard to the seller. On the one hand, LOA § 218 could be viewed as a provision the objective of which is to regulate the moment starting from which the seller is liable for the defects of the goods; that would mean that, in addition, the seller could be released from liability under § 103 if he or she proved that the non-performance could be excused.¹⁹ However, according to the comment on LOA § 218, the provision serves as a special provision to LOA § 103 (more specifically, concerning a situation described in § 103 (4), for which case the law provides that a person shall be liable for non-performance regardless of whether the non-performance is excused) and, as a result, the seller cannot be released from liability for the delivery of

¹⁴ V. Kõve. Draft Common Frame of Reference and Estonian Law of Obligations Act: Similarities and Differences in the System of Contractual Liability. – *Juridica International* 2008 (14), p. 200.

¹⁵ P. Varul *et al.* *Võlaõigusseadus II. Kommenteeritud väljaanne* (Law of Obligations Act II. Commented edition). Tallinn 2007, p. 41 (in Estonian).

¹⁶ *Tsiviilseadustiku üldosa seadus*. – RT I 2002, 35, 216; 2007, 24, 128 (in Estonian). English text available at <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022> (30.03.2009).

¹⁷ P. Varul *et al.* *Võlaõigusseadus I. Kommenteeritud väljaanne* (Law of Obligations Act I. Commented edition). Tallinn 2006, p. 391 (in Estonian).

¹⁸ The legal literature refers to these two claims as to a 'small' and 'big' claims for compensation for damage.

¹⁹ When deciding on the issue, it should be kept in mind, among other things, that the word 'liability' has a double meaning in the LOA. On the one hand, it concerns determination if a particular legal remedy can be used; on the other hand, it is about whether the obligor could be reproached for his or her behaviour. See I. Kull, M. Käerdi, V. Kõve. *Võlaõigus I: Üldosa* (Law of Obligations I. General Part). Tallinn 2004, p. 26 (in Estonian).

defective goods, even though it could be excused.^{*20} Hence, the comments of the LOA have assumed the position that the seller is liable with no exceptions (i.e., even in the case of *force majeure*) for the defects that the goods have at the moment when the risk is passed. This, in turn, means that the seller is no longer subject to strict liability but absolute liability.

It is not possible to tell from the explanatory memorandum to the Law of Obligations Act^{*21} whether the legislator had such a goal, because it does not touch upon the interrelationship between LOA § 103 and § 218. Neither has the position presented in the comments on LOA § 218 been discussed in the judicial practice of the Supreme Court. The Supreme Court has indeed analysed the issues related to LOA § 218 (1) in two judgements^{*22}, but instead from the perspective of what the moment is from which the seller is liable for the defects of the goods. In both cases, the Civil Chamber has noted that the non-conformity served as the basis for the seller's liability according to LOA § 100, § 101, and § 218 (1)^{*23}, yet this does not provide a direct answer to the question of whether the seller could be released from liability by reason of *force majeure*. In its decisions concerning contracts of sale, the Supreme Court has noted, for example, regarding reduction of price that the obligor is liable for the non-performance unless the non-performance is excused (§ 103) but that reduction of price could also be applied regardless of whether the non-performance is excused.^{*24} One possible conclusion that can be drawn from this wording is that in the case of legal remedies that depend on whether the non-performance is excused (above all, compensation for damages), § 103 should still be applied, as a result of which the release of the seller from liability could be considered.

However, a different assumption can be made on the basis of decision 3-2-1-80-08 of the Supreme Court, in which the court considered the liability of a contractor in the event of lack of conformity of work (LOA § 642) and established that the special regulation of the contract for services was exhaustive regarding the liability of the contractor and that the regulation of excusability set out in LOA § 103 did not have a supplementary significance in the case of unsatisfactory performance.^{*25} As the Estonian legislator has transposed the provisions of Directive 1999/44 both to the regulation of contracts of sale and to contracts for services^{*26}, the provisions concerning the liability of a contractor are extremely similar to those governing the liability of a seller, and it may be concluded from the decision of the Supreme Court that the existence of *force majeure* would be insignificant as regards the liability of the seller upon the delivery of defective goods.^{*27}

Hence, in the sample case presented in the paper, the seller would always be liable according to Estonian law (on the assumption that the buyer was unaware and not expected to be aware of the defect of the goods). In this case, in order to file a claim for compensation for damages, the buyer need not rely on the seller's warranty according to which he is liable for the genetic abnormalities of the dog. Pursuant to LOA § 230, warranty against defects means that the seller gives a promise by which he or she secures for the buyer a more favourable position than the one prescribed by law. Since warranties are usually expressed in the delivery of a document containing the conditions of the warranty to the buyer^{*28}, it, obviously, cannot be concluded in the sample case that such a warranty had been given. However, if we proceed from the comments on the LOA and the position of the Supreme Court in its decision 3-2-1-80-08, the lack of warranty is probably not a problem for the buyer, because the liability of the seller is already very strict.

The Supreme Court has established that a claim for the compensation of costs to be made in the future to repair an object of sale that has defects instead of the actual curing of the damages (performance) can be regarded as a claim for the compensation of 'big' damage (i.e., compensation for damages instead of performance).^{*29} The sample case allows for inferring that, as it would be impossible to eliminate the genetic abnormality, the buyer could claim compensation for damages instead of performance (i.e., elimination of the deficiency) under § 115 (1).

Unlike the principle arising from BGB § 311a, the seller's unawareness of the genetic abnormality of the dog is absolutely insignificant according to Estonian law, which has also been emphasised by the Supreme Court^{*30} and derives from the fact that fault-based liability is usually not applied to breach of contract pursuant to the

²⁰ P. Varul *et al.* (Note 15), p. 33.

²¹ 116 SE I. Võlaõigusseadus. Eelnõu (Law of Obligations Act. Draft). Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=91610001&login=proov&password=&system=ems&server=ragne11> (30.03.2009) (in Estonian).

²² CCSCd, 3-2-1-131-05. – RT III 2005, 43, 425; CCSCd, 3-2-1-115-04. – RT III 2004, 28, 311 (in Estonian).

²³ CCSCd, 3-2-1-131-05, paragraph 11; CCSCd, 3-2-1-115-04, paragraph 21.

²⁴ CCSCd, 3-2-1-131-05, paragraph 18; CCSCd, 3-2-1-71-07, paragraph 11. – RT III 2007, 32, 261 (in Estonian).

²⁵ CCSCd, 3-2-1-80-08. – RT III 2008, 43, 293 (in Estonian).

²⁶ M. Kingisepp, The European Consumer Sales Directive — the Impact on Estonian Law. – *Juridica International* 2008 (14), p. 220.

²⁷ It could also be argued that a contractor and seller do not always have identical opportunities to influence the object of contract: a contractor has more control of the work process and material used than for example a seller who has not created the object to be sold.

²⁸ P. Varul *et al.* (Note 15), p. 73.

²⁹ CCSCd, 3-2-1-115-04, paragraph 26; it is opined in the legal literature that such a position could obviously be discussed. See P. Varul *et al.* (Note 17), p. 392, footnote 220.

³⁰ CCSCd, 3-2-1-115-04.

LOA. It should have been investigated in this case whether the seller was aware or ought to have been aware if the parties had made use of the possibility provided for in LOA § 106 and agreed on the application of fault-based liability. Even in that case, it would not be important whether the seller acted within the framework of his economic and professional activities or not.

As to the alleged reason for the dog's anomaly — i.e., the genetic abnormality — when proceeding from the comments on the LOA and the position of the Supreme Court in decision 3-2-1-80-08 mentioned above, the court would not apply LOA § 103 and, hence, would not analyse whether the genetic defect was a deficiency that the seller could influence in any manner or take that into account in view of the principle of reasonableness. For release from liability, the seller's sole opportunity would lie in proving that the buyer was aware or had to be aware of the defect already at the time of entry into the contract, which cannot be considered in this case because the circumstances of the case showed that the defect could not be discovered over several months even by the specialist (i.e., veterinarian) hired by the buyer. Such a very strict position concerning the seller's liability seems unfair, especially in the case where the seller himself or herself is also a consumer — for example, if the person sells his or her dog's puppy to a neighbour.

LOA § 127 (3) allows for limiting the liability of the obligor in breach by the rule of the foreseeability of the damages.^{*31} However, in this case, it would not allow for reasonably limiting the compensation for damages, because the application of § 127 (3) does not presume that the obligor foresaw or should have foreseen the non-performance. Instead, what is important is whether the obligor had to foresee that such damages could result from the defect.^{*32} It could be said that even the seller who is not familiar with raising dogs should foresee that an anomaly in the dog may entail expenditure on medical assistance. Yet the outcome would be unfair: it is questionable why such a seller would have to be liable for a defect that was not visible or could not have been influenced; rather, it could be said that the defect was caused, so to say, by a decision of nature.

Of course, it could be claimed that a seller can enter into a relevant agreement based on LOA § 106 with a buyer to limit his or her liability. If both parties to the contract are consumers (i.e., a C-to-C contract is involved), entry into such an agreement is usually very unlikely. Rather, such agreements can be presumed when the seller is a person engaged in economic or professional activities. It must still be said that pet raising and breeding cannot be fully equated with the manufacturing of a thing, in which case the seller as the producer can in principle fully control the production process. As the sale of pets is subject to provisions in the drafting of which the legislator has, above all, kept in mind transactions conducted with things, the achievement of a fair result also in contracts entered into between parties engaged in economic and professional activities would be secured if the seller who had delivered non-conforming goods would retain the possibility that the non-performance could be excused.

The authors of this paper find that the interpretation of LOA §§ 218 and 642 has stemmed from the fact that, when regulating the deficiencies of goods and work, the Estonian legislator proceeded from the terms used in Directive 1999/44 that tackled the seller's liability but failed to take into account that the seller's 'liability' in the directive relates to legal remedies that do not presume the seller's liability as such according to Estonian law (LOA § 105). Clause 2 of Article 8 of the directive prescribes that Member States may adopt or maintain more stringent provisions, compatible with the Treaty in the field covered by this directive, to ensure a higher level of consumer protection, but the field covered is obviously limited to the legal remedies listed in the directive in the case of consumer sale. It is not the primary goal of the directive to harmonise national law regarding C-to-C or B-to-B contracts, and, although both the Estonian and German legislator have transposed the directive to all sales rights, the Estonian legislator has disregarded Recital 6 of the directive, according to which the directive does not impinge on provisions and principles of national law related to contractual and non-contractual liability.

Hence, the authors of this paper are of the opinion that, upon the breach of any contract of sale, the seller's liability under §§ 218 and 103 should be regarded as a precondition for the claim for the compensation of damages. Legal clarity would improve if LOA § 218 contained a direct reference to § 103 (analogously to BGB § 437 referring to the particular provisions contained in the general part).

It could be further asked whether Estonian law allows for achieving a result in conjunction with §§ 218 and 103 in which the degree of liability of a seller who is a consumer would differ from that of a seller engaged in economic or professional activities. In other words, on the basis of the sale of the puppy, we could ask whether both a dog-keeper who is a seller and a seller from a professional kennel are liable for the defect of a dog in the same way. It could be presumed, though, that a kennel that has relevant knowledge and experience could at least theoretically have greater opportunities for avoiding the genetic abnormality of a dog or could at least be considered to take it into account if the defect concerned is not rare in dogs of the species in question. It is still questionable whether a person who has engaged in dog breeding for 30 years and sells about 50 pup-

³¹ The obligor shall only compensate for such damage which the party foresaw or should have foreseen as a possible consequence of non-performance at the time of entering into the contract unless the damage is caused intentionally or due to gross negligence.

³² K. Sein. Kahju ettenähtavuse reegel kahjuhüvitise piiramise alusena (Rule of Foreseeability as Basis for Limiting Compensation for Damage). – *Juridica* 2003/4, p. 245 (in Estonian).

pies each year could claim under Estonian law that he was not engaged in economic or professional activities and that thus the case would not be one of consumer sale^{*33}, but it would be significant in consideration of whether the defects appearing after the delivery of the goods can be presumed to have existed at the time of the delivery of the goods or the buyer would have to prove it.

It could be significant from the perspective of the seller's liability — that is, from the standpoint of compensation for damages — if the legal act or the contract prescribed a lower standard of liability for a seller who is a consumer. If the parties have not entered into a relevant agreement, the wording of § 103 (1) and (2) does not allow for varying the standard of liability applicable to the seller according to the person of the seller. As is evident from the case considered here, such a possibility could still derive from law, especially given that the seller who is a consumer often lacks knowledge of the possibilities for limiting contractual liability. Thus, the authors believe that the Estonian legislator could consider the possibility of setting out a lower standard of liability for a seller who is a consumer in the Law of Obligations Act, supplementing § 218 accordingly — even more so as such a rule has also been prescribed in the Draft Common Frame of Reference^{*34} (DCFR), which has been said to be a document that may necessitate the supplementation of the regulation of the Law of Obligations Act regarding different types of contracts.^{*35} Article IVA–4:203 of the DCFR thus limits the liability of a non-business seller for damages up to the contract price, except if he or she knew or could reasonably be expected to have known the facts relating to lack of conformity of the goods.^{*36}

How should the Estonian legislator interpret the standard for liability of the seller if both parties to the contract engage in economic or professional activities? To answer this question, it would be reasonable to analyse those provisions of the CISG that served as one of the most important international sources in drafting the LOA's §§ 103 and 218.^{*37}

4. The seller's liability according to the CISG

The liability of the obligor is governed by Article 79 (1) of the CISG, which prescribes the release of the obligor from any of his or her obligations in the case of circumstances that can be regarded as *force majeure*.^{*38} The provisions of the LOA and CISG are very similar in this respect. According to Article 36 (1) of the CISG, the seller is liable for any lack of conformity that exists at the time when the risk passes to the buyer, even though the lack of conformity may become apparent only after that time.^{*39} If the delivery of defective goods to the buyer can be excused, it would mean, above all, that the seller would not have to compensate the buyer for damages caused by non-performance.^{*40} In other words, as in the LOA and BGB, a claim for compensation for damages presumes the liability of the obligor. The question of whether the delivery of defective goods by the seller to the buyer could be excused is complicated by the wording of Article 79 of the CISG, containing the word 'impediment' but not prescribing excuse only for the complete non-performance — rather, it speaks about failure to perform any obligation.^{*41} Some commentators are of the opinion that the word 'impediment' in Article 79 (1) should be interpreted as referring to a circumstance fully impeding the performance of the

³³ In the above case, the seller pointed out in the burden of proof among other things that since he was breeding dogs as a hobby, he was not an entrepreneur as defined in BGB § 14 and a contract entered into between him and the buyer was not a contract of consumer sale. The BGH did not consider it necessary to analyse this because it established that the seller was not liable for the genetic abnormality of the pet anyway. According to LOA § 208 (4), consumer sale is the sale of a thing where a consumer is sold a movable by a seller who enters into the contract in the course of his or her economic or professional activities; as the Act does not prescribe that the seller should be a legal person or a sole proprietor, it may be possible on the basis of Estonian law that the contract would still be considered consumer contract.

³⁴ C. von Bar, E. Clive, H. Schulte-Nölke (eds.). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Interim Outline Edition. München: Sellier 2008.

³⁵ P. Varul. The Creation of New Estonian Private Law. – European Review of Private Law 2008 (16) 1, p. 109.

³⁶ See also U. Huber. Modellregeln für ein Europäisches Kaufrecht. – Zeitschrift für Europäisches Privatrecht 2008/4.

³⁷ The persons drafting the Act have found the regulation of the CISG to be internationally the most acceptable both in theory and practice especially regarding the contract of sale. See *Võlaõiguseadus. Eelnõu* (Note 21). It is important to keep in mind that the CISG only regulates contracts of sale in which case the parties reside in different countries and the parties engage in economic and professional activities.

³⁸ Pursuant to Article 79 (1) of the CISG, a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

³⁹ Cf. LOA § 218 (1).

⁴⁰ CISG Art. 79 (5).

⁴¹ When comparing the similar provisions of the LOA and the CISG, it is important to note that LOA § 103 (1) also speaks about the obligor's liability for non-performance, except when the non-performance can be excused. LOA § 100 refers to non-performance both as a failure to perform and unsatisfactory performance.

obligation and that, hence, Article 79 would not be applicable to the delivery of defective goods to the buyer.^{*42} The prevailing opinion is, however, that the delivery of non-conforming goods to the buyer also is a failure to perform an obligation^{*43} and falls within the area of government of Article 79.^{*44} The preference of such an interpretation of Article 79 in the comments on the CISG has been justified by the fact that the seller's unlimited liability for unavoidable and unforeseeable circumstances would not be in the buyer's interests, as the seller would include the likelihood of *force majeure* in calculation of the price, which would increase the price of the goods.^{*45} In addition, a party to the contract cannot be expected to assume liability for absolutely all circumstances that could affect the performance of the contract, including circumstances that cannot be foreseen upon entry into the contract and that the obligor cannot affect in any manner.^{*46}

The question of whether the breach of the obligation of the seller as manifested in the delivery of defective goods to the buyer could be excused has been examined by courts several times upon the application of the CISG. The court has only once assumed the position that the delivery of defective goods could be excused.^{*47} The position taken by the court was, however, undermined by the fact that the final remedy came to be reduction of price, which can be applied on the basis of the CISG regardless of whether the obligation of the obligor can be excused. There are no more recent judgements available that would be so specific, but in the relevant cases the courts have rather admitted to the possibility that the delivery of defective goods by the seller to the buyer could be excused.^{*48}

The analysis of the judicial practice described above shows that there may only be rare cases in which the delivery of defective goods can be excused. To date, excluding the seller from liability has been prevented by the fact that the criteria necessary for excluding from liability specified in Article 79 (1) of the CISG have not been met. According to the courts, the non-performance has not been beyond the seller's control and, consequently, it cannot be excused.

In all of the judgements relevant to the subject of this paper and on the basis of the CISG so far, the seller can be deemed to have only served as a broker. Yet the delivery of defective goods by a seller who is the producer of the goods or has previously been their owner for an extended time could be excused. In such a case, the number of cases in which the breach of the obligations of the seller could be excused is even more limited, because of the more extensive control of the seller with regard to the goods.^{*49} However, such cases cannot be fully excluded. This could be considered, for example, in the case presented in the introduction to this paper. Let us presume that the puppy was sold by a kennel located in Germany and purchased by a kennel located in Estonia that would wish to take it to dog shows and use it in breeding. The other facts of the case remain the same. With due regard to the positions provided in the comments on the CISG and the judicial practice so far, the court would certainly consider whether the breach of the obligation of the seller could be excused if the seller relied on the possible excusability. We cannot exclude the possibility of the court ruling that the damage to the puppy's ankle could be viewed as a defect caused by *force majeure* and, hence, the seller not being deemed liable for the breach of his obligation.

How would the application of Article 79 be influenced by Article 36, which analogously to LOA § 218 provides for the liability of the seller for the non-conformity of the goods if it existed at the time of passing of the risk to the seller? Article 36 has been viewed as setting a time limit as a precondition for the liability of the seller in the first place. The issue has been analysed, for example, by the Appellate Court of Bern in the 'wire and

⁴² For example, J. O. Honnold. Uniform Law for International Sales under the 1980 United Nations Convention. Third Edition. The Hague 1999, comm 427; B. Nicholas. Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods. § 5.02, comment 2. Available at <http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html> (17.03.2009).

⁴³ According to the wording of Article 79 of the CISG 'A party is not liable for a failure to perform any of his obligations ...'

⁴⁴ P. Schlechtriem, I. Schwenzer. Commentary on the UN Convention on the International Sale of Goods. Oxford 2005, Article 79, paragraph 6; F. Enderlein, D. Maskow. International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods. New York 1992, Article 79, comment 2; F. Ferrari, H. Flechtner, R. A. Brand. The Draft UNICITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention. London 2004, Art. 79, comment IV A 4; C. Liu. Force Majeure: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, comment 3. Available at <http://www.cisg.law.pace.edu/cisg/biblio/liu6.html#fmiii> (11.03.2009).

⁴⁵ P. Schlechtriem, I. Schwenzer (Note 44), Article 79, paragraph 1.

⁴⁶ K. Sein. Mis on vääramatu jõud? (What is *Force Majeure*?) – Juridica 2004/8, p. 511 (in Estonian).

⁴⁷ CISG Case Presentation France 19. January 1998 District Court Besancon. Available at <http://cisgw3.law.pace.edu/cases/980119f1.html> (12.03.2009).

⁴⁸ CISG Case Presentation Germany, 31 March 1998, Appellate Court Zweibrücken (Vine wax case). Available at <http://cisgw3.law.pace.edu/cases/980331g1.html> (11.03.2009); CISG Case Presentation Germany, 24 March 1999, Supreme Court (Vine wax case). Available at <http://cisgw3.law.pace.edu/cases/990324g1.html> (11.03.2009); CISG Case Presentation Germany, 9 January 2002, Supreme Court (Powdered milk case). Available at <http://cisgw3.law.pace.edu/cases/020109g1.html> (11.03.2009); CISG Case Presentation Switzerland, 11 February 2004, Appellate Court Bern (Wire and cable case). Available at <http://cisgw3.law.pace.edu/cases/040211s1.html> (9.03.2009). See also F. Ferrari, H. Flechtner, R. A. Brand (Note 44), Article 79, comment 8; P. Schlechtriem. Federal Supreme Court (Bundesgerichtshof), Civil Panel VII, 24 March 1999, Index No. VIII ZR 121/98. Available at <http://cisgw3.law.pace.edu/cases/990324g1.html> (9.03.2009).

⁴⁹ P. Schlechtriem (Note 48).

cable case' in which it noted, *inter alia*, that Article 36 had to be viewed in conjunction with Article 79.^{*50} According to the reasoning of the court, the seller is liable under Article 36 but in the case of *force majeure*, the possibility of applying Article 79 has to be taken into account regardless of the provisions of Article 36. Hence, if there are grounds for the application of Article 79, this precludes the liability of the seller stemming otherwise from Article 36.^{*51}

In the cases in which the liability of the seller for the delivery of defective goods to the buyer cannot be applied of law on the basis of Article 79 (1) of the CISG, the CISG relieves the strict objective standard for the obligor through the rule of the foreseeability of damages.^{*52} According to this, the damages may not exceed the loss that the party in breach foresaw at the time of conclusion of the contract. This helps to avoid the creation of an unreasonably extensive obligation of the obligor to compensate for damages.

5. Conclusions

The comparison provided in the paper showed that the extent of the liability of the seller is different in German and Estonian law and that the seller's liability is considerably stricter according to the applicable interpretation of Estonian law, which essentially means absolute liability.

The authors of this paper are of the opinion that the Estonian applicator of law could abandon such interpretation of the Law of Obligations Act, according to which in fact absolute liability must be applied to the seller who has delivered defective goods to the buyer.

The first reason is that recognition of the absolute liability of the seller would mean disregard for the fact that the Estonian legislator, in creating the system of contractual liability, has taken as the basis the CISG, which governs contracts of sale and which prescribes the possibility of the seller to be released from the obligation to compensate for damages if non-performance was caused by circumstances that were beyond the seller's control and could not have been reasonably foreseen.

Secondly, such a strict approach would entail unfair consequences above all for a seller who is a consumer. There is no convincing justification for such strict liability of the seller who is a consumer if the internationally recognised approach is that even if both parties engage in economic or professional activities, the principle of strict liability and not absolute liability should be taken as the basis in compensation for damages.

Thirdly, the authors hold that also recognition of the absolute liability of the seller is not justified because of an unjustified disregard for the fact that Directive 1999/44 does not impinge on the provisions and principles of national legislation related to contractual and non-contractual liability in transposition of the directive and preparation and interpretation of the text of the LOA. The German legislator has prevented deviation from the principle of fault-based liability applicable in the BGB by giving direct reference in BGB § 437 to the provisions of the general part, which discuss the liability applied. The authors are of the opinion that the Estonian legislator should also adhere to the regime of contractual liability for which it opted when drafting the Law of Obligations Act and supplement the LOA's § 218 with a direct reference to § 103.

⁵⁰ CISG Case Presentation Switzerland, 11 February 2004 Appellate Court Bern (Wire and cable case). Available at <http://cisgw3.law.pace.edu/cases/040211s1.html> (9.03.2009).

⁵¹ P. Schlechtriem, I. Schwenzer (Note 44), Art. 36, paragraph 6.

⁵² The second sentence of Article 74 of the CISG. See also P. Schlechtriem, I. Schwenzer (Note 44), Article 74, paragraph 34. The analogous provision in the LOA is § 127 (3). In the CISG, the rule of foreseeability is understood proceeding from the reasonable division of risk between the parties. On the basis of the LOA, the damage foreseen is such as the obligor foresaw or could have foreseen upon entry in the contract.