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MEANING AND ENFORCEABILITY OF FIT FOR PURPOSE CLAUSES – A CIVIL LAW JURISDICTION PERSPECTIVE –

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ABSTRACT

So-called "fitness for purpose" (or "fit for purpose") clauses are commonly included in international construction contracts. The scope and implication of such a "fit for purpose" clause is relatively clear under English law, as also set out in the 2017 UK Supreme Court decision *MTH v E.on*. Under English law, this clause is enforceable and constitutes a standalone obligation on top of a 'no defects' obligation of the contractor. It also applies irrespective of a contractor's fault (or a contractor's failure to exert reasonable skill and care). However, this debate was based on the presumption that the contract in question was governed by English law.

The meaning and scope of a "fitness for purpose" clause under civil law is somewhat different – and arguably less clear. It may be even questionable whether such a clause has a standalone meaning and whether it is at all enforceable.

This paper reviews "fitness for purposes" from different legal systems, focusing on a Korean law and Swiss law perspective, and addressing the questions of (i) what the meaning and

scope of such a clause is under these laws, (ii) whether the fault principle applies to this clause and if so how that impacts the applicability of this clause, (iii) whether such clause is enforceable, and (iv) whether there are other statutory mechanisms that function in place of a "fitness for purpose" clause.

The above issues will be primarily examined from a Korean law perspective and complemented by a brief Swiss law analysis on these issues. Although not applicable to (pure) construction contracts, the position under the CISG will also be outlined in this paper to ascertain how the legal term "fitness for purpose" is interpreted and dealt with in some civil law jurisdictions in general.[1]

Keywords: International Construction Contracts – Fitness For Purpose – Contractor Obligations – Statutory Mechanisms – Korean Law, Swiss Law and CISG

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1. MEANING AND APPLICATION OF FIT FOR PURPOSE CLAUSES UNDER ENGLISH LAW – WITH FOCUS ON MT HØJGAARD A/S V E.ON

A. Meaning Of "Fit For Purpose" Under English Law

Under English law, two distinct standards of care may generally apply to a contractor: "fitness for purpose" and the lesser standard of "reasonable skill and care".

"Fitness for purpose" entails an obligation to achieve a specific outcome – the building must be fit for the intended purpose of the contract irrespective of whether the contractor has complied with the specifications and requirements provided by the employer. If this outcome is not achieved, the contractor is in violation of the contract. It is possible for the contractor to be in breach even without the employer needing to establish the contractor's fault or lack of reasonable skill and care.

In the absence of an express "fitness for purpose" provision in the contract, there is no general obligation or implied obligation under English law imposing a "fitness for purpose" obligation on a contractor. There are however statutes (for instance the Sale of Goods Act 1979, Section 14(3)) in which a certain "fitness for purpose" obligation is set out as a statutory obligation in particular circumstances.

B. Application Of Fit For Purpose Clauses – Strict Liability?

Under English law, a "fitness for purpose" obligation (arising from a "fitness for purpose" clause) imposes a strict duty on the contractor to ensure the completed work is appropriate for its intended use. Any building deviating from this, regardless of whether or not the contractor made their best effort and acted with care, could be deemed a breach of contract. In other words, a contractor would not be exempt from liability even if it establishes that it had no fault in violating the "fitness for purpose" obligation.

In *MT Højgaard,* the UK Supreme Court reviewed a construction contract providing for both the "fitness for purpose" obligation and the "reasonable skill and care" obligation. It held that the court's role was to respect the bargain entered into between the parties, and as such, if the contract provided for both standards then both standards should be enforced on the contractor – as a result of which the higher standard (i.e., "fitness for purpose") would apply.

The UK Supreme Court in *MT Højgaard* also addressed the issue as to where the "purpose" of a contract could be deduced from, for the purpose of assessing the "fitness for purpose" obligation. It held that so long as a technical specification attached to the contract formed part of the contract, this could be relied on as the basis for determining the "purpose" of a contract. The court ruled in the case that offshore wind farm foundation structures should be compliant with strict technical design specifications, ensuring a structural lifetime of twenty years.[2]

C. Consequences Of Violating A Fit For Purpose Clause

Unless otherwise stipulated in the contract, the legal remedy for breach of contract under common law is compensation for damages. Hence, where a contract includes a "fitness for purpose" clause, should a contractor fail to meet such a contractual obligation, it will generally be liable for damages.

Additional remedies such as termination of contract are available if specifically provided for in the contract, or if the breach of the "fitness for purpose" obligation amounts to a fundamental breach.

Further, depending on the express terms agreed between the parties, the employer may seek specific actions from the contractor – for instance, seeking a quality commitment from the contractor.

2. MEANING AND ENFORCEABILITY OF FIT FOR PURPOSE CLAUSES UNDER KOREAN LAW

A. Meaning Of "Fit For Purpose" Under Korean Law In Light Of The Concept Of "Defects"

There is no terminology under Korean law equivalent to a "fitness for purpose" obligation. However, there is the concept of "defect", and thus what would be a breach of a "fitness for purpose" obligation under common law would likely be regarded as a "defect" under Korean law.

The Korean Civil Code expressly uses the term "defect" but does not contain a definition of this term. As a result, there are three competing theories with respect to the meaning.

[2] Turner, R. (2018). Hanging by a Slender Thread: Design Obligations in Construction Contracts following *MT Højgaard A/S v E.On*. *Society of Construction Law*, 210, 2-6.

The first theory suggests a subjective understanding of "defect" – namely that it refers to a "failure to meet agreed requirements". For instance, if an employer has provided specifications to a contractor and the contractor completes a building that is not in conformity with those specifications (as contractually agreed between the parties), that building would be defective under this test.

The second theory relies on an objective standard. Here, when the contractor fails to meet a certain objective threshold (even if it complied with the specifications provided by the employer), that building would be considered defective.

The third theory integrates elements of both the objective and subjective theories above. When the subject matter meets the objective standard, it is considered not defective. However, where the subject matter is unique, such that there is no objective criterion to rely upon, the subjective concept of defect comes into play.[3]

In light of this, the Korean Supreme Court held that the definition of "building defect" encompassed both subjective and objective elements – a "building defect" meant that the building contained structural and functional deficiencies that departed from what was agreed in the contract or did not possess the industry quality standard commonly anticipated for buildings. The Korean Supreme Court further ruled that the determination of a "defect" should comprehensively take into account the terms of the contract, adherence to the construction plans and compliance with criteria specified in relevant laws and regulations.[4]

This means that, in circumstances where a contract governed by Korean law requires that a building be free from both defects and fit for purpose, the "fitness for purpose" clause could be rendered virtually meaningless, as the concept of "defect" under Korean law broadly covers both objective and subjective elements.

[3] Choi, M. G.(2006). Geon-Chuk-Do-Geup-Gye-Yak-E-Seo Mul-Geon-Ui Ha-Ja-Ui Gae-Nyeom (건축도급계약에서 물건의'하자(瑕疵)'의개념) [The Definition of a "Defect" for Construction Contracts]. *Chung-Ang Law Review*, 8(3), 263.

[4] Supreme Court Judgment Case No. 2005*Da*56193, 2005*Da*56209 (consolidated) dated 26 June 2008.

B. Application Of Fit For Purpose Clauses – Does The Fault Principle Still Apply, And If So Does A Fit For Purpose Clause Operate Like A Reasonable Skill And Care Clause

Under the Korean Civil Code, a foundational principle of civil law is the principle of fault. According to this principle, a party may not be held liable for a breach of contract unless it was at fault when breaching the contract. In other words, if a contractual obligation was not performed due to a circumstance beyond the control of a party, that party may not be held liable for its non-compliance because it had no fault for its failure to comply.

This principle is clearly set out in Article 390 of the Civil Code concerning liability under contracts:[5]

> ***Article 390 (Non-performance of Obligations and Compensation for Damages)***
>
> *If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may claim damages: Provided, That this shall not apply to where performance has become impossible and where this is not due to the obligor's intention or negligence.*

The fault principle is a fundamental premise of Korean contract law. Relatedly, the Korean Constitutional Court ruled that a provision in the Accidental Fires Act holding individuals who have excusable grounds (and hence are non-negligent) still accountable, is in violation of the Korean Constitution.[6] The Constitutional Court held that assigning liability to those with an excusable ground should only occur under extraordinary circumstances, and the law must adhere to the proportionality test outlined in the Korean Constitution. This Decision underscores that the fault principle under Korean contract law holds constitutional significance and is not easily derogable. Therefore, there is a risk that a clause which holds contract parties strictly liable even if they have no negligence could be deemed unconstitutional and thereby unenforceable.

In the event a "fitness for purpose" clause becomes subject to the fault principle under Korean law, one can only claim that a "fitness for purpose" obligation was breached and seek remedies for such

[5] Song, D. S. (2023). *Korean Civil Law*. Pakyoungsa.

[6] Constitutional Court Decision Case No. 2004*HeonGa*25 dated 30 August 2007.

a breach if the contractor was at fault (i.e., was negligent) – or in other words, if the contractor had not exercised its reasonable skill and care for the works performed. This would mean that drawing a distinction between a "fitness for purpose" obligation (to which the fault principle applies) with a contractor's "reasonable skill and care" obligation would become extremely difficult. In short, in light of the fault principle under Korean law, a "fitness for purpose" may not operate as it would in a common law governed contract.

C. Enforceability Of "Fitness For Purpose" Clauses In Light Of The Framework Act On The Construction Industry

The Framework Act on Construction Industry ("**Framework Act**") is a special statute enacted to "*ensure the proper execution of construction works and the sound development of the construction industry by providing for fundamental matters concerning the survey, design, execution, supervision, maintenance and management, technological management, etc. of construction works*".[7] The Framework Act applies to construction projects carried out in Korea.

Article 22 of the Framework Act sets out certain principles applicable to contracts for construction works. In particular, Article 22(5) of the Framework Act states as follows:

> ***Article 22 (Principles of Contract Agreements of Construction Works)***
>
> *(5) In any of the following cases where the terms of a contract are remarkably unfair to either party to the contract, only such part of the contract shall be deemed ineffective: <Newly Inserted by Act No. 12012, Aug. 6, 2013>*
>
> 1. *Where either party to the contract does not approve changes to the contract amount which occur due to design change or changes in economic conditions after the conclusion of the contract without good cause, or passes the burden on to the other party to the contract;*
> 2. *Where either party to the contract does not approve the change of the contract period due to changes in the scope of work after the conclusion of the contract without good cause, or passes the burden on to the other party to the contract;*

[7] Article 1 of the Framework Act.

3. *Where either party to the contract passes responsibility for matters on to the other party to the contract, which cannot be expected as at the time of the conclusion of the contract in light of all the relevant conditions, such as a type of a contract for construction works and the scope of construction works;*

4. *When the scope of the contract has not been specifically stipulated or a dispute exists between the parties to the contract, where either party to the contract infringes on a legitimate interest of the other party to the contract by determining the scope of the contract at his or her discretion;*

5. *Where either party to the contract infringes on a legitimate interest of the other party to the contract by determining excessively reduced or increased liability for damages of a party to the contract due to breach of the contract;*

6. *Where either party to the contract excludes or limits the right of other party to the contract acknowledged by related Acts and subordinate statutes, such as the Civil Act, without good cause.*

According to Article 22(5) of the Framework Act, the terms of a construction contract can be held unenforceable and ineffective if the terms are remarkably unfair to a party. In particular, Article 22(5) sub-section 3 states as an example of a remarkably unfair contract clause: "*Where either party to the contract passes responsibility for matters on to the other party to the contract, which cannot be expected as at the time of the conclusion of the contract in light of all the relevant conditions, such as a type of a contract for construction works and the scope of construction works*". Also, Article 22(5) sub-section 5 states as an example of a remarkably unfair contract clause: "*Where either party to the contract infringes on a legitimate interest of the other party to the contract by determining excessively reduced or increased liability for damages of a party to the contract due to breach of the contract*".

There is no Korean court precedent known to the author directly addressing this provision. For reference, the Korean Supreme Court held that to declare a specific contract clause as ineffective because it unjustly limits the other party's contractual benefits, it is not enough for the clause to simply cause some minor disadvantages to the other party. It must be recognized that the clause unfairly disadvantages the other party by going against their legitimate interests and reasonable expectations, in violation of fairness principles set by the state or other entities. Hence, a clause in a construction contract will not be rendered ineffective lightly. Whether a contract clause unreasonably limits the other party's contractual benefits should be determined by considering various factors: the nature and extent of the disadvantages that may arise from the clause, the likelihood of such disadvantages occurring, the overall impact on the entire contract, the process of contract negotiation between the parties, and the provisions of relevant laws and regulations, among other factors.[8]

That said, there still appears to be a certain risk that a "fitness for purpose" clause requiring the contractor to deliver a building that is fit for purpose irrespective of the contractor's duty of care may be rendered unenforceable and ineffective under Article 22(5) sub-sections 3 and 5 of the Framework Act. That is because such a clause would hold a contract party strictly liable, even though it cannot be expected as at the time of the conclusion of the contract that such liability would arise, and even where the contractor has exercised reasonable skill and care for the mandated works. Imposing liability on a contract party under a strict "fitness for purpose" clause could also be deemed to restrict a party's right excessively.

How the Korean court will interpret and enforce a "fitness for purpose" clause in the context of Article 22(5) of the Framework Act remains to be seen.

D. Other Statutory Mechanisms Under Korean Law Imposing Strict Liability On The Contractor For Defective Works

a. Statutory Defect Liability Provisions In The Korean Civil Code

[8] Supreme Court Judgment Case No. 2012*Da*74076 dated 21 December 2017.

In the Korean Civil Code, there are eleven specific clauses under the section “Contracts for Work”. Among these, six clauses pertain to the contractor’s accountability for defects (set out in Articles 667 to 672 of the Korean Civil Code). It is worth noting that these provisions do not carry the same mandatory nature as decennial liability, and therefore can be superseded by the parties’ agreement to contract terms providing otherwise.

Article 667 (Contractor's Liability for Warranty)

(1) Where any defect is found in the completed subject-matter of a work or in a certain part of the subject-matter of a work which has been finished before the completion of all the work, the person who ordered the work may demand the contractor to repair and rectify such defect within a specified period: Provided, That this shall not apply if excessive costs are required for correcting a minor defect.

(2) The person who has ordered the work may claim compensation in lieu of, or together with, correction of the defect.

(3) Article 536 shall apply mutatis mutandis to paragraph (2).

Article 671 (Contractor's Liability for Warranty Special Rules Applicable to Land, Building, etc.)

(1) A contractor for work with respect to land, a building or any other structure shall be liable for any defects in the subject-matter of the work or in its foundations for a period of five years after delivery: Provided, That this period shall be ten years where the subject-matter of the work is made of stone, limestone, brick, metal or any other similar material.

(2) If the subject-matter is destroyed or damaged by reason of such defects mentioned in paragraph (1), the person who ordered the work shall exercise the rights mentioned in Article 667 within one year from the day that such destruction or damage took place.

Article 667(1) of the Korean Civil Code provides that statutory liability for defects applies not only to fully completed works but also to portions of the project that were finished before the entire

project was completed. Article 671 sets out varying defect liability periods based on the nature of the work. For land, buildings, or structures, the defect liability period is five years from the completion date. However, if the work involves materials like stone, limestone, brick, or metal, the period extends to ten years (Article 671(1)).

According to the Korean Supreme Court, unless agreed or defined by the parties otherwise, the term "defect" in these statutory provisions must be interpreted broadly to encompasses the subjective test as well as the objective test, as described above. Within the statutory defect liability period (either 5 or 10 years), the employer has the statutory right to demand the contractor to repair a defect in the completed work, unless the defect is minor and the repair cost would be excessive.[9] Importantly, this statutory right of the employer (or this statutory obligation by the contractor) arises even if the contractor has exercised reasonably its skill and care for the works – in other words, this statutory duty imposes a strict liability on the contractor.

This statutory duty differs from a "fitness for purpose" clause in terms of the legal remedies available to an employer. As noted above, an employer may seek damages against a contractor if a "fitness for purpose" obligation contained in an English law governed contract was breached by a contractor. These damages are not limited to repair costs – they cover all damages under *Hadley v Baxendale* (ordinary damages, special damages). In contrast, the remedies available to an employer under Article 667 of the Korean Civil Code include demanding the contractor to repair the defect, or seeking damages in lieu of such demand, which is limited to repair costs. Therefore, while the scope of claimable damages is more limited, Article 667 of the Korean Civil Code entitles an employer to seek specific performance, which is a remedy usually not available under English law.

b. Interplay Between Statutory Defect Liability Provisions And Contractual Obligations To Deliver Works Without Defects

Along with the statutory remedies under Article 667 of the Korean Civil Code, an employer may also seek remedies (including damages) as a result of a contractor's breach of contract. Here, the scope of damages is not limited to repair costs – they amount to ordinary damages and (foreseeable) special damages (see Article 393 of the Korean Civil Code). An employer can choose

[9] Han, M., & Khalil, U. (2020, June). *Statutory Liability for defects under Korean Law. International Bar Association*. https://www.ibanet.org/article/54b4ef24-cf7f-4de0-a630-3d3ce0698759 [Accessed 25 August 2023].

which remedy to pursue – it can also opt to pursue both remedies (to the extent they do not result in double recovery).

Statutory liability under Article 667 of the Korean Civil Code does not require an employer to prove the contractor's fault – it is a strict liability provision in that sense. It follows that the contractor would not be able to exonerate him/herself even if it showed that it was not at fault. The remedies under Article 667 are limited to demanding repair or seeking compensation of repair costs. In contrast, contractual liability (also set out in Article 390 of the Korean Civil Code) requires a contractor's fault for a breach of contract – only then may an employer seek damages against a contractor. Instead, the scope of damages is much wider than that under Article 667 of the Korean Civil Code.

Since these claims are distinct under Korean law, they can be pursued selectively or simultaneously.

3. MEANING AND ENFORCEABILITY OF THE FITNESS FOR PURPOSE CLAUSES UNDER SWISS LAW

A. Meaning Of "Fit For Purpose" Under Swiss Law In Light Of The Meaning Of "Defects"

Under Swiss law, fitness for purpose is primarily to be understood within the context of the definition of "defect". Thus, similarly to Korean law, a breach of a "fitness for purpose" clause would likely be considered a "defect". This is reflected in Article 368 of the Swiss Code of Obligations ("**CO**"), which applies to contracts for works (i.e., constructions) and deals with the "*right of the buyer in case of defects*". Whilst the provision distinguishes between defects and other deviations from the contract (cf. para. 1: "*If the work suffers from defects or otherwise deviates from the contract* [...]"), both situations are contained within the term defect, which is the only term used in the other provisions on liability for defects applicable to contracts for work in the CO (cf. Articles 367 and 369-371 CO),[10] and amount to a breach of contract.[11]

[10] Decision of the Swiss Federal Supreme Court ("**DFSC**") 100 II 30, c. 2.

[11] DFSC 100 II 30, c. 2.

According to the Swiss Supreme Court, a work is defective:

(i) when it lacks the properties (i.e., qualities, specifications, features) explicitly or implicitly agreed upon by the parties;

(ii) when it lacks the properties which the customer could have expected according to the rules of good faith.[12]

As for the first category, the properties envisaged are not limited to what is explicitly provided for in the contract but will also extend to what the parties may have commonly intended, and if that cannot be determined, what could be objectively and reasonably intended pursuant to the principle of good faith.[13]

As for the second category, even without any agreement on the properties of the construction, the contractor owes the employer completed work that has so-called presupposed properties ("*vorausgesetzte Eigenschaften*"), namely which is of a quality not lower than average ("*Normalbeschaffenheit*"), and is fit for purpose ("*Gebrauchstauglichkeit*").[14] A work is deemed "fit for purpose" if it has the properties necessary or usual for the purpose or intended use of the work ("*Gebrauchszweck*").[15] This also entails the modalities of use, such as the time, duration, intensity, place of use or group of users.[16] If the parties do not specify the purpose or intended use of a work in a clause, the contractor owes the employer work which is fit for an ordinary purpose, i.e., a purpose which seems normal for the particular type of work at issue,[17] and which complies, as a minimum, with the recognized state of the art rules or an equivalent standard.[18] For instance,

[12] DFSC, 4A_428/2007 c. 3.1; Chaix, F. (2021). Commentary on Article 368. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 368 CO, para. 5). Helbing Lichtenhahn Verlag.

[13] Chaix, F. (2021). Commentary on Article 368. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 368 CO, para. 5). Helbing Lichtenhahn Verlag.

[14] Gauch, P. (2019). *Der Werkvertrag*. Schulthess Verlag. (p. 672, para. 1407).

[15] Gauch. *Der Werkvertrag*. (p. 678, para. 1417).

[16] Gauch *Der Werkvertrag*. (p. 678, para. 1418).

[17] Gauch. *Der Werkvertrag*. (p. 678, para. 1419).

[18] DFSC, 4A_428/2007 c. 3.1.

the fitness for purpose of a work always presupposes that the work fulfills objectively justified safety expectations.[19]

As a consequence to the above, a contractual clause by which the contractor undertakes that the works will present certain specific qualities (including, potentially, a definition of the purpose or intended use of a work) is treated very similar to that of a seller which would attribute to the item for sale some "promised qualities" within the meaning of Article 197 CO,[20] and is therefore treated, like in sale contracts, as a legal warranty for defects.[21]

Whether and to what extent the parties to a contract agreed on a fitness for purpose clause is a question of contract interpretation. Under Swiss law, in order to determine the common and real intention of the parties (subjective interpretation), Swiss law imposes not to focus on inaccurate expression or terminology which the parties may have used, either by mistake or to disguise the true nature of the agreement (Article 18(1) CO, *falsa demonstratio non nocet*).[22] It would instead be necessary to rely on indications and facts such as the content of the parties' declarations of will – whether written or oral – but also the general context and circumstances surrounding such declarations, such as previous statements or subsequent facts.[23] If the real and common will of the parties cannot be established, their conduct must be interpreted according to the principle of trust (objective interpretation), which requires to determine the parties' objective will, by finding the meaning that one party could and should reasonably and in good faith attribute to the declarations of will of the other party.[24]

For instance, the interpretation of fitness for purpose clause may become relevant in the following scenarios:

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[19] Gauch. *Der Werkvertrag.* (p. 680, para. 1423).

[20] DFSC 93 II 311, c. 3b referring to a contractual guarantee of "*absolute watertightness of the roof*".

[21] DFSC 100 II 30, c. 2; DFSC 93 II 311 c. 3b.

[22] Winiger, B. (2021). Commentary on Article 18. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 18 CO, paras. 15-16). Helbing Lichtenhahn Verlag.

[23] Winiger, B. (2021). Commentary on Article 18. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 18 CO, paras. 16-17). Helbing Lichtenhahn Verlag.

[24] Winiger, B. (2021). Commentary on Article 18. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 18 CO, paras. 132-134). Helbing Lichtenhahn Verlag; DFSC 144 III 93 c. 5.2.2.

- Where the parties agreed on a work property which affects the fitness for purpose of the work, the agreed upon property is owed to the employer, but not the fitness for purpose that is incompatible with it.[25]

- If there has been an (explicit or implicit) agreement on the fitness for purpose of the work which collides with another agreed upon property of the work, there is a contradiction between the two agreements. In such a case, the contradiction is only apparent if the interpretation of the contract shows that the contractor only owes one or the other of the mutually exclusive properties.[26]

- However, if the question of what the contractor owes (whether the fitness for purpose or the other property) is not clearly set out by the contract, the court or arbitral tribunal may consider the "*hypothetical will of the parties*", i.e., it would determine what reasonable and honest parties would have wanted if they had already resolved the contradiction when concluding the contract. According to this objective interpretation, the agreed fitness for purpose will often prevail, which, of course, does not mean that it will always prevail.[27]

B. B. Application Of "Fitness For Purpose" Clauses And The Principle Of Fault

Under Swiss law, when a breach of contract can be established the fault of the obligor is presumed. Hence, to the extent that a contract is not performed or not duly performed, the obligor bears the evidentiary burden of proving that it is not at fault (*duty to exonerate*), without which it is liable for damages.

This is set out in Article 97 of the Swiss Code of Obligations concerning general contractual liability:

> *If the performance of an obligation cannot at all or not duly be affected, the obligor shall compensate for the damage arising therefrom, unless it proves that no fault at all is attributable to it.*

[25] Gauch. *Der Werkvertrag*. (p. 676, para. 1414).

[26] Gauch. *Der Werkvertrag*. (p. 677, para. 1415).

[27] Gauch. *Der Werkvertrag*. (p. 677, para. 1415).

Moreover, an objective standard of negligence applies.[28] In the case of a professional, the conduct is assessed by reference to the standard of care which generally prevails in its trade or profession.[29]

As will be further explained below, the provisions on contracts for work and services in the CO (Articles 363 et seqq.) grant the contractor different statutory remedies in case of defective works (including the violation of a fitness for purpose clause). Some of those remedies (such as e.g., repair of defective works) do not precondition the fault of the contractor, whereas the contractor's fault is a requirement for a claim for damages. In the latter case, it is necessary that the defective character of the works is attributable to the contractor, either because it acted intentionally, or because it acted with negligence.[30] The contractor is expected to deploy the necessary duty of care, which includes respecting the rules of art and the technical norms generally recognised.[31] Since fault of the contractor is presumed, they will have the burden of exonerating themselves.

Accordingly, the Swiss Supreme Court has held:[32]

> *Under Article 368 CO, the contractor is responsible for the work's quality, even in the absence of fault. His liability is sanctioned by the client's right to reject the defective work, or to reduce the price, or to require the contractor to repair the work. If the contractor is at fault, he may be required to pay full damages. In accordance with the rule in article 97 of the Swiss Code of Obligations, he must prove that he is not at fault.* (Emphasis added)

[28] Thévenoz, L. (2021). Commentary on Article 97. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 97 CO, para. 51). Helbing Lichtenhahn Verlag.

[29] Thévenoz, L. (2021). Commentary on Article 97. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 97 CO, para. 52). Helbing Lichtenhahn Verlag.

[30] Chaix, F. (2021). Commentary on Article 368. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 368 CO, para. 62). Helbing Lichtenhahn Verlag.

[31] Chaix, F. (2021). Commentary on Article 368. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 368 CO, para. 62 and ad Art. 364, paras. 3 and 4). Helbing Lichtenhahn Verlag.

[32] DFSC 93 II 311, c. 3; see also DFSC 4A_594/2017, c. 4.2.

C. Statutory Mechanisms Imposing Liability On The Contractor For Defective Works

Under Swiss law, Article 368 CO regulates the contractor's accountability for defects. It should be noted that this provision does not have a mandatory nature and can hence be superseded by specific contractual provisions.[33]

According to the case law of the Swiss Supreme Court, the remedies available under Article 368 CO take precedence over the general action for damages for breach of a contractual obligation under Article 97 CO.[34] Insofar as the breach of a fitness for purpose clause in a contract for work and services amounts to a defect of the work, the statutory provisions concerning defects of work (Articles 367 et seqq. CO) are therefore exclusively applicable to determine the contractor's liability. This has an effect in terms of statute of limitations, the claim under Article 368 CO being subject to a prescription of 2 or 5 years as per Article 371 CO and the claim under Article 97 CO being subject to a prescription of 10 years pursuant to Article 127 CO.

Article 368 CO transforms the obligation of the contractor to perform *in kind* into certain warranty claims (termination of the contract, reduction of the purchase price, rectification of defects and compensation for damages) provided that the employer has fulfilled the relevant statutory requirements (inspection of the work and timely notification of the defect pursuant to Article 367(1) CO).[35]

According to Article 368(1) CO, if the contractor delivers work which is not fit for purpose and thus defective within the meaning set out above, the employer has a right to terminate the contract and to demand restitution of what he has already paid. This is however only possible if the work is so defective that it cannot be used or repaired.[36] If the defect is of lesser importance, pursuant to Article 368(2) CO, the employer has a right to require the reparation or rectification of the work,

[33] DFSC 118 II 142.

[34] DFSC 100 II 30, c. 2. See also Chaix, F. (2021). Commentary on Article 368. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 368 CO, para. 66). Helbing Lichtenhahn Verlag.

[35] DFSC 100 II 30, c. 2.

[36] DFSC, 4A_177/2014 c. 4.1.

if such reparation is possible without excessive expenses for the contractor.[37] Similarly, in case of minor defects, the employer has a right to ask for a price reduction as per Article 368(2) CO.

As mentioned above, the rights to terminate the contract, to require the rectification of the work or ask for a price reduction pursuant to Article 368 CO are independent of any fault of the contractor. In that sense, these statutory duties impose a strict liability on the contractor.

It must be noted, however, that Article 369 CO limits the strict liability of the contractor to the extent that they can prove that the defects in question are attributable to the employer, either because they arise out of instructions that he has given contrarily to the formal advice of the contractor or for any other reason (e.g., due to the materials provided or the land designated by the employer for the construction). Interestingly, some commentators consider that Article 369 CO could also be invoked in cases where an object that is handed in by the employer to the contractor for reparation is so defective that an irreproachable intervention by the contractor is impossible.[38]

Articles 368(1) and (2) *in fine* CO provide that the employer has a cumulative right to seek damages for the loss resulting from the defect in the work which remains or would remain despite the termination of the contract, the reduction of the price or the rectification of the work.[39] In other words, the damages covered by this provision include not only the repair costs but also the consequential damages, *i.e.*, damages having their source in the defect but developing outside of it ("*Mangelfolgeschaden*"), such as lost profits.[40] Contrarily to the other remedies available under Article 368 CO, the right to claim damages requires the establishment of the contractor's fault.

The remedies available under Article 368 CO are thus broader than under English and Korean law.

[37] DFSC, 4A_229/2012 c. 6.

[38] Chaix, F. (2021). Commentary on Article 369. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 369 CO, para. 19 and the reference therein). Helbing Lichtenhahn Verlag. The example provided in the commentaries refers to clothes covered in indelible stains being handed in for cleaning.

[39] Gauch. *Der Werkvertrag*. (pp. 826-827, para. 1864).

[40] Chaix, F. (2021). Commentary on Article 368. In Thévenoz, L. & Werro, F. (Eds.), *Code des obligations. Vol I. Commentaire Romand* (ad Art. 368 CO, para. 57). Helbing Lichtenhahn Verlag; Bohnet, F. (2019) *Actions Civiles Volume II:CO* (p. 535, para. 25).

4. "FIT FOR PURPOSE" OBLIGATIONS UNDER THE CISG

A. Meaning Of "Fit For Purpose" Under The CISG

The UN Convention on Contracts for the International Sale of Goods (CISG) contains a specific provision in Article 35(2) CISG which governs fitness for purpose obligations in international sales contracts. The criteria of Article 35(2) apply subsidiarily to contractual standards under Article 35(1) if the parties have provided no, or not sufficient, contractual description of the goods to be delivered. These provisions can shed light on how a fitness for purpose obligation may be interpreted and operated in a commercial contract in an international context governed by laws different from common law.

If the parties to a contract have implicitly or explicitly agreed on a specific purpose of the goods, such an agreement falls under Article 35(1) CISG.[41] Hence, goods delivered that do not fulfil the agreed purpose will be considered as goods that lack the "*quantity, quality and description required by the contract*".

In turn, Article 35(2) CISG sets forth that goods are non-compliant with the contract unless they:

(a) "*are fit for the purposes for which goods of the same description would ordinarily be used* ", or

(b) "*are fit for any particular purpose expressly or impliedly made known to the seller at the t ime of the conclusion of the contract",* unless the seller proves that *"the buyer did not rely , or that it was unreasonable for him to rely, on the seller's skill and judgement*".

B. Fitness For Ordinary Purpose As Per Article 35(2)(A) CISG

Coming first to Article 35(2)(a) CISG, it requires the seller to deliver goods which are "fit for the purpose for which goods of the same description would ordinarily be used". Given the broad language of Article 35(2)(a), the two main interpretative issues emerge, namely with regard to the notion of "ordinary use" and the applicable standard.

[41] Brunner, C. & Gottlieb, B. (2019). Article 35 CISG. In Brunner, C. & Gottlieb, B. (Eds.), *Commentary on the UN Sales Law (CISG)* (pp. 227-247, para. 18). Kluwer Law International.

a. The Notion Of "Ordinary Use"

There are numerous factors which can play a role in determining what exactly qualifies as "ordinary use" in the sense of Article 35(2)(a). These may include the nature of the goods, the normal expectations of certain characteristics, public statements or advertisements by the seller or the producer emphasizing certain qualities of the goods and the price of the goods.[42] The parties involved are also of considerable importance. For instance, if the seller is a producer of premium products, the buyer may expect a higher quality than from a producer of cheaper products.[43]

Broadly speaking, fitness for the ordinary purpose under Article 35(2)(a) requires that the quality of the goods meet the expectations that the user has in relation to the goods of the same type in the particular circumstances of the individual case. By way of example, food must be edible, and suspicion that the food may be contaminated can constitute a lack of conformity if the seller cannot dispel such suspicion.[44]

Further, according to case law based on the CISG, tradability of goods may be an important part of being fit for the purpose of ordinary use in terms of Article 35(2)(a) CISG, and in the case of food intended for human consumption, tradability includes that the goods are at least not harmful to health.

b. The Applicable Standard

Whether a product is deemed to be conforming under Article 35(2)(a) CISG depends on what is considered as being the "*ordinary*" purpose of that category of products. As stated in the Secretariat Commentary, "*the normal expectations of persons buying the goods of this contract description*" are relevant for this standard.[45] While the CISG itself provides no guidance on how to determine

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[42] Kröll in: Kröll S., Mistelis, L., & Viscasillas, P. (Eds.). (2018). *Commentary on the UN Convention on Contracts for International Sale of Goods (CISG)* (p. 505, paras. 75). Verlag CH Beck.

[43] Kröll in: Kröll S., Mistelis, L., & Viscasillas, P. (Eds.). (2018). *Commentary on the UN Convention on Contracts for International Sale of Goods (CISG)* (p. 505, paras. 76). Verlag CH Beck.

[44] Schwenzer, I. & Tebel, D. (2014). Suspicions, mere suspicions: non-conformity of the goods? *Uniform Law Review, 19(1)* p. 154.

[45] Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat, UN Doc. A/CONF.97/5, Art. 33, p. 32, para. 5, available at: 1979 Secretariat Commentary | CISG-online.org

whether goods are fit for the ordinary use, many scholars and tribunals tried to derive certain criteria.

An attempt at a thorough analysis of various interpretations of Article 35(2)(a) can be found in a case decided by an arbitral tribunal in 2002 in a case administered by the Netherlands Arbitration Institute.[46] Several Dutch companies, sellers in the dispute, had entered into twelve contracts for the supply of a condensate crude oil mix referred to as "Rijn Blend". The contract was concluded for several years, however, in mid-1998, after the first deliveries, the buyer indicated that the goods were non-conforming, and that it would suspend taking delivery of the Rijn as the detected high levels of mercury made the condensate unacceptable for processing or sale. Given that a solution was not found regarding the mercury levels and the buyer refused to take the goods, the sellers sold the condensate to third parties at a price below the contract price and sought damages from the buyer.

When addressing the merits of the case, the tribunal, applying Article 35(2)(a), identified three main approaches to quality under Article 35(2)(a): "*merchantable*" quality, "*average*" quality and "*reasonable*" quality.

(i) Merchantable quality

Coming first to the "merchantable" quality test, the tribunal noted that the goods were deemed to be conforming if there was a substitute market. In other words, the question raised in the case was whether "*a reasonable buyer would have concluded contracts for Rijn Blend at similar prices if such a buyer had been aware of the mercury concentrations*". Since the seller resold the condensate at lower prices, the tribunal held that the goods did not meet the "*merchantable*" quality test because "*other buyers in the market for Rijn Blend were* […] *unwilling to pay the price* [the sellers] *had agreed with* [the buyer]."

(ii) Average quality

As for the "*average*" quality test, the tribunal established that the buyer had failed to meet its burden of proof as it was unclear from the evidence "*whether there was a common understanding*

[46] Netherlands Arbitration Institute, Case No. 2319, Netherlands, 15 October 2002, available at: https://www.unilex.info/cisg/case/836-

in the refining industry what average quality for blended condensates (such as Rijn Blend) should have been and what levels of mercury were tolerable."

(iii) Reasonable quality

Having dealt with both tests, the tribunal rejected them as going against the international character of CISG, due to their recourse to domestic conformity notions which was against the spirit of the CISG and, hence, in violation of Article 7 of the Convention.

The tribunal rather applied the third standard calling for the delivery of the goods of "*reasonable*" quality, i.e., a certain quality which is reasonable to expect having regard to price and all other relevant circumstances.

The tribunal found that the goods did not meet the "*reasonable quality*" test and hence were non-conforming as per Article 35(2)(a) for two reasons. First, the price under the contract could not have been obtained by the seller with regard to the Rijn Blend with increased mercury levels, that has a "*significantly lower*" value. Second, the long-term nature of the relationship between the parties suggested that the buyer was entitled under the contracts to a constant quality level of the Rijn Blend corresponding to the quality levels that had been obtained during the initial period of the contracts on which the buyer could reasonably rely.

C. Fitness For A "Particular Purpose" As Per Article 35(2)(B) CISG

Article 35(2)(b) CISG requires the seller to deliver the goods which are fit for a particular purpose expressly or impliedly made known to the seller. The inclusion of this standard in Article 35(2) shows that no agreement on the purpose transmitted to the seller is required – such cases fall under Article 35(1) CISG, since in that case the purpose becomes part of the characteristics of the goods as per Article 35(1) CISG.[47] Hence, the purpose "*made known*" to the seller is less restrictive than "*contractually agreed upon*".[48]

[47] Kröll In Kröll, Mistelis, & Viscasillas (Eds.). . *Commentary on the UN Convention on Contracts.* pp. 515-516, para. 115; Schlechtriem P. & Butler P. (2009). *UN Law on International Sales: The UN Convention on the International Sale of Goods* (p. 117, para. 138). Springer.

[48] Schlechtriem, P. & Schwenzer, I. (2016). *Commentary on the UN Convention on the International Sale of Goods* (p. 607, para. 22). Oxford.

There are two elements that need to be met in order to successfully invoke Article 35(2)(b) CISG. First, the particular purpose needs to be made known (expressly or impliedly) to the seller, and second, the buyer reasonably relied on the seller's skill and judgment.

a. A Particular Purpose Made Known To The Seller

First, if the buyer intends to use purchased goods for a purpose for which goods of this kind are not ordinarily used, the buyer must expressly or impliedly make such intended use known to the seller by the time of the conclusion of the contract.[49]

A particular purpose, i.e., the reasons why the buyer decided to purchase specific goods, can be discerned both from the contract and all circumstances surrounding it, including negotiations.[50] Article 35(2)(b) serves to protect the buyer in cases where the seller did not explicitly articulate any consent to the purpose transmitted by the buyer.[51] In the end, the buyer is only required to prove that the seller was informed about or ought to have been aware of the purpose, and not that the seller consented to the information provided, as is necessary under Article 35(1) CISG.[52]

The language in Article 35(2)(b), which focuses on the act of "*making known*" rather than the result, suggests that there is no requirement of actual knowledge; instead, it must be sufficient if a reasonable seller could have discerned the particular purpose from "*the buyer's individual circumstances and the way in which the goods will be used*".[53]

Although no agreement of the parties on the purpose transmitted by the buyer is required, a seller must be able to deduce the particular purpose from the information passed.[54] This issue was elaborated in *the Menthol crystals case* decided in 2004, where the Swiss buyer ordered a chemical

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[49] Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat, UN Doc. A/CONF.97/5, Art. 33, p. 32, para. 8, available at: 1979 Secretariat Commentary | CISG-online.org

[50] Schwenzer, I. (2016). Article 35. In Schlechtriem & Schwenzer. (2016). *Commentary on the UN Convention on the International Sale of Goods*. (p. 607, para. 23).

[51] Kröll. Article 35. In Kröll, Mistelis & Viscasillas (Eds.). *Commentary on the UN Convention on Contracts.* (pp. 515-516, para. 120).

[52] Schlechtriem, P. & Butler, P. (2009). *UN Law on International Sales: The UN Convention on the International Sale of Goods*. Springer (p. 117, para. 138).

[53] Schlechtriem, P. & Butler, P. (2009). *UN Law on International Sales: The UN Convention on the International Sale of Goods*. Springer (p. 117, para. 138); Schlechtriem, P. & Schwenzer, I. (2016). *Commentary on the UN Convention on the International Sale of Goods* (pp. 607-608, para. 23).

[54] Kröll. Article 35. In Kröll, Mistelis & Viscasillas (Eds.). *Commentary on the UN Convention on Contracts* (p. 516, para. 116).

product, described as menthol of a certain brand in "*large crystals*".[55] After the delivery of the crystals, the buyer complained about their size and requested replacement on the grounds of non-conformity. The Federal Court recalled that, under Article 35(2)(b), it was for the buyer to prove that a particular purpose relating to the goods had been expressly or impliedly made known to the seller at the time of the conclusion of the contract. The Court acknowledged that "*the seller only delivered one standard quality of crystals, which in principle satisfied its customers".* Given that the buyer did not objectively define the term "*large crystals*", nothing allowed the seller to understand that the term used implied a particular requirement or the special use of the crystals within the meaning of Article 35(2)(b).

b. Reasonable Reliance On The Seller's Skill And Judgment

The second prerequisite of Article 35(2)(b) is that of "*reasonable reliance*". The buyer cannot invoke Article 35(2)(b), if the seller proves that "*the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment*". This is not the case where the buyer invokes characteristics that are directly within the seller's sphere of influence,[56] for example, where the seller is a professional in a particular field or an expert in relation to the goods sold, as it will be rather burdensome for the seller to prove that the buyer either did not rely or it was unreasonable for him to rely on its skill and judgment.[57] The same holds true if the seller is the manufacturer of the goods.[58]

The issue of whether equal skill of both parties invalidates the buyer's reliance on the seller's skill is still a matter of debate. In the case *Dutch plants case I,*[59] decided in 2006, the German court's opinion was that the seller was only to be considered liable if he was more skilled. It emphasized that the buyer's reliance on the seller's skill seems not to be protectable if the buyer is able to

[55] *Menthol crystals case,* Switzerland 13 January 2004 Supreme Court, available at: https://www.unilex.info/cisg/case/978

[56] Henschel, R.F. (2004). Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Competing Set of Rules. *Nordic Journal of Commercial Law*, 1.

[57] Huber, P. & Mullis, A. (2007). *The CISG*: A *New Textbook for Students and Practitioners*. Sellier European Law Publishers (p. 139).

[58] Kröll. Article 35. In Kröll, Mistelis & Viscasillas (Eds.). C*ommentary on the UN Convention on Contracts*. p. 518, para. 128; Huber & Mullis. *The CISG: A New Textbook for Students and Practitioners*. p. 139.

[59] *Dutch plants case I,* District Court Coburg, Germany, 12 December 2006, available at: https://cisg-online.org/search-for-cases?caseId=7367

estimate the usability of the goods in the same way.[60] Thus, the mere fact that the buyer has knowledge about the goods must not in itself exclude reliance in the sense of Article 35(2)(b), as long as the buyer does not have more experience than the seller.[61]

However, the position may be different if the buyer himself gained considerable experience in relation to the goods in question. Clearly, no reliance is to be argued, if the buyer takes part in the selection of the goods, influences the manufacturing process, or provides precise specifications.[62]

D. Consequences Of Violating "Fit For Purpose" Obligations

Where the goods do not fit for purpose, they are considered non-conforming, in which case the buyer may resort to the general remedies available under the CISG. Article 45 in conjunction with Articles 46-52 CISG entitles the buyer to resort to the following remedies:

- Performance, including substitute delivery and repair in cases of non-conformity;
- Reduction of the purchase price; and/or
- Avoidance of the contract.

Moreover, in addition as per Article 45(1)(b) in conjunction with Article 74 CISG the buyer may claim damages.

[60] *Dutch plants case I,* District Court Coburg, Germany, 12 December 2006, available at: https://cisg-online.org/search-for-cases?caseId=7367

[61] Schlechtriem & Schwenzer. *Commentary on the UN Convention on the International Sale of Goods.* pp. 608-609, para. 25.

[62] Kröll. Article 35. In Kröll, Mistelis & Viscasillas (Eds.). C*ommentary on the UN Convention on Contracts.* p. 518, para. 130.

5. CONCLUSION

This article has set out to show that the meaning, scope and enforceability of a "fitness for purpose" clause may vary significantly depending on the substantive law governing the construction contract. Moreover, whether a “fit for purpose” clause constitutes a standalone obligation, or whether it is part of the contractor’s general obligation to provide a work that is free from any “defects” (respectively in compliance with the specifications agreed between the parties) may be the subject of contract interpretation.

When it comes to the enforceability of fit for purpose clauses, the legal remedies available in case of a breach of such a clause, each legal system, whether English law, Korean law or Swiss law, provides for slightly different approaches and legal requirements. In particular, one essential question is whether the contractor's fault (or a contractor's failure to exert reasonable skill and care) is required, which will have an effect on the remedies available to the Employer.

When negotiating the construction contract, the contracting parties should be conscious of the potential differences and implications of the governing law when agreeing on a “fitness for purpose” provision.

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