



Buyer's Repair and Replacement Rights at the Seller's Liability for Defects

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Abstract

Trust, one of the most important elements of economic life, also contributes greatly to the stability of social life. In this respect, the degree of trust people feel towards each other deeply affects both economic and social life. The high perception of trust in society improves relations between individuals, thus contributing to the resolution of problems before they reach the legal and judicial level. However, such a high degree of confidence and perception, as in many societies, also not seen in Turkey. Therefore, disputes arising between individuals are mostly resolved in courts. Sales contracts are an important tool in measuring the perception of trust in the society. In a legal system, the more detailed the sales contracts are and the more detailed regulations are made against the negative situations that will arise as a result of the sales contract, it can be easily stated that the sense of trust in the society where that legal system is applied is also weak. Because the weakness of personal relationships between buyer and seller, and the decline in business and professional ethics show that individuals need the law and the protection provided by the laws rather than "promises". Considering the current legal regulations in Turkey, it is seen that sales contracts are arranged in a very detailed way. In this study, in the context of the responsibility arising from defective goods and the defective goods, which are frequently encountered in practice, the buyer's rights to demand repair and replacement are discussed.

Keywords

Sales contract, Defect, Liability for defects, Repair, Replacement

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I. Introduction

Today, economic and social life is developing and changing much faster than before. This development and change naturally brings about certain rules and regulations. The structure to provide these rules and regulations is law. Law is binding as long as it meets the needs of its time and serves as a remedy for any troubles. The needs of today are also more flexible, which means legal regulations that take the will of the parties into account more.

In today's world, where production has increased and become widespread considerably, if the problems arising in the manufactured goods are to be evaluated in the context of the code of obligations, it is now much more important to eliminate, remove the defects and according to which rules it will be performed. For, people now know each other little or not at all in the contractual relationships they enter. Hence, they prefer to cling to stronger branches such as written legal rules rather than trust in each other. At this point, it is possible to evaluate the optional rights that the seller has in case of warranty obligation to the defect in this context.

In the period of Law No. 818, the buyer was given the optional rights of avoidance of the contract, demanding abatement of the purchase price and request for a replacement with a defect-free one. The right to request free repair was not covered in the protection of the Law. However, this right was protected by contracts of guarantee etc. between the parties. Yet, this situation provided the buyer with a contractual claim right, but did not provide any legal protection.

The lawmaker must have realized this deficiency and wanted to eliminate it, the buyer has also been given the right to request free repair in conjunction with the New Code of Obligations No. 6098. This regulation has been a positive step in terms of both meeting the needs of the age and preventing a situation that causes loss of rights. This study has been prepared at this point in order to explain this positive step as much as possible and to indicate which rules it is subject to.

Within the scope of this study, first of all, the terms of defect and liability for defects will be explained, and which conditions should be found in order to be able to mention the liability for defects will be specified. Then, it will be explained which rules the scope of repair and replacement rights are subject to.

II. Liability for Defects

A. Liability for Defects Term and its Legal Characteristic

1. In Compliance with Code of Obligations

Article No. 219 of Turkish Code of Obligations No. 6098 says “*The seller is responsible to the buyer for the goods which do not have the indicated qualities. In addition, the seller is liable for any tangible, legal or financial defects that are against the quality or the quantity affecting the quality, and eliminate the value of the good in terms of purpose of use and the benefits expected by the buyer.*”, which defines liability for defects and the defect itself. According to this provision, the defect is that the seller does not provide the qualifications notified or these deficiencies cause a decrease in the value of the sold good or result in its complete disappearance (Akıntürk & Karaman, 2012, p. 244; Ayhan, 2011, p. 4; Aksoy Dursun, 2011, p. 1846), in other words, the “*separation of the sold from its normal qualifications.*” (Yavuz, N., 2012, p.109)

As for the legal characteristic of the term of liability for defects, while there are opinions claiming that the warranty for defects can be put forward in compliance with the provisions of fault (Karaca, 2012, pp.60-70) or culpa in contrahendo, there are also various opinions: claiming it is a warranty-like contract, or bad performance and evaluating warranty for defects as sui generis (Ayhan, 2011, p.6). The prevailing opinion is that the liability for defects is complementary to the property obligation of the seller, which is one of the obligations of the seller, and in this respect, it is a legal obligation (Yavuz, N. 2012, p. 110; Yavuz, C. 1989, p. 29; Yavuz, C., 2012, p. 67; Zevkliler & Gökyayla, 2010, p. 101). Therefore, even if the parties have not made a contractual regulation stating that the seller is liable for the defects of the sold good, the buyer will be able to claim this right based on the Code.

2. In Compliance with Consumer Protection Law

Defective good is defined in accordance with the Article 4/1 of Consumer Protection Law No 4077 saying “*A good which contains material, legal or financial deficiencies influencing the quality, or the quantity affecting the quality specified on the packaging, labelling, presentation or operating instructions, or in the advertisements or notices, or declared by the seller or*

indicated in the standards or technical specifications or decrease or eliminate its value or the expected benefits by the consumer is considered as defective.”.

In addition to that, defective service is also defined in the Article 4/A as *a service which contains, material, legal or financial deficiencies influencing the quality or the quantity affecting the quality specified in the advertisements or announcements made by the supplier; or established in the standards or technical specifications, or decrease or eliminate its value or the expected benefits by the consumer”.*

Since Consumer Protection Law is a special law according to the Code of Obligations, as can be seen in the definitions above, the expressions that highlight consumer are included. However, another feature of the Consumer Protection Law arising from the fact that it is a special law is that the Code of Obligations will be applied in cases where there is no provision in this Law.

B. Requirements of the Liability

1. In General

According to Article 219 of the Code of Obligations, if the seller has defects that reduce the value of the sold good or completely eliminate it, prevent the buyer from obtaining the expected benefits from it, and if the good has defective features, which are normally supposed to be present, even if the seller has committed or has not made a commitment, the seller is liable for these defects (Yarg. 13. HD. 2004/5405 E., 2004/16730 K.; Yarg. 13. HD. E. 2009/7538, K. 2010/2990).

However, there are some requirements of the seller’s liability for these defects. According to this, the defect, benefit and the damage must already exist in the good when it is transferred to the buyer in accordance with the contract, the defect must be significant, the defect must be latent, the liability for the defect must not be eliminated by the contract, and the buyer must have fulfilled the obligations imposed on him within the framework of the provisions of liability for the defect..

2. The Existence of Defect in the Sold Good at the time when Benefit and Damage are Transferred

In order for this requirement to be realized, the defect in the sold goods must exist before the benefit and damage are transferred to the buyer by the sales contract (Zevkliler & Gökyayla, 2010, p. 105; Yarg. 13. HD. E. 2011/3355, K. 2011/6924). The moment when the benefit and damage are transferred by the contract is when it gets into possession of the buyer (Turanboy, 1991, p. 154). In the Code of Obligations, there is no provision stating that the defect must exist when the benefit and damage are transferred to the buyer so that the seller should be liable for the defect. However, considering other national and international practices (For example, Vienna Convention art.36 / 1, BGB 459.p.) (Ayhan, 2011, p. 21; Yavuz, C. 1989, pp. 91-92) and evaluating this situation in terms of fairness, it is seen that it would be more appropriate to seek the existence of the defect when the benefit and damage are transferred - the transfer of actual possession.

Defects that occur after the possession has been transferred to the buyer, which means the benefit and damage have been passed to the buyer, do not incur the responsibility of the seller unless they arise from reasons existing before the delivery of the goods (Yavuz, C. 2009, p. 70). In such case, if the seller knows the existence of this situation that has arisen before and does not notify the buyer of it, or if he has assured the buyer that there is no such situation, which means he has acted fraudulently, then the seller will naturally continue to be liable for the defect of the sold good, but also his liability will be heavier due to his fraudulent behaviour (Zevkliler & Gökyayla, 2010, p. 105).

3. Significance of the Defect of the Sold Good

In Article 219 of Code of Obligations it is stated that the seller will be responsible for the existence of material, legal or economic defects that eliminate or significantly reduce the value of the sold good in terms of the purpose of use and the benefits expected by the buyer. Accordingly, in order for the seller to be held responsible for the defect in the sold good, it is necessary that this defect significantly reduce the benefit which the buyer will obtain from or completely eliminate the expected benefit (Ayhan, 2011, p. 23). To explain what is meant by “significantly reducing”, it is, for example, when a device with this function of recording sound is purchased for this purpose,

it is expected from this device to have the ability to record sound and not to have any malfunction that prevents the recorded sound from being understood while performing this feature. Therefore, if this purchased device does not record the sound at all or even if it does, the record cannot be listened later, it means there is a significant decrease in the value of the sold good. Likewise, if it is not possible to conclude the contract due to the defect, which means there is an impossibility, if a reduction is required from the value determined by the contract, or if the value must be determined less than the normal value from the very beginning, then it will be possible to mention a significant defect without a considerable decrease (Yavuz, N., 2012, p. 80).

Although the establishment of the usage purpose of the goods sold by the parties constitutes a criterion in determining the responsibility and it is useful in terms of ensuring understandability, it cannot be concluded that there is a legal deficiency or deficiency if it is not determined. That is to say, even if the usage purpose of the sold good is not determined in accordance with the contractual sale, if it is understood from common views on which qualifications of the sold good are used for, which means the practical use, then these criteria will be taken into consideration in evaluating whether the defect is important or not. It is naturally concluded that when it is assumed that the parties' purposes do not match each other while concluding the contract of sale, common views (customs) and practices rather than their unilateral purposes will be taken into account (Yavuz, C., 2009, p. 71).

4. Latent Defect of the Sold Good

Latent defects are those in the sold good which are the subject of the contract that the buyer is not aware of and cannot be discovered by a simple examination or adequate attention (Yavuz, N., 2012, p. 82).

Although there is no clear statement in the Code of Obligations that the defect in the sold good must be latent so that the seller should be held responsible for the defect, in Article 222, it has been stated that the seller will not be liable for the defects recognized by the buyer at the time of the sale contract, and the seller will be liable for the defects that may be seen by the buyer after the sold good is sufficiently examined, only if he also undertakes that there is no such defect. Therefore, the seller will not be held liable for defects that are determined or possible to be determined by a simple inspection by the buyer,

since the buyer will be deemed to have accepted to buy the good with the defects (Yavuz, C., 2009, p. 71; Korkmaz etc., 2011, p. 153). In order for the seller to be held liable for the defect, if he has not promised a guarantee, the defect must be of a nature that cannot be detected by a simple examination or noticed through sufficient attention. It is also quite natural that the seller can be held responsible for the defects that can be detected with a simple examination in case he promises a guarantee (Zevkliler & Gökyayla, 2010, p. 105).

Regarding this issue, in Article 4 / V of Consumer Protection Law, it is stated “Except for the provisions regarding liability for damages caused by the defective service, the above provisions are not applied to services purchased knowing that they are defective.”, which means the seller cannot be held responsible for the service or the good purchased by knowing that it is defective, and cannot be claimed to be liable for the purchased goods. However, in order for this issue to arise, there must be a clear statement or notification that will not cause any doubt that the faulty good or service is defective.

For instance, if a product is sold even though it is defective, the seller must put the phrases such as “DEFECTIVE”, “MALFUNCTIONED “, “ FAULTY “ (Yavuz, C., 2009, p. 71; Zevkliler & Gökyayla, 2010, p. 105; Yavuz, N., 2012, p. 82) and anyone who comes to the place where this good is sold should know that the product is sold even if it is defective in order for the buyer to be held liable.

5. Noncancellation of the Liability for Defects by the Contract

It is possible to cancel the liability for defects by the contract (Yavuz, C., 2009, p. 72; Zevkliler & Gökyayla, 2010, p. 105; Yavuz, N., 2012, p. 117); however, the provisions regulating the liability of the seller for the defect are not mandatory (Arbek, 2005, p. 187; Akünal, 2011, pp. 547-548), but substitute rules of law (Yavuz, N., 2012, p. 117).

Even though it is possible to cancel the liability for defects in accordance with the contract, if there is fraudulent behaviour, the agreement or agreement documents that eliminate the liability of the seller for the defect will not be in effect. This issue is stated in Article 221 of Code of Obligations as follows: “*If*

the seller is seriously faulty in transferring the sold as defective, any agreement that eliminates or limits the responsibility for the defect is absolutely null and void.”, which means nonliability agreements will not be effective not only in case of fraudulent behaviour but also of being seriously faulty (Yavuz, N., 2012, p. 118).

Due to the fact that the provisions of the liability of guarantee for defects are not mandatory in the elimination of this liability by contract, the parties can narrow or expand the seller’s liability for defects in the contract as they wish except for the situation and fraudulent behaviours envisaged in Article 221 of Code of Obligations. Starting from this point, it can be said that it is likely to exclude the liability for defects regulated within the seller’s area of responsibility in the legal regulations from the seller’s responsibility area. In addition, it is possible to reach agreements against the requirements that the defect is significant, and it exists when the benefit and damage are transferred (Yavuz, C., 1989, pp. 94-95).

In case provisions that cause hesitation and require interpretation in contracts which eliminate or restrict the seller’s liability of warranty for defects are present, they are interpreted in a limited way and in favor of the buyer (Yavuz, N., 2012, p. 118; Yavuz, C., 1989, p. 98). Regarding this, the provisions stipulated in the contract stating that the liability of warranty for the defect will be eliminated with respect to only certain parts of the sold good, but that the liability for the other parts will continue will also be invalid. For, the seller’s liability for defect is related to the whole of the sold good (Yavuz, C., 1989, p. 103).

6. The Buyer’s Fulfilment of the Liabilities Incurred by the Law

In order for the buyer to make certain claims from the seller within the scope of his liability for the defects in the sold good, the buyer must have fulfilled the obligations of inspection and notice, even when necessary, protection, determination and sale. The buyer is required to report the inspection and notice liabilities within a period that will not impose additional obligations on the seller. This issue is stated in Article 223/I of Code of Obligations as follows: “*The buyer is obliged to review the situation of the sold transferred to him as soon as possible according to the usual flow of business and if he sees a defect requiring the seller’s liability, he must notify him within an appropriate period of time.*”

Although the period in which obligation of notification will be applied is not clearly stated in the article (For the opinion about the fact that the expression “appropriate period” in the article will cause loss of rights; therefore, the “appropriate period” should be changed to “immediately”, see Ceylan, 2012, p. 9-94), the criteria to be used in determining this period are specified. While, there is an opinion in the doctrine which says obliging the fulfilment of obligations of inspection and notice within a certain period of time may have some negative consequences against the buyer and seller, it should therefore be eliminated (Çetiner, 2010, pp. 135-141), there is also another opinion defending that thanks to the determination of these periods, malicious buyers will be prevented from using their rights maliciously, and therefore it is a regulation that must exist (Demir, 2005, p. 33). The following criteria must be followed in determining the inspection and notice periods; “*the first possible moment according to the ordinary flow of the works “and” a period appropriate for the nature of the existing defect*”. However, certain periods have been determined to fulfil the obligation of inspection and notice in two cases. These cases are animal sales and commercial sales between traders.

In Article 224, organizing the sale of animals, it is stated that in case the period for which the seller will be liable is not determined in writing, and the defect is not related to the pregnancy of the animal, the seller will be liable only if he is notified of this situation within nine days starting from the date of the transfer or the date of the buyer's default in the transfer, and also only if it is requested by the experts to examine the animal within the same period.

Likewise, in Article 23 / c of the Commercial Code, it is arranged that if the good is evidently defective at the time of delivery, the buyer must notify the seller of this situation within two days; if it the defect is not apparent, the buyer is liable for examining or getting the good examined in order to discover whether it is defective or not within eight days after receiving it (Ayhan, 2011, p. 27), and in case the good is found to be defective as a result of this examination, then the buyer is obliged to notify the seller of this situation within this period in order to protect his rights.

In case there is an obvious defect in the sold good, the fact that the buyer has not fulfilled his obligation of inspection and notification is concluded as he accepts the sold good, but if there is a defect that cannot be found through an

ordinary examination, the fact that the buyer neglects to fulfil his obligation of inspection and notification is not concluded as he has accepted the sold good, and does not eliminate the seller's warranty liability for the defect. (Article 223/II)

The buyer's obligations to protect, sell and determine the status of the sold is a situation that usually occurs in distance sales. This issue is arranged in Article 226 of the Code of Obligations. Accordingly, in distance sales, if the buyer claims that the seller is faulty, and the seller does not have a representative in the place where the buyer is located, the buyer is obliged to take the necessary measures to prevent damage to and protect the sold good (Art. 226/I). The buyer will pay the costs incurred while fulfilling the obligation of protection on behalf of the seller. Therefore, the buyer will be able to claim these costs from the seller (Yavuz, C, 1989, p. 75).

As for the buyer's obligation to detect the defects in the sold, accordingly, the buyer must have status of the sold duly determined without delay. If he fails to do this, he will be obliged to prove that the defect he alleges existed at the time it reached him (Art. 226/II)

The buyer is not obliged to have the defect of the sold good detected by the official authorities. It is possible to have it detected by any private institution performing such kind of work (Arbek, 2005, p. 191). For, it is sufficient to have the detection performed and documented by any third party. However, the detection should be conducted as soon as possible because it is carried out to determine the status of the sold good at the time of delivery (Yavuz, C, 2009, p. 122).

Finally, it is necessary to mention the buyer's obligation to sell what is sold. As stated in the last provision of Article 226, "*if there is a danger of deterioration of the sold item in a short time, the buyer is authorized to sell it through the court in the place where it is located, and even liable for selling it if it is a benefit to the seller. In case the buyer does not notify the seller of the situation soonest, he will be responsible for the damage caused by it.*" To exemplify, if the sold item is fruit or vegetables that will lose its main quality in a short time, and if the buyer claims that this fruit or vegetable is defective, and if there is a possibility of deterioration within the time period when the sold item is sent back to the seller, then the buyer will be liable to have the item sold. However, he primarily needs to notify the seller of this defect.

Otherwise, if he tries to have the product sold without any notification, it will be considered that he has accepted the product (Yavuz, C. 1989, p. 75).

C. The Buyer's Optional Rights in case of Presence of Defects

1. In General

If the buyer claims that the sold is defective, he will have a number of rights if the above conditions are met. These rights are cancellation of the contract, asking for a price reduction and requesting repair and replacement with a new one in compliance with Article 227 of Code of Obligations.

All of these rights are innovative rights (Başoğlu, 2012, pp. 116-117). Therefore, once used, they cannot be withdrawn again, and when they reach the addressee, they have effect and bear consequence.

In consideration with the subject of this study, the buyer's rights to cancel the contract and demand price reduction among these optional rights will be briefly mentioned, and the right to request repair and replacement with a new one will be essentially emphasized.

2. Cancellation of the Contract

The chance to cancel the contract due to defect is arranged in Art.227 / I b.1, 229 and 230 of the Code of Obligations. The buyer's right to cancel the contract due to defect is a right that results in disruptive innovation. Therefore, its provisions are effective when it reaches the seller, which terminates the contract (Zevkliler & Gökyayla, 2010, p. 110; Yavuz, C., 1989, p. 88; Tunçomağ, 1977, p. 165; Tandoğan, 2008, p. 190).

The buyer may cancel the contract provided that he declares that he is ready to return the sold item. By cancelling the contract, the buyer becomes obliged to return the sold item to the seller together with the benefits obtained from it. On the other hand, the buyer may also request the seller to refund the sales price he has paid including the interest, to pay the expenses incurred for the sale with litigation costs, as in the complete possession of the sold, and to compensate direct damages due to the defective goods. (Art.229).

It seems more appropriate to the purpose of the law to understand buyer's obligation to notify that he is ready to return the sold item in order to cancel

the contract specified in the Code No. 6098 as follows: the Code aims to emphasize the statement of readiness to return the sold item not as a condition of validity, but as buyer's obligation to return it as a result of cancellation of the contract. From this point, it must be accepted that even if the buyer does not have a declaration that he will return the sold item, he can cancel the contract (Çetiner, 2009, pp. 108-109).

The rule says that in case a multi-part good or multiple sold good are present, a defect related to one or a part of their parts cannot be extended to all those sold covered in the contract and thus cancellation of the contract cannot cover the entire subject of the contract (Zevkliler & Gökyayla, 2010, p. 112). However, if the defect affects the whole subject of the contract, then the possibility to cancel the contract will be effective according to the entire subject of the contract.

Cancellation of the contract for the original of the sale includes its additions even if they are sold at a separate sale price, but cancellation of the additions does not include the original sold good (Art. 230/latest).

3. Request for a Price Reduction

The buyer is given the opportunity “*to keep what is sold and to request a price reduction in the sales price at the rate of defects*” in accordance with c.1 s2 of Article 227 of Code of Obligations. Request for a price reduction is an innovative right as other elective rights specified in Article 227. For this reason, it has effect when it reaches its addressee (seller) and so bear consequences.

Price reduction is not a renewal. This is because a new debt is not established instead of the old one, and a reduction is made over the existing debt. Similarly, it is not possible to mention about drawing up a new contract here. A change in the fundamental components of the contract can hereby be mentioned (Yavuz, C., 1989, p. 97).

In order to reduce the price, the decrease in the value of the delivered good must be less than the one agreed in compliance with the contract (Turanboy, 1990, p. 171). However, in Art. 227/V of Code of Obligations, the limitation on the use of optional rights specifies at what rate the decrease in value must be. Accordingly, it is stated that if the deficiency in the value of the sold item

is very close to the sales price, the buyer can only use one of the rights to return from the contract or to request a replacement with a similar one without defects. Accordingly, it is stated that in case the deficiency in the value of the sold item is very close to the sales price, the buyer can only use one of the rights to cancel the contract or to request a replacement with a similar one without defects. An opinion in the doctrine (Çetiner, 2009, p. 109) suggests that this limitation specified by paragraph V is not mandatory but interpretive, and therefore, the right to request price reduction can be granted to the buyer in this context. In our opinion, in an environment where there are more negative rights such as renunciation and replacement without defects for the seller, it should not be possible for the buyer to be exempted from the opportunity to request a reduction in price.

There are three main opinions on which method to use in reducing the sales price in the doctrine and judicial legislation. These are the method of absolute judgment, compensation method and proportional method. In the absolute judgment method, the value of the sold when it is defective and the value without defects are determined separately, and the price to be reduced is calculated by deducting the nondefective value from the defective value. In the compensation method, the defective value of the sold good is deducted from the value agreed in the contract, and the amount of the price reduction is finally found. Finally, according to the proportional method applied by the Supreme Court (Yarg. 13. HD. E. 2007/5987, K. 2007/10970), the ratio between the defective value and the non-defective value of the sold good is applied to the sales price agreed with the contract, and the amount to be deducted from the sales price is found by percentage calculation (Zevkliler & Gökyayla, 2010, p. 113; Bilge, 2009, p. 81).

4. Request for Repair

The right to request repair, more precisely, to ask for free repair, was not regulated in the previous Code of Obligations No. 818. However, it was widely used in practice. This was not only because the fact that the provisions of guarantee against defects are not mandatory, but also this issue was arranged in Article 4/2 of Consumer Protection Law. For this reason, although a legal regulation in the Code of Obligations emerged a deficiency in terms of legislation, it could not be mentioned that there was a problem in

terms of implementation. With the enactment and enforcement of the Code of Obligations No. 6098, the existing deficiencies in terms of legislation have been eliminated, and the right to request free repair has been included in the scope of the law.

At the time of the Code of Obligations No. 818, it was accepted that the buyer would not have the opportunity to request free repair from the seller unless it was specifically specified in the contract (Yavuz, C., 1989, p. 103). With the Code of Obligations No. 6098, this problem has been eliminated and even if it is no longer regulated in the contract, the buyer has been given the opportunity to request free repair as a legal right.

There are two different views in the doctrine regarding the legal nature of the right to demand repair. The first of these views is that the right for repair is an innovative right along with all other optional rights (Yavuz, C., 2009, p. 141). Another opinion is that the right for repair and replacement with a new one is fulfilment-oriented rights (Başoğlu, 2012, p. 117). There is a difference between evaluating the right to request repair as an innovation right and as a fulfilment-oriented right: If the right for repair is an innovation right, it will have the effect and bear consequences when it reaches its addressee, so it will not be possible to take it back and change it, which means it is impossible to use other optional rights. This will create negative consequences against the buyer. However, if it is accepted as a right for performance, even if it is used, if a result cannot be obtained, it will be possible to use the rights to withdraw from the contract and request a price reduction, which are innovative rights. This will result in negative consequences for the buyer. However, in case it is accepted as a fulfilment-oriented right, even if it is used, but a result cannot be obtained, it will be possible to use the rights to cancel the contract and request a price reduction, which are innovative rights (Başoğlu, 2012, p. 116).

In order for the buyer to request a free repair, besides the above-mentioned general conditions regarding the defect, it should be possible to repair the sold part partially or completely, the repair costs of the defective goods should not be excessive and the buyer should be requested to repair the defective product.

In order for the buyer to request a free repair, it should be possible to repair the sold part partially or completely besides complying with the above-mentioned general conditions regarding the defect, the repair costs of the

defective goods should not be excessive and the buyer should make a request for the defective product to be repaired.

More detailed information on the subject will be provided later under the heading “the right to request repair”.

5. Replacement with a New Good

In p.I s.4 Art. 227 of Code of Obligations, buyer's right to request replacement of the defective good with a new one is specified. Accordingly, if possible, the seller is obliged to replace the sold good with a new one upon the buyer's request.

In the interpretation of the article, it is not mentioned that the sold item, the subject of the contract, emerges an obligation of a part or a kind, and the right to request a replacement with a new one (without defects) is granted to the buyer independently. For this reason, although it can be argued that the only limit set here is the fact that it becomes impossible to replace it with a new one (without defects) (Yavuz, C. 1989, p. 101), the view that the possibility of replacing it with a new one cannot be used in the sale of parts and that this possibility is only available in the sales of varieties seems more appropriate (Zevkliler & Gökyayla, 2010, p.114).

III. Rights to Request Repair and Replacement With A New Good

A. Right to Request Repair

1. The Concept of Repair of a Defective Good which is the Subject of the Sale in General

The Lexical meaning of the word “repair” is as follows: “*1st meaning: Repair work, renovation, fixing, 2nd meaning: Reconstructing, restoring the damaged parts of a building, a statue or a painting*”. In our legislation, there is no definition of the concept of repair. However, the term meaning of the concept of repair can be explained as follows; “*repair is the elimination of defects in a sold good in order to prevent the fulfilment of the warranties for the legal defect that the buyer has due to his warranty for the defect.*” (Arbek, 2005, p. 45).

It is seen that in our legislation, the word repair is not used in a uniform way. While the word “repair” is used in p.I s.3 Article 227 of the Code of Obligations, Article 4/II of Consumer Protection Law, and the Regulation on After Sales Services of Industrial Goods (Official Gazette No. 25138 dated 14.06.2003), the concept of repair is used in Article 7 of the Regulation on Warranty Certificate Application Principles (Official Gazette No. 25138 dated 14.06.2003). Furthermore, there are also writers who use the concepts of “elimination of the defects “ (Tandoğan, 2008, p. 187) and “repairing the defects” (Akünel, 2011, pp. 547-548) in the doctrine.

The right to request free repair is a fulfilment-oriented right that allows the buyer to demand the elimination of all defects in the sold good, as an alternative to the buyer’s right to cancel the contract, request reduction in the price and have the good replaced with a new one in case of the seller’s warranty for the defect (Bilge, 2009, p. 82; Başoğlu, 2012, pp. 116-117).

2. The Status of Repair of Defective Goods in the Legal Regulations

Before the adoption of the Code of Obligations No. 6098, the buyer could not request free repairs under the Code of Obligations. In the Old Code of Obligations No. 818, the right to request free repairs was not regulated. However, after the amendment made in the Consumer Protection Law No. 4077 and in compliance with Law No. 4822 (Official Gazette No. 25048 dated 14.03.2003.), the consumer (buyer) was granted the right to request free repair.

Although the Code of Obligations No. 8181 did not recognize the right to request free repairs, in this period, both the possibility provided by the Consumer Protection Law and the fact that the provisions of warranty for defects were not mandatory, gave rise to the opportunity to apply to the right to request free repairs commonly through standard contracts or terms of contracts in practice,

However, it was seen that such applications were performed to eliminate or limit the seller’s liability for the defect. For this reason, it was claimed that the provisions regarding the limitation of the seller’s liability for the defect should be applied here as well (Yavuz, C. 1989, p. 103).

With the adoption and enforcement of the Law No. 6098, the conflict between the application and the legislation has been resolved, and the right to request free repair has been included in the scope of the Code of Obligations.

3. Request for Repair of the Defective Good which is the Subject of the Sale

a. Buyer's Request for Repair of the Sold Good

In the previous chapters, it has been stated that there must first be a defect, then this defect need to meet the requirements specified by the Law and the buyer must make a request in order to be able to use his optional rights granted by the Code of Obligations in case the buyer claims that the sold good is defective, and it has also been mentioned that such request is an innovative right which comes into effect when it reaches the seller.

Likewise, it is justified by some authors in the doctrine that in case of constitution of commercial customs and traditions, the buyer can request free repairs in accordance with them (Arbek, 2005, p. 127-128).

Since Customer Protection Law grants the consumer (buyer) the right to request free repair by law as in the Code of Obligations, it will be possible for the buyer to benefit from the right to request free repair with a declaration of intention directed to the seller.

b. Seller's Request for Repair of the Sold Good from the Buyer

Neither the Code of Obligations, Consumer Protection Law, nor the relevant regulations have granted the seller a right to request for the repair of sold good.

It is seen that such kind of a right is not generally recognized in comparative law. However, in Article 48 of the Vienna Convention, it is accepted that the seller has the right to request a repair provided that it will not cause an unreasonable delay, and a big inconvenience (Tandoğan, 2008, p. 187), create an insecurity in the payment of the expenses incurred and the provisions of Article 49 regarding the cancellation of the contract are to be reserved (Arbek, 2005, p. 150-153).

If this issue was evaluated in terms of the Code of Obligations, it would not seem possible to claim that the right to demand free repair, which was not

granted to the buyer in the period of Law No. 818, was granted to the seller. Although the buyer is given the right to request free repairs in the Code of Obligations No. 6098, the situation that applies to Law No. 818 is also valid for Law No. 6098, which means that the seller does not have the right to request repair.

When an evaluation is made within the framework of freedom of contract, the following result will emerge: If the seller has requested to make a contract in order to deprive the buyer of other rights by obtaining the right of repair and to prevent the buyer from creating a situation that he deems more beneficial for himself (buyer), in short, if he has acted against the provision of “acting honestly”, then it must be deemed invalid due to contradiction to the general provisions of the contract. Moreover, it should be considered that the opportunity to use his optional rights for defects is only granted to the buyer (Arbek, 2005, p. 156).

Taking Consumer Protection Law into consideration, it is possible to mention a similar situation with the one in the Code of Obligations. Accordingly, the seller’s right to request the repair of the sold will not be based on a legal basis, but it will always be possible if the contract is acted in good faith.

4. Conditions for Repair of the Defective Good which is the Subject of the Sale

a. Material Conditions

i. In General

It has been stated in the previous chapters that certain material and formal conditions need to exist in order to use the optional rights granted to the buyer with the claim that a good is defective.

In general, the following material conditions need to exist in order for the buyer to make a claim because the sold good is defective: the presence of the defect in the sold good when the benefit and damage are transferred, significance of the defect in the sold good, latency of the defect in the sold good, non-elimination of the liability for the defect from the contract, buyer’s fulfilment of his obligations imposed by the law.

In addition to the existence of these conditions, it is compulsory that the defect is not able to be repaired objectively partially or completely and the repair costs of the defective goods must not be excessive in order for the buyer to request free repair. Since the necessary information about the general requirements has been given in the previous sections, it will be sufficient to make the essential explanations about these two requirements in this section.

ii. The Possibility of Objective Partial or Complete Repair of the Defect

There should be no impossibility for the defective goods to be repaired by the seller for free repair. This impossibility is objective impossibility. In the presence of objective impossibility, it will not be possible to repair the defective product, so it will not be possible to perform this if free repair is requested. In such a case, it will be considered to replace the sold good with a new one completely or partially without any defects (Arbek, 2005, p. 177). In case the defect spreads to a part of the product, not the whole, the buyer's request for repair will be effective for the defective part, and the non-defective part will not be included in the repair request.

In case of partial defect, a problem arises as to whether other optional rights can be used for the parts excluded from the part which is subject to the repair request. In such a case, it would be appropriate to adopt the view that it is possible to apply to other optional rights (Arbek, 2005, p. 118).

iii. Non Excessive Costs of the Defective Good

In p.I s.3 of Art. 227 of the Code of Obligations, while the buyer's right to request free repair is regulated, it is also stated that this right can be used "*provided that it does not require an excessive cost*". Although there is no explanation on what is meant by an excessive expense in the Code, the following generally accepted criteria are used in determining the excessive expense in the doctrine: the cost of repair is close to the sales price, equivalent to the same amount of or more than the sales price, and there is an explicit imbalance between the benefits of the buyer and the seller as a result of repairing the defective good (Zevkliler & Gökyayla, 2010, p. 115).

In case the repair costs are close to the sales price, the same or more than that, there will occur a clear imbalance between the benefit of the buyer and the loss the seller will have, so the use of other optional rights, not repair, will

become a current issue. For example, if reduction of the price of a teletube would be less harmful for the seller than repairing it, it would be more appropriate to reduce the price.

Claiming that there is an excessive expense is the duty of the seller or those responsible for repairing the defective item (Arbek, 2005, p. 180; Zevkliler & Gökyayla, 2010, p. 115). If the seller has started the repair of the defective good, it will not be possible for him to claim later that the repair costs are excessive (Arbek, 2005, p. 180).

b. Formal Conditions

Since formal conditions that will be related to seller's liability due to the warranty for the defect, ie. the inspection and notification liability; are exactly valid in applying the right to request free repair, it will be sufficient to refer to the relevant parts here.

5. Effects and Consequences of Repair of Defective Good which is the Subject of the Sale

a. The Content of the Liability to Repair the Defective Good

The content of the liability to repair the defective good, which is subject to the sale, consists of the liability to work in order to eliminate the defects and the one to deliver the repaired goods to the buyer (Arbek, 2005, p. 201).

The main factor that distinguishes the repair of defective goods from the elective rights of cancellation of contract and reduction of the price is that some expenses must be made in order for the repair request to be realized (Arbek, 2005, p. 201). It is possible to collect the expenses involved in the repair of defective goods under three main headings; The costs related to the determination of the defect, the costs related to the transportation of the defective goods, material costs and labour costs.

As a rule, the seller must bear all repair costs (Arbek, 2005, p. 201; Zevkliler & Gökyayla, 2010, p. 115; Yavuz, C. 2009, p. 194; Akünel, 2011, p. 560, Çetiner, 2009, p. 110). However, it may be possible to impose this liability on the buyer with the contracts to be made between the parties. Surely, in such case, as stated in the previous sections, a statement proving the seller has a serious fault or misleading behaviour must not exist.

Regarding the repair of defective goods, the essential point is to repair the defective goods; hence, it does not matter who performs the act of repair. However, it is stated in the principle that the repair obligation will be fulfilled by different people depending on the situation due to the fact that the right to demand repair was not regulated in the period of Law No.818 regarding who will bear the repair obligation.

Accordingly, there is no doubt that if the manufacturer is a party to the contract of sale, the repair obligation will belong to the manufacturer (Yavuz, C. 2009, p. 193; Akünal, 2011, p. 559), but if other people other than the manufacturer intervene and the buyer buys the defective goods from these people, there are various possibilities about who this repair obligation would belong to. Regarding this subject in Consumer Protection Law, a solution has been found to the problem by deciding that other persons such as importers, manufacturers (Kapancı, 2012, pp. 86-96), dealers, together with the seller will be jointly responsible for the fulfilment of their optional rights (Kapancı, 2012, p. 50) (Art..4/ III). Furthermore, it is also possible for the parties to provide a more comprehensive protection with contractual warranty commitments in addition to the protection provided by law (Kapancı, 2012, p. 97).

b. The Location of Repair of the Defective Good

Even though there is no provision regarding the location where the defective good that is subject to sale; will be repaired in the Code of Obligations, it is accepted that the general provisions will be enforced in this regard. Thus, if there is a contract between the parties as to where the repair will take place, the repair is carried out at the specified location in accordance with this contract, yet if there is no such an agreement, the location of repair is determined according to the qualities and intended use of the sold good (Arbek, 2005, p. 211; Akünal, 2011, p. 561; Yavuz, C., 2009, p. 194; Yarg. 13. HD. E. 2008/13999, K. 2008/14939; Yarg. 13. HD. E. 2009/14676, K. 2010/4491; Yarg. 13. HD. E. 2010/43, K. 2010/6136).

c. The Duration of Repair of the Defective Good

The right for free repair is regulated in the Code of Obligations No. 6098, but the details of this right such as how long and for whom it will be used

have not been regulated. For this reason, it is necessary to apply the general provisions of the Code of Obligations in these matters.

Repairing a defective good is an obligation that requires a certain amount of time. Therefore, when determining the duration of the repair of the defective goods, a separate evaluation should be made in each case and a time period should be determined within the framework of the nature of the defective good and the defect (Kapancı, 2012, p. 50).

d. Seller's Failure to Duly Perform his Obligation to Repair the Defective Good

The seller will not be able to discharge this obligation unless he performs the repair duly. For, the general rule stipulates that a bad performance is not a performance. To consider a seller's performance as a duly fulfilment of repair, he must completely eliminate the defects in the sold good and not violate his liabilities regarding ancillary action (Arbek, 2005, p. 216).

If the defect of the sold good requires qualified workmanship, in case the seller should not provide this qualified workmanship and as a result it is not possible to eliminate the defect, then it will be considered that the obligation for repair is not fulfilled properly. Likewise, if the same or better quality parts as in the good's nondefective version are not used in the repair of the sold good, then there will be a failure to perform duly. Moreover, the seller's failure to take necessary precautions to protect the defective sold good, its financial value and buyer's personal rights will also be considered as non-performance (Arbek, 2005, p. 219).

As a result of seller's failure to fulfil the repair properly, the buyer will have the right to request the repair again, to cancel the contract or to demand compensation (Kapancı, 2012, p. 50). The following question may hereby arise: In case the right to repair is an optional right, and comes into effect and bear consequences upon reaching the addressee, and if it is not possible to revert from it, how is it possible that the buyer has the right to cancel the contract? Here, according to the German Supreme Court, it is a matter of the resurgence of buyer's optional rights.

In case ancillary obligations are not fulfilled, it will be possible to file a compensation lawsuit, not a performance lawsuit as these are dependent obligations (Arbek, 2005, p. 221).

e. Default in Repairing Defective Goods

The occurrence of a default in repairing the defective goods can be caused by the actions of the buyer or the seller. In case it arises from buyer's actions, there is a state of default due to the fact that the buyer has not fulfilled the active and passive obligations that arise during the delivery and repair process. However, in case of seller's default, it will be considered resulting from failure to start the repair on time, to complete the repair in a reasonable period of time or to repair properly.

If there is an agreement between the parties regarding the period of fulfilment of the obligation for repair, if these periods are exceeded, the seller will go into default with a notice made by the buyer. If there is no agreement between the parties on this matter, the seller will go into default with a notice after the time required for the repair has been exceeded. What should be understood from the "required time", as stated above, is the time needed according to the qualities of the defect and the sold good. In determining whether this period has been exceeded or not, the judge at court should appreciate how much time is required for the repair, taking into account the nature of the work, the defect and the sold good.

If the buyer fails to act in compliance with a number of obligations arising during the repair period, delays or precludes the repair of the defective sold good, the buyer's default will be mentioned (Kahraman, 2010, pp. 4330-4344). In the Code of Obligations, although there is no special regulation regarding the default of the buyer in the realization of the repair obligation, Articles 106-111 of the Code of Obligations regarding the default of the creditor will apply here analogically (Arbek, 2005, p. 231).

f. Durations and Provisions in Effect for Repair of Defective Goods

As stated above, there is no specified exact duration for the repair of the defective good in the Code of Obligations, and it has been considered adequate to determine the criteria for this. In the Consumer Protection Law, it is stated that the duration for repair shall be maximum 30 (thirty) days in paragraph V of Article 6 of the Warranty Regulation regarding the repair period (Tutumlu, 2011, p. 98).

In the Art. 231 of the Code of Obligations regulating the statute of limitations in liability for the defects, it is arranged that unless the seller has made a commitment for a longer period, any lawsuits to be filed regarding the liability for defects will be prescribed by two years starting from the transfer of the sold good to the buyer even if the defect of the sold good is revealed later.

The right of plea arising from the defect that the buyer notifies within two years beginning from the transfer of the sold good will not disappear when this period of two years has passed. (art.231/I p.2)

If the seller is seriously faulty at transferring the sold item as defective, he cannot benefit from the two-year statute of limitations (Art.231 / II). Similarly, if the seller sells the defective goods to the buyer through fraudulent behaviour, the two-year statute of limitations will not be applied (Yarg. 4. HD. E. 2005/10201, K. 2006/9437).

B. The Right to Replace with a New Good

1. The Concept of Replacement of the Defective Good with a New One which is the Subject of the Sale in General

The verb “to replace” is defined in the dictionary as “ the act of replacing, change, alteration”. Based on these meanings, it is revealed that there are two meanings of replacement that can be evaluated as positive and negative. Its positive meaning is “replacement”, that is, to replace something with its equivalent. Its negative meaning is “alteration”, that is, changing something by ruining its original.

What is meant by replacement in Art. 227/ s.4 of Code of Obligations regarding this issue is used positively, which means “replacing”. For, the purpose of allowing the buyer the opportunity to replace the defective good with the same without defects is to ensure that the will of both the buyer and the seller is realized by delivering a similar product to the buyer. Therefore, it is aimed that neither a less qualified good should be subject to change, which causes the buyer to be mistreated (alteration), nor a more qualified good should be subject to change, which makes the seller aggrieved.

2. The Status of the Replacement of Defective Goods with the New in Legal Regulations

The right to replace the defective good granted to the buyer with a new one without any defects due to the seller's liability for defects is arranged in Art. 227 / I s.4 of the Code of Obligations. According to that, if possible, the buyer has the right to request a replacement of the sold good with a similar one without defects.

This right has been arranged in Art. 4/2 of the Consumer Protection Law No. 4077 as follows: “...*In this case, the consumer has the right to cancel the contract including the refund of the price, to request replacement of the good with a similar one without defects, or a price reduction or free repair at the rate of defects.*” It allows the consumer (buyer) to request a replacement of the defective good with a new one or a similar one without any defects in case the requirements specified are realized.

3. Request for Replacement of the Defective Good which is Subject to the Sale

In order for the seller to be able to undertake his liability within the framework of the provisions of warranty for the defect and to replace the defective good with a new one (without defects), there must be a request in addition to the presence of the defect. For, merely notifying the seller of the fact that the sold good is defective does not give a hint about which optional rights granted in the Code of Obligations the buyer will use. It is possible when the buyer or the seller makes the replacement request.

In order for the buyer to request the replacement of the sold one, it must be a good equivalent to the defective one. However, the fact that the defective good is not a similar item, but an item determined by its type will not prevent the use of the right to replace it with a new one (Tandoğan, 2008, p. 198; Yarg. 13. HD. E. 2007/11592, K. 2008/1274). Nevertheless, if there is damage caused by the buyer's fault or the buyer's acts of changing or disposing of the sold good, the buyer will not be able to request a replacement (Tandoğan, 2008, p. 199).

The seller is granted the right to request a replacement of a defective good with a new one in accordance with Art. 227/III of the Code of Obligations as

follows: “*The seller can prevent the buyer from using his optional rights by supplying the buyer a similar product without defects and removing all the damage he has incurred.*”

Even though it is not possible to limit or eliminate the optional rights granted to the buyer by the law with a declaration from the seller as a rule, it is accepted that such declarations from the seller will be in effect and bear consequences in cases which are in good faith and not contrary to the contract. In case of a replacement with a new one, if there is a distance sale, and the second shipment of the sold good without defects creates a great burden for the seller, and if the fact that the seller sends the goods without defects at an early date decreases the burden and results in no delay, then it is possible for the seller to offer replacement of the sold good with a new one without defects (Tandoğan, 2008, p. 199).

In order for the seller to request a replacement with a new one, the following requirements are sought: the sale is made on the condition of delivery at the place of performance, and there is an apparent distance sale, the sold good is a certain item with the same quantity or type, the sold good needs to be replaced immediately and the buyer needs to be paid for his damages (Tandoğan, 2008, p. 199; Zevkliler & Gökyayla, pp. 114-115).

4. Conditions for Replacement of the Defective Good with a New One which is the Subject of Sale

a. Material Conditions

i. In General

Since the right to replace a defective good with a new one is one of the optional rights granted to the buyer in the Code of Obligations, which can be requested from the seller in case of his faulty performance, the general requirements needed for the use of these optional rights must also be present in this case. For this reason, it will be sufficient to refer to the relevant section above in terms of explanations regarding general requirements.

In this section, the material conditions of the right for replacement with a new one, which differ from other optional rights, will be explained. These are as follows: The defective sold good must be an item that is determined with

the same quantity or type, and it is impossible to replace the defective sold good with a new one by an act of the buyer or the seller.

ii. The Good Sold is an Item Determined by its Quantity or Kind

In order to use the right to replace the defective good with a new one, it must be substitutable, which means that there must be other goods that have the same characteristics as those sold ones and are not specifically determined. If there is a product that is distinguished from other goods with its qualities and is unique; that is to say, if there is an obligation for a part, it will not be possible to request a replacement with a new one since in terms of an obligation for a part, there is no new or similar product without defects. The goods subject to the contract are personally exclusive. Therefore, in cases where there is an obligation for a part, the buyer may request to use either compensation right or any other optional rights apart from the right for replacement.

There is a dispute on this issue arising from the expression of the new Law. Accordingly, since there is no statement in the Law that the subject of the contract is an equivalent or non-equivalent good, it must be possible to request for replacement with a new one due to the defects in the contracts whose subject is the obligation for a part (Başoğlu, 2012, p. 28; Çetiner, 2009, p. 110). In our opinion, as stated above, it is not possible to argue that the lack of such a determination in the Law allows for the replacement of parts with new ones.

iii. The Right to Cancel a Contract

It is possible to apply for the opportunity to request replacement of the sold goods only in cases where the right to cancel the contract is also available. For, the right to cancel the contract and the right to request a replacement with a new one are the ones that have similar consequences, and therefore, in cases where the right to cancel the contract is not possible, the right to request replacement with a new one should not be possible (Tunçomağ, 1977, p. 181; Zevkliler & Gökyayla, pp. 114-115).

This issue has been specified in Art. 227/latest in the Code of Obligations as in the following: *“If the deficiency in the value of the sold good is very close to the sales price, the buyer can only use one of the rights to cancel the contract or to request a replacement with a similar one without defects.”* Although it

is not mentioned in the article that there is an obligation to use both optional rights at the same time, considering the purpose of the legislator and the consequences of the two optional rights, this article should be interpreted as in cases where the right to cancel the contract does not exist, the right to replace it with a new one should not be present.

b. Formal Conditions

Since the formal conditions required in order for the seller to be liable due to warranty for defects are exactly valid for the use of this optional right, it will be sufficient to refer to the relevant parts hereby.

5. The Effects and Consequences of Replacement of the Defective Good which is Subject to Sale with a New One

a. The Content of the Liability for Replacement of the Defective Good with a New One

The basic obligation for the optional right to replace the defective good with a new one is the replacement of the defective one with the same without defects. The seller is obliged to replace the defective goods sold and delivered to the buyer with a new one, ie. without defects, at the request of the buyer or with his own offer.

As stated above, the right to cancel the contract should coexist with the right to replace it with a new one. For this reason, the buyer may prefer to cancel the contract instead of requesting a replacement with a new one. Nonetheless, although the right to request for a replacement with the new one can be used by the seller, it is not possible for the seller to use the right to cancel the contract.

In the case of using the right to replace with a new one, the problem arises whether the benefit obtained from the sold good should also be returned. According to the Supreme Court, it is not possible to deduct the benefit fee. While the sold good mentioned is replaced, it is necessary to perform the replacement with the new one without returning the benefits obtained by the buyer to the seller (Yarg. 13. HD. E. 2006/6251, K. 2006/11865).

b. Time Periods to be Followed in the Replacement of Defective Goods with a New One

The buyer's right to request the replacement of the sold good is not subject to a certain period of time. For that reason, the buyer does not have an obligation to immediately report the defects after delivery of the sold item (Kapancı, 2012, p. 47). Therefore, it is likely to request a replacement of the defective sold good till the two-year limitation period specified in Art. 231 of the Code of Obligation has expired (Yavuz, C., 2009, p. 191; Tunçomağ, 1977, p. 181). However, this is not applicable in case of malice. For instance, if the buyer does not notify the seller of the defect he has detected immediately after taking the delivery of the sold good in order to increase the transportation costs and damage the seller, it must be accepted that he can no longer apply to his right to request replacement with a new one and other optional rights.

c. Seller's Failure to Fulfil the Obligation to Replace the Defective Good with a New One

In case the buyer requests a replacement for the sold good with a new one, the seller has to replace it with a similar one without defects. The good without defects to be supplied in place of the defective one must have at least the same qualifications as the one sold. Therefore, providing a poorer quality or less qualified product to the buyer does not result in the fulfilment of the obligation for replacement.

In case the goods with the required qualifications are not delivered, the buyer does not lose the right to request a replacement with a new one; on the contrary, he can request the delivery of another product without defects. The buyer does not lose the right to request for replacement with a new one; in addition, he has the opportunity to use his right to cancel the contract, if he has not waived using this right by the contract.

d. Default in Replacement of Defective Goods

There is no provision in the law about during what periods the seller will fulfil the replacement of the defective good with the new one. For this reason, when the default will come into question will be determined in accordance with the situation, general provisions and, if any, local customs and traditions,

If the seller has the opportunity to deliver the product without defects immediately, but still has not delivered it, the moment of default is the moment when the goods are delivered. However, if the seller does not have the opportunity to deliver the defect-free good immediately, and he has to get it transferred from the warehouse, the place of production, etc., then the time spent for transportation should be a reasonable time that will not be against the conditions and the normal course of life. The obligation to prove that this reasonable period has been exceeded is undertaken by the buyer.

IV. Conclusion

It is certain that the Code No. 6098 has brought many innovations compared to the Code No. 818. In this sense, there have been many steps forward to meet the needs of the period and prevent loss of rights. Among the optional rights considered within the scope of this study, granting buyers the right to request free repair has become one of the further steps.

Although granting buyers the right to request free repair and its inclusion in the scope of Code of Obligations have been a positive development, the lack of explanation of the legal regulation still causes some problems to persist and new ones to emerge. For that reason, the fact that the legislator expresses how these optional rights will be used more clearly will be useful in solving the problems that may arise in practice. It is for sure likely to make a defence that it is not possible for the legislator to regulate every possibility and that the gaps in the law can be filled by judicial opinions and doctrine; still it is not probable to agree with this from the perspective of the legal system we are subject to. For, the code that our country is subject to, which we have collected by translating and making some amendments, is the Swiss Code of Obligations prepared with a casuistic method. Hence, a rule of law appropriate for every predictable situation should be evaluated within the scope of code by the legislator. For this reason, although it is a positive development that granting the buyer the right to request free repair, besides other optional rights, it is not sufficient. The framework under which these rights will be applied should be explained in more details by the legislator.

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