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영문) A Comparative Legal Study on the Non-Performance and Remedies under International Commercial Contract
- Focusing on the Principles of European Contract Law and CISG, PICC -

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A Comparative Legal Study on the Non-Performance and Remedies under International Commercial Contract*

- Focusing on the Principles of European Contract Law and CISG, PICC -

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Ⅰ. Introduction

The 'European Union'(EU), which has been united and systemized at the turning point of the new millennium, forms the world's single largest market after taking the predicted steps. Forming this single European economic system is seen not only as one of the most significant economic phenomena drawing a huge attention from the world throughout the last century but also as one of elements that may have a great ripple effect throughout the current or future world economy in the perspective of reorganization of world economy's

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order.[1)]

As one section of the progress, the unification of the European economic structure urge European nations to enact an uniform law regulating internal economic relations in Europe and actually, so-called the 'Principles of European Contract Law'(hereinafter, refer to 'PECL') whose Part 1 and 2 were published in November, 1998 and Part 3 was published in 2002 by 'Commission on European Contract Law'(CECL), is considered as a representative example reflecting the said movement.[2)]

Historically, the PECL contains some legislative background based on the common validity of contract legal interest as a reasonable standard of contract laws emerging from integrated legal merits between legal circles because it is a result of several legislative movements naturally taking place while pursuing the unification of European contract laws.

In the other hand, the PECL is not a mandatory law, which carries legal binding force directly applied to member countries in Europe but a non-binding legislative standard, which only borrows general principles of the European civil laws to formulate a form of a code. Therefore, the PECL has its unique intention providing member countries in Europe with a legal ground to cope with commercial impediment, from which the PECL holds a legal status as another reason to urge the enactment of an uniform law, which can directly regulate international commercial transaction between member countries in the future.[3)]

Nevertheless, since PECL holds a history to be enacted by combining the legal principles between legal systems under the united

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1) Burchell J., *et al.*, "The European Union and the World Summit on Sustainable Development : Normative Power Europe in Action?", *Journal of Common Market Studies 43*, No. 1, Blackwell Publishing, 2005. p.75.

2) 「www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002.」.; Burchell J., *et al.*, *ibid.*, pp.75~85.

3) Park, Y. B., "EU Uniform Contract Law", *Bub-Jo*, 1999. p.2.

European economic system, it implements its own legal function, as it were intention of enactment by providing following matters; universal validity as a legal standard toward EU so far; ground for interpretation to unify laws in EU, and; legalistic criteria and suggestion to courts in EU.[4]

This study intends to analyze the legal and commercial suggestion through comparative legal study with each international uniform contract law by mainly focusing on non-performance and particular and general remedies for non-performance specified in the PECL in the perspective of unification of law based on the intention of enacting PECL. In this case, each 'International Uniform Contract Law'(hereinafter, 'contract law') indicates 'United Nations Convention on Contracts for the International Sale of Goods'(hereinafter, refer to 'CISG')[5] and 'UNIDROIT Principles of International Commercial Contracts'(hereinafter, reer to 'PICC').[6]

In particular, the reason why this study takes CISG and PICC for comparative study with PECL is because; PECL intends to same legal intention in much area with CISG and PICC; reforming common legal principles of international commercial contract can provide legal benefits; both PECL and PICC were historically and legally enacted by close connection mutually based on CISG; CISG became domestic law on Mar. 1, 2005 and is applied in Korea through joining procedure to the convention, and; the 2004 amendment of PICC which plays a gap-filling role was finalized and announced, so reformation of comparative study is urgent.[7]

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4) Lando, O., "The Principles of European Contract Law : Part Ⅰ, Part Ⅱ", *Pace Law*, Pace Law School Institute of International Commercial Law, 'Introduction'. 2002.

5) Any other details are refer to 「www.unilex.info」.

6) Details of PICC(2004) are UNIDROIT, 「UNIDROIT Principles of International Commercial Contracts」, 2004 ; Bonnell, M. J., "UNIDROIT Principles 2004 : The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law", *Uniform Law Review*, pp.5~40.

In summary, this study emphasizes the status of PECL which is told to realize the ideal feature of contract law in international commercial transaction, and analyzes and contemplates specific regulation performance of PECL in a comparative perspective with contract regulations by focusing the regulation system mainly within the scope of the topic.

From this point, this study will present legal and commercial suggestions as a ground to pursue and identify legal stability between contract parties in an international commercial transactions by correctly recognizing the intention of enactment and regulations of individual contract regulation in the relevant area.

Ⅱ. Composition of Non-Performance and Legal Effect

1. Conditions on Non-Performance

Non-performance generally means the obligation between contract parties who form juridical relation are not performed. Namely, the obligation is not performed considering regulations, intention of contract, commercial practice and principle of good faith, and it forms an illegal act with legal tort.[8)]

However, there is a certain gap between international private law and/or international law in terms of composition of principle of law for the type and effect. For example, the type of non-performance are divided into delay of performance, impossibility of performance

7) Bonell, M. J., "The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law : Similar Rules for the Same Purposes?", *Uniform Law Review*, 1996. pp.229~246.

8) Seo, M. K., Shim, C. S., "A Study on the Conditions of Non-Performance ans Legal Cases under International Commercial Contract," *Korea Trade Review*, Vol. 33, No. 5, The Korea Trade Research Association, 2008. pp.254~255.

and incomplete performance under the civil law systems which inherits German law including Korea, and practical enforcement of performance, claim for damages, right to cure, right to request complete benefit and termination of contract are allowed as legal effects respectively.

Whereas, the common law considers the type of performance as only one legal matter which is breach of contract. In this case, legal effects are formed differentiately according to the degree of breach of contract.

In short, since common law considers breach of obligation under contract as an element of breach of contract, this is fundamentally different from the legal principle of civil law which considers the responsibility of non-conforming party based on intention and fault as a condition of breach of contract.[9)]

This difference can be inferred from the fact that the common law emphasizes the legal equity where the non-conforming party completes compensation for damages for the other party, such contract can be cancelled, while civil law emphasizes contractual liability, namely 'pacts must be respected'(*pacta sunt servanda*).[10)]

2. Regulation System about Non-Performance in CISG and PICC

1) CISG

Under contract regulations, the criteria according to the legal principle of non-performance are divided into the matters that 'whether legal process of contract aiming at initially impossible benefits and collateral liability of the seller will be absorbed into non-performance,' or 'whether the contract aiming at initially impossible benefits are divided into fault of contract conclusion and

9) Farnsworth, E. A., *Farnsworth on Contracts*, 2nd ed., Aspen Pub., 1998. p.449.
10) Kim, S. Y., *Comparative Contract Law*, Bubyoungsa, 2002. pp.118~119.

collateral liability, and the collateral liability of the seller should be formed as an independent system.'

CISG, PICC and PECL accept such non-performance in each regulations system by unifying breaching cases against liabilities in contract. However, in terms of using terminology, CISG uses 'breach of contract'.

The uniform perspective does not consider the intentional or mistaken fault as an element of breach of contract or non-performance unlike Korean civil law, and especially includes all contracts aiming at collateral liability and initially impossible benefits including delay of performance and impossibility of performance.[11]

In short, CISG does not specify the liability not performed, but comprehensively put all liabilities under the contract as the object of non-performance(CISG, Art. 70(1)). But, it organizes major liabilities between parties of contract possibly not performed within individual regulation. For example, in case of the seller, 'liabilities on the delivery of goods and document hand-over'(CISG, Art. 30-34) and 'equality of goods and liabilities for the rights of the third party'(CISG, Art. 35-44), and as a specific liabilities, it states 'liability to deliver goods,' 'liability to hand over documents,' 'liability to arrange carriers,' and 'liability to transfer rights on goods.' Whereas, in case of buyer, 'obligation to pay the price'(CISG, Art. 53-59) and 'obligation to take over the delivered goods'(CISG, Art. 60) are prescribed upon the equivalent relation between contract parties.[12]

However, CISG regulates that termination, which is for the termination of contract in case all liabilities in the contract are breached, is only applied to the fundamental breach of contract(CISG, Art. 25, 49, 64). Such regulation prescribes the case when the breach of contract committed by one party cause damage which

11) Kim, S. Y., *ibid.*, p.125.

12) Honnold, J. O., *Uniform Law for the International Sales under the 1980 United Nations Convention*, 3rd ed., Kluwer Law Int'l, 1999. pp.207~211.

substantially deprives rights the other party expects under the contract.

In this case, the scope of fundamental breach of contract falls under when the other party cannot enjoy benefits expected in the course of implementation of the contract due to the specific breach of the liability of one party of the contract.

As the requirements to determine this, detriment, substantial deprive, foreseeability and burden of proof are presented, but the decision is only depended on provisions and contents of individual contract.[13)]

After all, if the contract is breached, CISG requires deciding after considering the amount of damage of the damaged party and the degree of subjective recognition of the breaching party. And it regulates that the contract is terminated only when the result of the consideration falls under the fundamental breach of contract between contract parties.

First of all, in regard to right to terminate contract, it prescribes that the seller may declare the contract avoided, if the buyer does not, within the additional period of time fixed by the seller, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed. However, it adds provisory clauses stating that in cases where the buyer has paid the price, in respect of late performance by the buyer, before the seller has become aware that performance has been rendered, and in respect of any breach other than late performance by the buyer, the seller loses the right to declare the contract avoided unless he declares the contract avoided within a reasonable time, after the seller knew or ought to have known of the breach, or after the expiration of any additional period of time fixed by the seller or after the buyer has declared that he will not perform his obligations

13) Kritzer, A. H., *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sales of Goods*, Kluwer Law Int'l, 1989. pp.203~206 ; Honnold, *op. cit.*, pp.181.2~186.

within such an additional period(CISG, Art. 64).

On the contrary, the loss of right to declare the contract avoided by buyer is stated related to non-delivery for the subject matter with a contract in a relation respect to price payment, such regulations correspond to the regulations above(CISG, 49., 47(1)).

Finally, the occurrence of right to avoid the contract in respect of non-performance and restrictions on the exercise are as follows; such non-conformance should be equal to fundamental breach of contract, and; in case of non-delivery, it should be fundamental breach of contract, however, the exercise is only limited when the seller does not perform within an additional period fixed by the buyer or buyer declares he will not accept delivery, and;[14] the avoidance of contract is only effective by declaration made by *nachfrist* to the other party.

2) PICC

As reviewed before, PICC regulates the breach of contract specified in CISG as non-performance. That means it states that it includes a defective or late performance as a party does not perform any obligation under the contract. Moreover, it is same as CISG since it does not request responsibility of the non-performing party.

However, if simultaneous performance between contract parties are assumed, each party may withhold the performance until the other party tenders its performance, and if the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed (PICC, Art. 7.1.3).

PICC specifies that the right to terminate contract due to non-performance has to be made when the other party's non-performance upon contract falls under 'fundamental non-performance' like CISG. However, the criteria of determination

14) Schlechtriem, P, *Uniform Sales Law : The UN-Convention on Contracts for the International Sales of Goods*, Manz, 1986. p.102~104.

on the non-performance is more specifically described than CISG to fill the gap of CISG. For example; whether strict compliance with the obligation which has not been performed is of essence under the contract; whether the non-performance is intentional or reckless; whether the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated, are included and; where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party(PICC, Art. 7.3.3); a party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may avoid the contract.[15)]

PICC prescribes that the other party should exercise all legal remedies within the regulation system of PICC unless such non-performance is exempted, however it states that the request of performance and claim for damages cannot be exercised under following conditions; non-performance by *force majeure*; non-performance by interference by the other party; withholding performance by protest of simultaneous performance or preliminary performance.

In particular, PICC includes the right about repair and replacement of defective performance in regard to non-performance(PICC, Art. 7.2.3), as described hereafter, such regulation allows the other party to require payment to guarantee realistic performance if a party who is obliged to pay money does not do so(PICC, Art. 7.2.1). Even in case of performing non-monetary obligation, PICC regulates -as a related regulation to the right for the performance- the other party requires performance unless; performance is impossible in law or in fact; performance or, where relevant, enforcement is unreasonably

15) Park, J. K., "Contract liability under UNIDROIT Principle", *Sangsabub-Yeongu 11-2*, 1999. Ⅱ.

burdensome or expensive; the party entitled to performance may reasonably obtain performance from another source; performance is of an exclusively personal character, or; the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance(PICC, Art. 7.2.2).

3. General Regulation System of PECL on Non-Performance

PECL presents the principles of contract law commonly applicable to member countries of EU. The scope of application includes all contracts including pure domestic contracts and contracts between merchants and consumers. Therefore, PECL forms a system similar to PICC which embraces impediment or non-performance in the contract in a perspective of uniform law,[16] but since PECL intends to be applied between member countries as 'General rules of contract law in the EU'(PECL, Art. 1:101), it is fundamentally separated from PICC which set forth general rules for international commercial contracts.[17] Moreover, there is a difference from CISG which limits to international sale of goods.

Non-performance regulated by PECL means not performing obligation of the contract like PICC, and not only includes delayed performance and defective performance, but also clearly states duty to co-operate for full performance of the contract.

PECL specially forms 'non-performance and remedies in general: Chap. 8.' and 'particular remedies for non-performance: Chap. 9.' The major contents of the former are as follows.

First of all, as remedies available, whenever a party does not perform an obligation under the contract and the non-performance is

16) Commentary of common regulations are Bonell, *An International Restatement of Contract Law : The UNIDROIT Principles of International Commercial Contract*, 2nd ed., Transnational Juris, 1997. pp.89~91.

17) Bonell, *ibid.*, Ⅳ, 2.

not excused due to an impediment, the aggrieved party may resort to any of the particular remedies. However, if the action of the party is within the limit to cause the non-performance of the other party, the remedies for non-performance may be restricted. Also, it states that remedies compatible each other can co-exist, and the right to cure damage is not lost even when exercising other remedies.

In regard to fundamental non-performance, it has regulations corresponding to PICC, but it has no clear regulations when the performance result of the non-performing party causes unbalanced losses. However, it has a special feature to care the party whose tender of performance is not accepted by the other party because it does not conform to the contract may make a new and conforming tender where the time for performance has not yet arrived or the delay would not be such as to constitute a fundamental non-performance in order to pursue the realize the contract as much as possible for the complement of the non-performing party.

In the meantime, the regulations about the assurance of performance and notice fixing additional period for performance are same as the regulations of PICC. However, PICC regulates that in case delay in performance is not fundamental, and the aggrieved party may by notice to the other party allow an additional period of time for performance, if where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party, it does not allow to terminate the contract. This is different from PECL(PICC, Art. 7.1.5(4)).

The 'excuse due to an impediment' regulation(PECL, Art. 8:108) of PECL corresponds to exemption clauses(PICC, Art. 7.1.6) and 'force majeure'(PICC, Art. 7.1.7). However, PICC clarifies the right to terminate the contract, and request interest for delayed performance and obligation amount despite of the regulation on *force majeure*(PICC, Art. 7.1.7(4)).

On the contrary, PECL has regulations about 'clause limiting or excluding remedies' to restrict or preclude remedies for

non-performance except the case unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction.[18]

4. Interim Conclusion

Since PICC was enacted based on CISG, it shows very similar in the contents as well as the regulation system of non-performance. For example, there are a principle that termination of contract does not form ex post facto as a legal effect of non-performance, and regulations in compatibility of termination of contract and right to claim damages including regulation system for non-performance and breach of contract, additional regulations for additional period for performance, the right to remedy of non-performing party and the right to request remedy of the aggrieved party, regulations on liability to compensate damages, exemption and force majeure, the right to terminate contract due to fundamental breach of contract and non-performance.[19]

However, PICC which takes a gap-filling role for CISG has more advanced regulations than CISG. Following examples indicate such point; It clarifies the criteria of determination on fundamental non-performance more specifically; in regards to exemption clauses, it states that any clauses which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract; and the scope of claim damage includes foreseeability like CISG, and additionally it

18) Lando, O. · Beale, H, *The principles of European Contract Law : Part Ⅰ. : Performance, Non-performance and Remedies*, Kluwer Law International, 1995. Art. 1.106 Comment E.

19) Lando and Beale, *Principles of European Contract Law, Part Ⅰ and Part Ⅱ, prepared by the Commission of European Contract Law*, Kluwer Law International, 2000. p.191, p.420.

has a regulation prescribing certainty of harm.[20]

Meanwhile, if the responsibility on non-performance is compared, PICC and PECL has similar regulations. If the common contents are summarized, they are as follows; non-performance of liability or breach of contract are regulated as non-performance; even collateral liability is absolutely considered as non-performance if the performance is not made regardless of fault including initial impossibility; they require mutual cooperative obligation to the performing party; they consider fundamental breach as a reason of termination of contract; termination of contract does not form ex post facto, and; the right to terminate contract and right to claim damages can be compatible. CISG also corresponds to this.

In case of PICC, following differences are emphasized; it premises broader possibility for the right to remedy of the party exercising inappropriate performance; it has more specific regulations for the methods; it considers whether the non-performing party suffers unbalanced losses as a result of the preparation or performance in case of termination of breach; Moreover, it regulates that a party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk, and this is unique regulation of PICC, which PECL does not have.

Ⅲ. Comparison of Individual Remedies for Non-Performance

1. Right to Request Performances

20) Honnold, *op. cit.*, p.408. comments.

1) Performance of Monetary Obligation

PICC regulates that if a party who is obliged to pay money does not do so, the other party may require payment in regards to 'performance of monetary obligation,'(PICC, Art. 7.2.1) but PECL specifies this more, and regulates that where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract. However, it has conditions that it could have made 'a reasonable substitute transaction'(PICC, Art. 9:506) without significant effort or expense, or the performance would be unreasonable in the circumstances(PICC, Art. 9:101).

On the other hand, CISG regulates that the rights to request performance of the seller and buyer, and each regulation clarifies one party to request performance may require performance by the seller of his obligations. However, as a provisory clause, if the party has resorted to a remedy which is inconsistent with this requirement, it is excluded. However, if the goods do not conform with the contract, the buyer may require delivery of substitute goods or the buyer may require the seller to remedy the lack of conformity by repair, only if the lack of conformity constitutes a fundamental breach of contract, and this is not unreasonable having regard to all the circumstances, and a request for substitute goods is made either in conjunction with notice given under or within a reasonable time thereafter(CISG, Art. 46, 62).

2) Performance of Non-Monetary Obligation

Both PICC and PECL regulate that the other party can require the performance upon an agreement when a party does not perform non-monetary obligation. In particular, PECL extends the scope to exercise the right of requesting specific performance including remedying of a defective performance.

As a common restrictions against the right to require performance, there are following regulations; where performance would be unlawful or impossible, or; performance would cause unreasonable effort or expenses, or; the performance is a personal character, or; the aggrieved party may reasonably obtain performance from another source, and; where the request is not exercised after it has or ought to have become aware of the non-performance.

As other cases, PICC separately have; regulations to repair or replace defective performance. More specifically, the right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance; Moreover, as a judicial penalty regulation, it allows that where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order(PICC, Art. 7.2.4).

2. Withholding Performance

PECL has more specific regulations about right to withhold performance than other contract regulations. That is, it prescribes that a party who is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed. The first party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances. Moreover, it states that a party may similarly withhold performance for as long as it is clear that there will be a non-performance by the other party when the other party's performance becomes due(PECL, Art. 9:201).

3. Avoidance of the Contract

Basically the avoidance of the contract means the occurrence of legal effect which lapses effectively established obligation by

expression of opinion of one party and reverts to the original state before the contract.

In case of CISG, the regulations on the avoidance of the contract composes the rights and obligations of contract parties, that is seller and buyer according to symmetrical formation.

The regulations corresponding to this are the right to avoid the contract(CISG, Art. 64), buyer's right to avoid the contract(CISG, Art. 49), notice of avoidance of the contract(CISG, Art. 26), anticipatory avoidance of contract(CISG, Art. 72), and avoidance of performance by installments.

On the contrary, CISG prescribes the effect of the avoidance of contract collectively; lapse of obligation and restitution request(CISG, Art. 81), impossibility of restitution of the goods in same condition(CISG, Art. 82), existence of other remedies(CISG, Art. 83) and refund of benefits(CISG, Art. 84).

The major contents are as follows; the effect to release both parties from obligation under the contract except any damages which may be due (CISG, Art. 81(1)), and a party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. In this case, if both parties are bound to make restitution, they must do so concurrently(CISG, Art. 81(2)). Moreover, it regulates that if it is impossible to make restitution of the goods, the buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods(CISG, Art. 46(2), 82), and specifies remedies under the case(CISG, Art. 83).

Regulations of PICC corresponding to this are right to terminate the contract(PICC, Art. 7.3.1), notice of termination(PICC, Art. 7.3.2), anticipatory non-performance(PICC, Art. 7.3.3), adequate assurance of due performance(PICC, Art. 7.3.4), effects of termination in general(PICC, Art. 7.3.5) and obligation of restitution(PICC, Art. 7.3.6), and these are reviewed before.

However, the regulation about the effects of termination in general

specifies that termination of the contract releases both parties from their obligation to effect and to receive future performance, termination does not preclude a claim for damages for non-performance, and termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

In regard to restitution, it states that if restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable, and nonetheless, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect. These regulations are in line with the related regulations of CISG(CISG, Art. 81).[21)]

Regulations of PECL in respect to the termination of the contract correspond to such regulations of PICC, but PECL has more specific regulations for restitution. Namely, compared to regulation on restitution of PICC(PICC, Art. 7.3.6 (1)), regulations of PECL are as follows; a party who terminates the contract may reject property if its value to the first party has been fundamentally reduced (PECL, Art. 9:306); On termination of the contract a party may recover money paid for a performance which it did not receive or which it properly rejected (PECL, Art. 9:307); On termination of the contract a party who has supplied property which can be returned and for which it has not received payment or other counter-performance may recover the property(PECL, Art. 9:308); On termination of the contract a party who has rendered a performance which cannot be returned and for which it has not received payment or other counter-performance may recover a reasonable amount for the value of the performance to the other party(PECL, Art. 9:309).

4. Price Reduction

21) Emanuel, S, *et al.*, *CONTRACTS*, Emanuel Law Outline Inc., 1993. pp.263~269.

The CISG Art. 50 regulates the right to reduce price. Namely, if the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered bears to the value that conforming goods would have had at that time.

However, if the seller remedies any failure to perform his obligations, or if the buyer refuses to accept performance by the seller, the buyer may not reduce the price. In case the seller does not take the responsibility of damage compensation, only price reduction is possible, and if the seller takes the responsibility, the buyer may select and exercise either right to reduce price or the right to request damage compensation. However, the right to reduce price should be exercised on the condition of expressing opinion of the other party, and the expression is based on the receipt or dispatch principle.

The exercise of right to reduce price may conflict with the right to request damage compensation. However, following conditions should be premised; although the buyer's right to request damage compensation is not accepted in case the reason not liable by the seller is engaged, that is foreseeability of non-performance and force majeure are derived(CISG, Art. 79), but the right to reduce price is accepted; the damage compensation requires acceptance of the seller or court, but the price reduction can be exercised by unilateral declaration of the buyer; the right to reduce price can be exercised despite of economic loss of the buyer; when the buyer exercises a right to seek other remedies, the right to claim damage compensation is accepted.[22)]

The regulations of PECL in regard to the price reductions are as follows; A party who accepts a tender of performance not conforming to the contract may reduce the price. This reduction shall be proportionate to the decrease in the value of the performance at the

22) Honnold, *op. cit.*, pp.310~311.

time this was tendered compared to the value which a conforming tender would have had at that time(PECL, Art. 9:401(1)); A party who is entitled to reduce the price under the preceding paragraph and who has already paid a sum exceeding the reduced price may recover the excess from the other party; However, a party who reduces the price cannot also recover damages for reduction in the value of the performance. But, even in this case, he remains entitled to damages for any further loss it has suffered so far as these are recoverable under Damages and Interest(PECL, Chap. 9, Sec. 5, Art. 9:401(3)).

Since the regulation system of PECL clarifies the right to reduce price with other remedies, and extends the scope of application to all kinds of contracts, it raises more specific legal meaning compared to relevant regulations of PICC which remains its application scope to only international commercial contracts.

5. Compensation of Damages

As seen before, CISG allows right to claim damages for both parties as a remedy in related to the breach of contract. However, the right to claim damages is not a right to be lost by performing other remedies, but rather it is a right to be compatible, and like other remedies, where the right is performed, if non-performance of both parties are assumed, it is satisfied, and also, in this case, the fault does not matter.

PICC also regulates as follows; irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract(PICC, Art. 3.18), and any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused(PICC, Art. 7.4.1).

In the other hand, individual contract regulation forms common regulation system by adopting foreseeability without additional restrictions on the scope of claim damage, but in regards to the method of compensation, PICC guarantees the aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. In this case, damages should include all losses and deprived benefits assuming all the aggrieved party's benefits earned not by paying expenses or losses are considered. However, if such damages are non-monetary, the it includes physical suffering or emotional distress. Therefore, such articles of PICC indicating full compensation for the method of right to damages attract attentions compared to PECL.

6. Interim Conclusion

The individual remedies for non-performance of individual contract regulation reviewed in the perspective of unification of international commercial contracts have largely similar regulation system or contents. However, the differences or suggestions distinguished with provision and regulations of PECL can be summarized as follows in accordance with the foregoing description.

First of all, in regard to right to performance, PECL regulates that; the creditor is entitled to recover money which is due, and if it could have made a reasonable substitute transaction without significant effort or expense, or performance would be unreasonable in the circumstances, and the creditor proceed with its performance, the creditor may recover any sum due under the contract. For non-monetary obligations, it guarantees remedying of a defective performance and right to specific performance;

In regard to withholding performance, a party who is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has

performed. The first party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances, and may similarly withhold performance for as long as it is clear that there will be a non-performance by the other party's performance becomes due. Like this, it has more specific regulations than contract regulations;

Termination of the contract are mostly same to relevant regulations of PICC, but it has more specific details as follows; a party who terminates the contract may reject property if its value; a party may recover money paid for a performance which it did not receive or which it properly rejected; a party who has supplied property which can be returned and for which it has not received payment or other counter-performance may recover the property; a party who has rendered a performance and for which it has not received payment may recover a reasonable amount;

The regulations of PECL for price reduction are as follows; a party who accepts a tender of performance not conforming to the contract may reduce the price; a party who has paid a sum exceeding the reduced price may recover the excess from the other party; a party who reduces the price cannot also recover damages for reduction in the value of the performance, but the party remains entitled to damages for any further loss it has suffered so far as these are recoverable;

PECL and other contract regulations do not add separate restrictions on the scope of right to damages, and adopt foreseeability. However, PICC guarantees the right to full compensation as the method of right to damages. Damages include all losses and deprived all benefits. If it is non-monetary damages, it includes physical and mental pain. This regulation can be emphasized compared to PECL.

Ⅳ. Summary and Conclusion

1. Legal Comparison of CISG, PICC and PECL

CISG, PICC and PECL are representative examples of legislation as a result of unification between domestic laws and legal systems in international contract law. Since they are established based on in-depth juridical principles and comparative research results through substantial legislative period, the influences to legal effect between parties in international commercial transactions are significant, and parties' interests derived from conflicts between different legal systems are properly distributed and adjusted.

CISG is the most successful legislation among unification or coordination work in international contract laws. Its status as an international uniform law is raised with binding power from universal validity of juridical principles adopted as a result of legal effects of practical laws and comparative work.

PICC, as a non-binding regulations, premises the legislation purpose applied as a general juridical principles in international commercial contract, and it is based on legal reasonableness of all regulations. PICC plays a gap-filling role to CISG, and claim legally practical benefits to provide criteria and guidance when determining decision in private international law.

PECL, which is legislated by CECL, is a result of efforts to form an uniform law in Europe, and the most significant juridical results in economic relation of Europe which formed uniform economic community. PECL forms general principles of contract law in Europe as a code of laws, but like PICC, it has no binding power. However, its purpose is to provide legal basis to member countries in Europe, and secondarily provides basis of legal principle of contract law and uniform interpretation, guidance for court judgment of each country, role to compromise between legal systems in Europe, and legislative

basis for future Europe uniform contract code of laws.

2. Legislative Results of PECL

Although it is limited in terms of application scope, this study compares, analyzes and contemplates the legislative result of PECL for non-performance and general remedies, and individual remedies with the regulation system of PECL which implements reasonable and ideal contract law in international commercial contract through comparison with individual contract regulations. The summary of the results are as follows;

The scope of application of PECL is applied to all contracts including domestic contracts and contracts between merchandisers and consumers. Therefore, PECL is fundamentally distinguished from CISG which limits to international trade of goods, and PICC whose scope of application is international commercial contract. In PECL, non-performance includes late performance and defective performance regardless of exemption where obligation under contract is not performed, and adds mutual cooperative obligation to guarantee complete performance of contract.

PECL has a regulation system where general regulations and individual regulations are compatible for the non-performance and remedies. As a remedies to be used, if a party does not cause the non-performance of the other party, where the obligation under the contract is not performed, and it does not fall under the exemption clauses, the aggrieved party may use any individual remedies in the regulation. Moreover, the remedies can be compatible, and the right to claim damages will not be lapsed even through any remedies are performed.

In terms of fundamental breach of contract, if compared to PICC, PECL does not have specific regulations for when the result of performance by non-performing party cause unbalanced losses.

However, it can provide appropriate performance for the contract assuming certain conditions are met to implement the contract as much as possible in regard to remedies by the non-performing party.

In respect to exemption by impediment, remedies for non-performing may be excluded or restricted unless the exclusion or restriction is contrary to good faith and fair dealing based on restriction and exclusion on liability agreement .

As for the right to perform as an individual remedy, in case of monetary obligations, the creditor is entitled to recover money which is due, and where the creditor has not yet performed its obligation, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless it could have made reasonable substitute transaction without significant effort or expenses, or performance would be unreasonable in the circumstances.

PECL guarantees the right to perform non-monetary obligation. That is, the aggrieved party is entitled to specific performance including the remedying of a defective performance. However, if the performance is unlawful or impossible, or it would cause unreasonable effort or expenses, the character is completely personal, same performance can be obtained from another source, and failure to seek the performance within a reasonable time, it is restricted.

As for withholding performance, a party may exercise the right until the other party has tendered performance or has performed, or it is clear that there will be a non-performance by the other party, and the party may reject the whole or a part of price as may be reasonable in the circumstances.

As for recovery upon the termination of contract, PECL has following regulations; a party may reject property if its value has been fundamentally reduced, on termination of the contract a party may recover money paid for a performance which it did not receive or which it properly rejected; a party who has supplied property which can be returned and for which it has not received payment or

other counter-performance may recover the property, a party who has not received payment or other counter-performance may recover the value.

As for price reduction, the regulations of PECL for price reduction are as follows; a party who accepts a tender of performance not conforming to the contract may reduce the price; right to recover excessive payment; non-acceptance on right to claim damages exercised due to reduction in value with price reduction at the same time, and retention of right to claim damages for any further loss it has suffered so far as these are recoverable.

PECL is the most successful legislation as a result of serial efforts to unite contact laws in Europe. Namely, in the perspective of unification between individual domestic laws and legal systems, and the perspective assuming the harmony with international uniform laws, it is are markable legislation result. From now on, it is expected timely juridical principles will be presented for the legal matters found as new issues in the area of international commercial contract through in-depth juridical and commercial comparative study with individual contract regulations.

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ABSTRACT

A Comparative Legal Study on the Non-Performance and Remedies under International Commercial Contract

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The PECL have been drawn up by an independent body of experts from each member state of the european union under a project supported by the european commission and many other organizations. Salient features of the general provisions of the PECL, freedom of contract and *pecta sunk servanda*, good faith and fair dealing, most of the PECL are non-mandatory. The CISG uses the term fundamental breach in various setting. The concept of fundamental breach is a milestone in its remedial provisions. Its most important role is that it constitutes the usual precondition for the contract to be avoided(Art. 49., Art. 51., Art. 64., Art. 72., Art. 73). In addition, where the goods do not conform with the contract, a fundamental breach can give rise to a requirement to deliver substitute goods. Furthermore, a fundamental breach of contract by the seller leaves the buyer with all of his remedies intact, despite the risk having passed to him(Art. 70). Basically, PECL, PICC generally follows CISG, it was similar to all the regulation's platform though the terms and content sometimes differ. For example regarding to the non-performance and remedies, in the case of non-performance, that is the PECL/PICC term

analogous to breach of contract as used in the CISG. Furthermore the PECL/PICC used fundamental non-performance refered to in PECL Art. 8:103 ; PICC Art. 7.1.1. correspond generally to the concept of fundamental breach referred to in CISG Art. 25. The main significance of the fundamental non-performance, in any systems, is to empower the aggrieved party to terminate the contract. The need for uniformity and harmony in international commercial contracts can be expected to lead to growth of international commerce subject to the CISG, PICC, and PECL. It is hoped that the present editorial remarks will provide guidance to improve understanding between the contractual party of different countries in this respect and following key-words.

Key Words : PECL, CISG, PICC, Non-Performance, Remedies