

A Comparative Study on the Buyer's Right to Withhold Performance for the Seller's Delivery of Defective Goods and Documents in International Sales within the CISG, English law and Korean law

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I. Introduction

1. General

Where the seller is not ready and willing to deliver the goods or has failed to deliver the goods, or even if the goods are delivered, where they are not in conformity with the contract, the buyer may be reluctant to part with the money. In this event, the law may justify the buyer's refusal to perform his part of the contract¹⁾ in certain circumstances so long as such non-delivery or non-conforming delivery continues. This is a kind of 'dilatatory plea' that is not intended to terminate the contract, but to allow the

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1) E.g., suspending required steps leading towards payment.

aggrieved party for a while to maintain his refusal to perform his part of the contract until the defaulting party either performs or offers to do so.²⁾ It is based upon the sales contract being deemed of the synallagmatic nature³⁾ in the sense that one party's failure to perform his part of the promised exchange will justify the other party's refusal to perform.⁴⁾ ⁵⁾

In awarding the right to withhold performance, relatively little difficulty seems to arise where the seller has failed to deliver the goods⁶⁾ or to offer the delivery of the goods⁷⁾ because in such a case there is no doubt in most jurisdictions that the seller's failure to do so justifies the aggrieved buyer's refusal to take delivery and make payment.⁸⁾ The real question are firstly, whether the right to refuse or withhold performance exists even where the goods are delivered in a timely fashion, but defective in point of quality or quantity, and secondly, if it does, in what circumstances and to

2) 'Dilatory plea' is generally recognized by most academic commentators and case law in Korea, as having the legal nature of the right to refuse or withhold performance. See Yun-jik Kwak, *Chae-kwon-gak-ron* (Particulars in Obligatory Law), (1998), at 101; Eun-young Lee, *Chae-kwon-gak-ron* (Particulars in Obligatory Law), (1997), at 125; Ki-sun Kim, *Han-kook-chae-kwon-bup-gak-ron* (Particulars in Korean Obligatory Law), (1988), at 60; Jeung-han Kim, *Chae-kwon-gak-ron* (Particulars in Obligatory Law), (1988), at 63; Tae-jae Lee, *Chae-kwon-gak-ron* (Particulars in Obligatory Law), (1985), at 84; The Korean Supreme Court Cases *21/4/1955, 4287 Min-Sang 287; 27/11/1990, 90 DaKa 25222*. Contra: Hyung-bae Kim, *Chae-kwon-gak-ron: Gae-yak-bup* (Particulars in Obligatory Law: Contract Law), (1997), at 144 et seq.; Sang-ho Choi, "Dong-si-e-haeng-eoi Hang-byun-kwon (Plea of Concurrent Performance)" (Jan., 1991) 361 *Sa-bup-haeng-jeong* 26, at 28 et seq.

3) This refers to a 'do ut des' relationship between the obligations of buyer and seller.

4) In civil law systems the right to refuse or withhold performance is often described as the *exceptio non adimpleti contractus*.

5) Yun-jik Kwak, *supra* n. 2, at 100; Hyung-bae Kim, *supra* n. 2, at 141; Eun-young Lee, *supra* n. 2, at 120 et seq.

6) This refers to the case in which performance by the seller are to be rendered before that of the buyer.

7) This is related to the case where performances by the parties are to be exchanged simultaneously or concurrently.

8) E.g., the United Kingdom Sale of Goods Act (1979) (here-in-after the SGA) s. 28; the Uniform Commercial Code s. 2-507; the UN Convention for the International Sale of Goods (here-in-after CISG) Art. 58(1); Korean Civil Code (here-in-after KCC) Art. 536(1); German Civil Code (here-in-after BGB) Art. 320; the Swiss Code of Obligations Art. 82; Austrian Civil Code Arts. 1052, 1060; French Civil Codes Art. 1612.

what extent the right is invested to the aggrieved buyer. Korean law offers no clear answers to those questions. This seems for the fact that the question of whether or not the seller is assumed to take a contractual duty to deliver non-defective goods in the sale of specific goods, which is regarded as the essence for the recognition of the right to withhold performance, is still arguable.⁹⁾ Similarly, the position under the CISG and English law is uncertain because of the absence of any specific provision under the CISG and the SGA or case law conferring the right to withhold performance.¹⁰⁾ In addition, the uncertainty in the rules as to the right to withhold performance in each jurisdiction is attributable to the fact that despite its intrinsic value in practice, to date there has been little discussion in detail of the right as an integral part of remedies in the event of the seller's non-conforming delivery. The uncertain and murky rules in each jurisdiction are likely to leave the buyer with the unnecessary dilemma of deciding whether or not he is supposed to pay where he wants to preserve the contract for a while until the seller's conforming delivery takes place. The uncertain rules may yield undesirable consequences to him where the buyer misjudges asserting a right to withhold performance. In practice, the buyer often finds himself either in an insecure position to receive the agreed goods from the seller where he decided to make payment for the defective goods delivered, or in breach of his contractual duty to pay where he decided to withhold to make payment.

The purposes of this paper are twofold. The first is to clarify the current position as to the right of withholding performance in the event of the

9) That is, insofar as the seller's contractual duty is denied, the buyer may not rely on the right to withhold performance in the event of the seller's delivery of defective goods because it is unlikely to place the seller in a breach of the contractual duty to deliver non-defective goods: denying the contractual duty means in effect to destruct the synallagmatic relationship between the seller's delivery of non-defective goods and the buyer's payment, on which the right to withhold performance is based.

10) But note that the CISG clearly allows the buyer to withhold performance in the cases of the seller's prospective non-conforming delivery. CISG Art. 71 (1).

seller's tender of non-conforming goods or documents in the CISG, English law and Korean law. This is intended to assist the parties in drafting the buyer's right to withhold performance in their own contract. The second is to compare the rules of one jurisdiction with those of other jurisdictions and to evaluate the rules in light of the practical functions and benefits of the right to withhold performance which will be discussed below and in light of the discipline of comparative law the basic question of which is whether a solution from one jurisdiction may facilitate the systematic development and reform of another jurisdiction.^{11) 12)}

2. The primary functions and benefits of withholding performance

In the cases where a seller is not ready and willing to perform his reciprocal contractual duties, or has failed to perform such duties, it is frequently witnessed in practice that a buyer seeks to assert a right of withholding performance of his part of contract. This seems to suggest that withholding performance plays significant roles in practice with real or perceived benefits which motivate the buyer to assert a right of withholding performance. Of various major factors which enhance the likelihood that the

11) The evaluation in light of the discipline of comparative law may be executed by asking the following three questions: first, whether a rule in a jurisdiction governing a legal matter could be utilized as a guideline to fill the gap in another jurisdiction that does not cover the matter in light of the practicability and appropriateness of the rule to control the matter; second, whether the clear position for a legal issue in a jurisdiction would provide any assistance for another jurisdiction to clarify its unclearness for the issue; third, what problems a jurisdiction has suffered by not following an approach taken in another jurisdiction and whether the approach can provide some idea as a suggestion of how to settle these problems.

12) For the functions, aims and methods of comparative law, see De Cruz, *Comparative Law in a Changing World*, (1999), at 18 et seq., 213 et seq.; Zweigert and Kötz, *An Introduction to Comparative Law*, 2nd ed. (Eng. Trans by Tony Weir), (1992), at 13 et seq., 28 et seq. For a further study of the methodology, see Markesinis, *Foreign Law and Comparative Methodology: a Subject and a Thesis*, (1997).

buyer will engage in withholding performance, one quickly coming across one's mind is that it efficiently protects the buyer from having to advance credit to the defaulting seller.¹³⁾ The ensuing discussion is to examine other factors which induce the buyer to assert a right of withholding performance.

First of all, it has a less drastic effect for the parties in the sense that the seller's failure to perform justifies the buyer withholding performance at least for so long as the failure continues without involving the more drastic step of terminating the contract.¹⁴⁾ ¹⁵⁾

Secondly, it is conducive to the preservation and performance of bargains since the existence of the right may act as a strong incentive to the seller to cure any non-conformity in the goods rendered.¹⁶⁾ The reason for this is that the seller would strengthen his efforts to perform in order to avoid the negative consequences of delay in his performance caused by the buyer's refusal to take delivery and to obtain payment.¹⁷⁾

Thirdly, characteristic of self-help remedies,¹⁸⁾ 'the immediacy of the action' is an additional advantage of withholding performance.¹⁹⁾ That is,

13) Lando (ed.), *Principles of European Contract Law*, (2000), at 404; Hyung-bae Kim, supra n. 2, at 142; Eun-young Lee, supra n. 2, at 125.

14) Note that the buyer's act of withholding performance may ultimately amount to a step preliminary to termination or a claim for specific performance.

15) Treitel, *Remedies for Breach of Contract*, (1988), at 245.

16) Hyung-bae Kim, supra n. 2, at 142; Maskow, Bianca/Bonell (ed.), *Commentary on the International Sales Law: the 1980 Vienna Sales Convention*, (1987), at 390; Beale, *Remedies for Breach of Contract*, (1980), at 19; Patterson, "Constructive Conditions in Contracts" (1942) 42 *Columbia L. R.* 903, at 925 et seq.; Carter, "Suspending Contract Performance for Breach", in: Beatson and Friedmann (ed.), *Good Faith and Fault in Contract Law*, (1995), at 492.

17) Id.

18) The term of 'self-help' means "private actions taken by those interested in the controversy to prevent or resolve disputes without official assistance of a governmental official or disinterested third party". See Brandon et al., "Project, Self-help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society", 37 *Vand. L. Rev.* 845, at 850; Taylor, "Self-help in Contract Law: An Exploration and Proposal" (1998) 33 *Wake Forest L. Rev.* 839, at 841. Self-help remedies include, for instance, withholding performance, termination, price reduction and etc.

19) Taylor, supra n. 18, at 847; Harris, *Remedies in Contract and Tort*, (1988), at 15, 30 et seq.

the buyer can act swiftly in response to the seller's delivery of non-conforming goods insofar as he can avoid any involvement of judicial remedy or other third-party intervention, both of which may often entail considerable delay.²⁰⁾

Fourthly, the action of withholding performance against the seller may provide the buyer with certainty in its immediate result, which is another feature of self-help remedies.²¹⁾ In this regard, the buyer may prefer withholding performance²²⁾ to seeking judicial remedies because where he waits for judicial determination, he may not be able to take protective action prior to determination due to the uncertain outcome of the judicial process.²³⁾

Fifthly, withholding performance may be an inexpensive remedy in comparison with judicial remedies, which is the other feature of self-help remedies.²⁴⁾ It may save the buyer from incurring expenditures associated with formal proceedings for compensation or restitution.²⁵⁾

Sixthly, given that most contractual parties in practice show dislike or distrust of the courts resolving the matters occurred in the process of performing their contract,²⁶⁾ withholding performance as a self-help remedy may provide an opportunity for the parties to further the feeling of control and autonomy.²⁷⁾ Namely, it may provide an opportunity for the parties to maintain their matters private, free from external meddling by official

20) Taylor, *supra* n. 18, at 847.

21) Taylor, *supra* n. 18, at 847.

22) But note that the buyer's decision to withhold performance exposes him to the risk of breach by non-performance.

23) Taylor, *supra* n. 18, at 847.

24) Harris, *supra* n. 19, at 15, 30 et seq.; Taylor, *supra* n. 18, at 847; Rubin, "The Nonjudicial Life of Contract: Beyond the Shadow of the Law" (1995) 90 *Nw. U. L. Rev.* 107, at 119 et seq.

25) Carter, in: Beatson and Friedmann (ed.), *supra* n. 16, at 492; Taylor, *supra* n. 18, at 861. For the various expenditures associated with judicial enforcement of a contract, see Rubin, *supra* n. 24, at 119 et seq.

26) Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *Am. Soc. Rev.* 55, at 65.

27) Taylor, *supra* n. 18, at 847 et seq.

bodies.²⁸⁾

Finally, a purpose of withholding performance is especially related to an information function in the sense that it may serve as a means to determine the likelihood that the risk of non-performance will materialize.²⁹⁾ In the event of the seller's defective performance, it may assist the buyer in establishing with more certainty whether the cure of defective performance in accordance with the contract will occur and in fashioning his next step to resolve the matters of defective performance.

All the functions and benefits examined above³⁰⁾ seem to explain the importance of adopting the right of withholding performance in practice where the aggrieved buyer wants to keep the contract on foot and demand goods fully conforming with the contract, being protected from having to advance credit to the seller. Notwithstanding the importance, one must note that the buyer may be reluctant to resort to asserting a right of withholding performance if there exists any ambiguity in the rules as to the right because of the risk that his action can be always challenged and his non-performance may amount to a breach of contract. Having said that, we may turn to rules which currently govern the cases of withholding performance in the CISG, English law and Korean law.

II. CISG

1. Availability of the buyer's right to withhold performance

1) Defects in quality or quantity

Although the provisions dealing with the buyer's remedies for the seller's

28) Taylor, *supra* n. 18, at 847 et seq.

29) Taylor, *supra* n. 18, at 849 et seq.; Carter, in: Beatson and Friedmann (ed.), *supra* n. 16, at 492.

30) For disadvantages in the use of self-help remedies, see Taylor, *supra* n. 18, at 850 et seq.

breach give specific rights to withhold performance in certain cases,³¹⁾ it does not make clear that the buyer has a general right to withhold performance in the event of the seller's breach of contract. Among other things, the most complicated question seems to be whether the buyer has a general right to withhold performance (in particular, a right to refuse to take delivery) where the goods delivered do not conform with the contract in respect of quality or quantity. It is worth noting that the answer for the question is of importance in practice in terms of the presumed link under the CISG between taking delivery and payment.^{32) 33)} It seems apparent that the right to refuse to take delivery is expressed in the list of remedies in art. 45. One must, however, bear in mind that it only refers to the special cases of early delivery and excess quantity,³⁴⁾ whereas there is no clear provision for the right to refuse to take delivery in the event of the goods delivered being defective in quality or quantity (shortage).

Nevertheless, it has been submitted by some commentators that the right to refuse to take delivery can be inferable from the analogical interpretation of the relevant provisions under the CISG.³⁵⁾ Their argument is based on the assertion that art. 86(1) presupposes the existence of a 'right to reject' which is generally stipulated without specific reference to art. 52 (refusal to take early or excess delivery) for the purpose of including all other possible cases of refusing to take delivery (e.g., where the buyer has received the goods which are not conformed to the contract); they assume that a right

31) CISG Arts. 52 (Refusing to take early delivery; delivery of excess quantity), 71 (Anticipatory breach and Suspension of performance). See also CISG Art. 58 (Payment as condition for handing over the goods or documents) under which a right to withhold performance is impliedly recognized.

32) CISG Art. 58.

33) However, the presumption may be evaded in the cases of, e.g., a sale 'cash against document'

34) CISG Art. 52.

35) Maskow, Bianca/Bonell (ed.), *supra* n. 16, at 389 et seq.; Enderlein and Maskow, *International Sales Law*, (1992), at 229 et seq. Cf. Huber, Schlechtriem (ed.), (Eng. trans. by Thomas), *Commentary on the International Sale of Goods*, (1997), at 367 et seq.; Hager, Schlechtriem (ed.), *id.*, at 475, 478.

to reject as presupposed in art. 86 is basically the same right to refuse to take delivery of the goods as in art. 52.³⁶⁾ In addition, they maintain that, although the right to refuse to take delivery is not expressly referred to under art. 58, it can be implied under art. 58 which makes the buyer's duty to make payment subject to the condition that the seller's delivery is in accordance with the contract.³⁷⁾ Furthermore, they justify their argument on the ground that arts. 46(1) and 47(1) are deemed to be at least consistent with the assumption of the right to refuse to take delivery under certain conditions.³⁸⁾

This view seems to have great merits in that, despite the absence of any specific provision existing under the CISG for the buyer's right to refuse to take delivery in the event of the seller's delivery of defective goods, it has devised a means to infer the right from several provisions under the CISG. However, it is argued that a right to reject presumed under art. 86 is not equal to a right to refuse to take delivery. Assume that a buyer did not refuse to take a seller's delivery because he could not notice a hidden defect contained in the seller's delivery when he received them, but sometime later he finds out the defect that amounts to a fundamental breach of contract defined under art. 25. Now he intends to require a fresh tender from the seller by virtue of art. 46(2) on the ground that taking delivery does not necessarily preclude the buyer from resorting to other remedies.³⁹⁾ The question arises whether the buyer will be obliged, pursuant

36) Maskow, Bianca/Bonell (ed.), supra n. 16, at 390; Enderlein and Maskow, supra n. 35, at 229.

37) Maskow, Bianca/Bonell (ed.), supra n. 16, at 391; Enderlein and Maskow, supra n. 35, at 229. It is also argued that if no such right was allowed, the buyer's right to examine the goods under art. 58(3) would be devoid of purpose. See Huber, Schlechtriem (ed.), supra n. 35, at 367. Note that the buyer's right to examine the goods under art. 58(3) involves a short, superficial examination which is not likely to prevent his subsequent examination and complaints in accordance with arts. 38 and 39. See Hager, Schlechtriem (ed.), supra n. 35, at 474; Enderlein and Maskow, supra n. 35, at 226.

38) Maskow, Bianca/Bonell (ed.), supra n. 16, at 390; Enderlein and Maskow, supra n. 35, at 229.

39) Maskow, Bianca/Bonell (ed.), supra n. 16, at 439.

to art. 86(1), to take reasonable steps to preserve the goods initially tendered.⁴⁰⁾ The answer for this question seems negative provided that the duty to preserve goods under art. 86(1) arises only where the buyer exercises a right to refuse to take delivery in the first place rather than that of other rights to reject (e.g., a right to require replacement or to terminate the contract) retained even after having taken delivery, and that the term 'reception' in art. 86(1) is distinct from the terms 'taking delivery' in art. 60.⁴¹⁾ ⁴²⁾ It seems that they should have considered that the good faith principle under art. 7 along with the mitigation principle under art. 77 are likely to impose the duty to preserve the goods on the buyer who claims replacement and art. 86 speaks of 'the right to reject' instead of 'the right to refuse to take delivery'.⁴³⁾ In this light, the view that art. 86

40) Insofar as the goods are in possession of the buyer, art. 86(2) is out of question.

41) Maskow, Bianca/Bonell (ed.), supra n. 16, at 392; Enderlein and Maskow, supra n. 35, at 229. Cf. Sevón, "Obligation of the Buyer under the Vienna Convention on Contracts for the International Sale of Goods", (1990) 106 *Juridisk Tidskrift* 327, 337 et seq.

42) Strangely, Enderlein and Maskow say later in their textbook that the term 'received' has the same meaning as the terms 'take over'. On this basis, the buyer is likely to be under the duty of preservation by art. 86(1) even where he claims replacement after he took over (or received) the seller's delivery. See Enderlein and Maskow, supra n. 35, at 229. According to their view, it may lead one to the conclusion that the buyer's duty of preservation before he takes (or receives) the seller's delivery is depended upon art. 86(2). However, it seems that this view is not free from criticism in the context that art. 86(2) may not cover all the possible cases of the buyer's duty of preservation before he takes the seller's delivery although it may deal with the duty where a carriage of goods is involved; it does not seem to place the buyer in the duty of preservation where he is agreed to collect the goods which have been placed at a third place (e.g., the place of storage).

43) Note that the right of rejection under art. 86 is related in this paper to all the possible cases where the buyer exercises the relevant rights to which he does not intend to retain the goods; the right of rejection could arise regardless of whether the delivery of goods has been taken by the buyer. Thus, the right of rejection may entail the cases, irrespective of the buyer having taken the seller's delivery, where he demands delivery of substitute goods (art. 46(2)) or terminates the contract (art. 49(1)(a) or (b)), but not the cases where he intends to keep the goods and merely demands repair (art. 46(3)), a price reduction (art. 50), or damages (art. 45(1)(b) in conjunction with arts. 74-77). In addition, the right to refuse to take delivery (e.g., as under arts. 52, 71) may be conceived as a special case of the right of rejection. Accords: Eberstein, Schlechtriem (ed.), supra n. 35, at 671. Cf. Honnold, *Uniform Law for International Sales*, (1999), at 524 (referring the right to reject under art.

establishes the existence of a general right to refuse to take delivery where the goods are not conformed with the contract on the assumption that a right to reject under art. 86 be identical to a right to take delivery can not be justified.⁴⁴⁾ In addition, it is questioned how a right to refuse to take delivery could be inferred from art. 58; as the wording of art. 58 shows, it clearly deals with the reciprocity between the seller's duty to deliver the goods in accordance with the contract and the buyer's duty to make payment rather than his other duty to take delivery.

Nonetheless, there seems to be no doubt that the CISG impliedly recognizes a right to refuse to take delivery where the goods delivered have a defect in quality or quantity. The right could be deducible from one of the principles of the CISG under which the buyer is not obliged to take delivery where the seller's delivery is not in accordance with the contract and the CISG. Although this principle is not explicitly elucidated under the CISG, it could be inferred by finding the interrelationship between the main duties of the parties under the CISG: the seller's duty to deliver⁴⁵⁾ and the buyer's duty to take delivery and to make payment.⁴⁶⁾ It is obvious that, unlike the interrelationship between the seller's duty to deliver and the buyer's duty to make payment, the interrelationship between the seller's duty to deliver

86 to the cases of termination of the contract (art. 49(1)(a)) and demanding replacement (art. 46(2)).

44) For the view that the right to reject under art. 86 is distinguished from the right to refuse to take delivery by saying that the former is a right to refuse to accept the goods as conforming to the contract on the basis that the buyer is under two separate duties to take delivery and to accept the goods if they are conformed with the contract, see Jafarzadeh, *The Buyer's Remedies for Seller's Non Conforming Delivery: A Comparative Study under English Law, the UN Convention on Contracts for the International Sale of Goods and Shiah Law*, Doctoral thesis in Univ. of Sheffield, (1998), at 115 et seq. This view can be appraised in that it has distinguished the right to reject under art. 86 from the right to refuse to take delivery. However, the consequence from his argument that the buyer should be placed in a duty to preserve the goods delivered even if he wants to retain them and claims for repair seem unreasonable because the mitigation principle in art. 77 is already applicable to this case and art. 86 does not seem to deal with the cases where the buyer intends to keep the goods delivered.

45) CISG Art. 30.

46) CISG Art. 53.

and the buyer's duty to take delivery is not expressly provided under the CISG. Yet, it is submitted that one should read arts. 30 and 53 as referring to each other;⁴⁷⁾ therefore, the seller is bound to deliver the goods on the condition that the buyer is ready and willing to take delivery of them and pay the price 'as required by the contract and the Convention', the buyer is obliged to pay and take delivery only if the seller is ready and willing to deliver the goods 'as required by the contract and the Convention'.⁴⁸⁾ This view becomes clearer when one considers that, even though art. 58 regulates the rights to withhold performance only for delivery and payment, it should be applied to other duties as long as they are of some substance on the basis that if a party is allowed to withhold performance by virtue of art. 71 on account of a prospective breach of such duties, then their actual breach must also justifies a right to withhold performance.⁴⁹⁾

2) Defects in documents

Where the seller tenders documents which do not conform to the contract, the CISG does not clearly provide the buyer with a separate right to withhold his performance (i.e., a right to refuse to accept such documents and pay for them). In this regard, one may strongly argue that the right to withhold performance in the event of the seller's tender of non-conforming documents can be derived from art. 58 which may entitle the buyer to refuse to pay the price for so long as the seller fails to hand over documents in accordance with the contract unless the contract specifies otherwise.⁵⁰⁾ However, it is worth noting that, unlike arts. 30 and 34 which speak of "documents relating to the goods", art. 58 only concerns documents "controlling disposition of the goods" so that the buyer's right to

47) Jafarzadeh, *supra* n. 44, at 121 et seq.

48) Jafarzadeh, *supra* n. 44, at 123.

49) Hager, Schlechtriem (ed.), *supra* n. 35, at 475; Schlechtriem, *Uniform Sales Law*, (1986), at 83.

50) Jafarzadeh, *supra* n. 44, at 126 et seq.

withhold performance is restricted to the cases where such documents are not conformed with the contract. The question is what kind of documents falls under art. 58.

There seems no doubt that art. 58 includes traditional documents of title⁵¹⁾ according to which the goods described therein are deliverable only to a lawful holder. A strict interpretation of art. 58 could suggest that only such documents should be included within the meaning of 'documents controlling disposition of the goods'.⁵²⁾ However, it has been criticized that such a narrow interpretation may be contrary to trade practices in which many other documents are accepted in practice as substitutes for the goods and one should take into account a functional interpretation of art. 58 in the sense that documents under art. 58 include all kinds of documents that can be used for the seller to perform his duty to deliver the goods in accordance with arts. 30 and 34.⁵³⁾ That is, insofar as a document gives the buyer a right to take possession of the goods to the exclusion of the seller,⁵⁴⁾ it may fall within the meaning of 'documents controlling disposition of the goods'. Thus, in addition to documents of title, at the best, a warehouse delivery warrant, a duplicate way-bill in the case of rail transport, a CMR way-bill in the case of international road transport, a duplicate airway bill and etc., could be within art. 58.⁵⁵⁾ In contrast, a quay receipt and a mate's receipt cannot be included within art. 58 because unlike the above documents, they merely prove that the goods have been taken over by the carrier or depositor.⁵⁶⁾ In addition, an invoice, an insurance policy, a

51) E.g., bills of lading, warehouse receipts, combined transport documents, international forwarding notes.

52) Enderlein and Maskow, *supra* n. 35, at 219; Maskow, Bianca/Bonell (ed.), *supra* n. 16, at 427; Hager, Schlechtriem (ed.), *supra* n. 35, at 473; Schlechtriem, *supra* n. 49, at 82.

53) Secretariat's Commentary, O.R., at 46, art. 53, No.5; Schlechtriem, *supra* n. 49, at 82; Enderlein and Maskow, *supra* n. 35, at 219 et seq.; Hager, Schlechtriem (ed.), *supra* n. 35, at 473.

54) Namely, it should contain an undertaking that a person entitled to possession of the goods will deliver them up, or enable the holder to make instructions as to the goods during their transport.

55) Hager, Schlechtriem (ed.), *supra* n. 35, at 473; Sevon, *supra* n. 41, at 335.

certificate of origin, a certificate of quality and etc., do not certainly fall within the scope of art. 58 because, although they are undoubtedly regarded as documents relating to the goods in one way or another under arts. 30 and 34, it cannot be said that they are determined to control disposition of the goods according to art. 58.⁵⁷⁾ This limitation for the application of art. 58 seems to attract criticism in that, despite their irrelevance to controlling disposition of the goods, they are frequently required in exchange for payment by the contract, usages, practices or Incoterms.⁵⁸⁾ ⁵⁹⁾ In the case where the documents are not in conformity with the contract, the buyer may respond in practice in the same way as if the goods themselves are not in accordance with the contract; he may immediately reject such non-conforming documents.⁶⁰⁾ This can be proved by general principles of law and usages as stated in Uniform Customs and Practice for Documentary Credits and Uniform Rules for Collection.⁶¹⁾ ⁶²⁾ In this light, it seems to show us how ill-designed for documentary sales the CISG is⁶³⁾

56) Hager, Schlechtriem (ed.), supra n. 35, at 473. Contra: Enderlein and Maskow, supra n. 35, at 219 et seq.; Maskow, Bianca/Bonell (ed.), supra n. 16, at 427.

57) For the view that an insurance policy could be within art. 58 on the basis of the idea that it may give a right to acquire the subrogate of the goods, see Hager, Schlechtriem (ed.), supra n. 35, at 473; Schlechtriem, supra n. 49, at 82. Contra: Maskow, Bianca/Bonell (ed.), supra n. 16, at 427. For the view that an invoice, a certificate of origin could also fall within art. 58 on the ground that they may be requisite for clearance (i.e., getting control) of the goods by customs authorities, see Maskow, Bianca/Bonell (ed.), supra n. 16, at 427.

58) All the required documents under INCOTERMS 2000 are stipulated in A8 in each trade term.

59) Although one may argue that the criticism could be easily denied when considering art. 9 which expressly provides the importance of any usage to which the parties have agreed or any practices which they have established between themselves, this does not necessary mean that the wording of art. 58 itself is appropriately designed overall for documentary sales.

60) Maskow, Bianca/Bonell (ed.), supra n. 16, at 428 et seq.

61) Maskow, Bianca/Bonell (ed.), supra n. 16, at 428; Enderlein and Maskow, supra n. 35, at 219 et seq.

62) Note that where the parties agree to make payment through the use of letter of credit, banks have very strict requirements as to the adequacy of documents so that they will refuse to pay for the documents tendered by the seller unless they strictly comply with the contract. See Uniform Customs and Practices for Documentary Credits 500 (1993 version) Art. 13.

63) For unsuitability of the CISG for documentary sales in general, see Reynolds, "The Vienna Sales Convention on the Sale of Goods: A Note of Caution", in:

and to justify the view submitted above that arts. 30 and 53 which specify the main duties of each party should be read as referring to each other.

Having recognized a separate right to reject defective documents, another question to be answered is whether the buyer may be entitled to a further right to refuse to take delivery of non-conforming goods where the documents themselves are perfectly in accordance with the contract, but they indicate defects in the goods: may the buyer's right to refuse to take delivery be prejudiced by his acceptance of the documents? Although the CISG does not specifically deal with this question, it could be resolved by virtue of art. 39(1) which may deprive the buyer of his right to rely on a lack of conformity of the goods "if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he discovered it or ought to have discovered it".⁶⁴⁾ Thus, he may be still entitled to his right to refuse to take delivery where he has accepted documents which are deemed to show the goods not in conformity with the contract on their face insofar as at the time of acceptance of the documents he had no knowledge of the lack of conformity and no means to know it.⁶⁵⁾

Birks (ed.), *The Frontiers of Liability*, (Vol. 2, 1984), at 24 et seq.; Williams, "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom", in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, (2001), (seen at <http://cisgw3.law.pace.edu/cisg/biblio/williams.html>).

64) Jafarzadeh, supra n. 44, at 127 et seq. For the view that where the buyer already knew of the lack of conformity before taking delivery, the reasonable time to give notice under art. 39(1) may start to run from the time of discovery (i.e., before taking delivery), see Enderlein and Maskow, supra n. 35, at 160; Schlechtriem, supra n. 49, at 70.

65) Jafarzadeh, supra n. 44, at 128. On the other hand, he may lose his right to refuse to take delivery of the goods where he has accepted documents even if they clearly show the lack of conformity. Such an argument could be justified either on the basis that the original contract was modified by agreement such that the buyer agreed to accept the goods which are not in accordance with the contract by virtue of art. 29(1) or on the basis that the buyer might be held to be estopped from relying on his strict legal rights. Prof. Honnold, *inter alia*, has argued that one of the general principles on which the CISG is based (art. 7(2)) is that a party may be prevented by his conduct from asserting his strict legal rights to the extent that the other party has relied on that conduct. See Honnold, supra n. 43, at 105 et seq.

2. Seriousness of a defect

Given that, as pointed out above, the seller's failure to deliver the goods and hand over any documents relating to them in accordance with the contract may confer on the buyer the right to refuse to take delivery and make payment under the CISG, the next question to be answered is what degree of non-conformity would entitle the buyer to the right. The CISG does not clearly regulate the question by its provisions. It seems, however, apparent that whether or not the buyer is allowed to refuse to take delivery and make payment does not depend upon the existence of a fundamental breach which is a prerequisite for the avoidance of the contract or for the claim of replacement.⁶⁶⁾ Since the right to withhold performance is based on the theory of reciprocity of the parties' duties rather than the theory of fundamental breach, he may be only required to show that the seller's delivery is not conformed with the contract.⁶⁷⁾ Yet, it is worth noting that one cannot be generous in granting the right to withhold performance.

66) CISG Art. 25 (which defines a fundamental breach when "a breach of contract committed by one of the parties results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result") Cf. For a recent study on the definition of fundamental breach, see Koch, "The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)", in: Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, (1999), at 177 et seq.; Pauly, "The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law" (2000) 9 *J. L. & Com.* 221.

67) It becomes clearer when one considers the approach taken by arts. 71(1) and 72(1) under which the right to withhold performance is distinguished from the right of avoidance in terms of seriousness of the breach: the right of avoidance under art. 72(1) requires that the seller's anticipatory breach amount to a 'fundamental breach' of contract within the meaning of art. 25, whereas the right to withhold performance under art. 71(1) does not necessarily demand the buyer to show the seller's fundamental breach, but it may be enough to prove that the seller's anticipatory breach relates to a 'substantial part of his obligations'. See Enderlein and Maskow, *supra* n. 35, at 286; Bennett, Bianca/Bonell (ed.), *supra* n. 16, at 519, 521; Leser, Schlechtriem (ed.), *supra* n. 35, at 524; Schlechtriem, *supra* n. 49, at 93 et seq.; Strub, "The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries", (1989) 38 *Int'l & Com. L.Q.* 475, at 494.

Accordingly, the granting of the right depends upon the system of remedies prescribed by the CISG: it relies on the nature of the breach and of the rights to which the breach gives rise. In this light, the buyer may be undoubtedly allowed to refuse to take delivery and to make payment where he is entitled to claim replacement⁶⁸⁾ or to terminate the contract.⁶⁹⁾ In addition, even if the nature of non-conformity is not so serious that the buyer can only rely on the restricted remedies of damages without termination of the contract,⁷⁰⁾ repair,⁷¹⁾ or price reduction,⁷²⁾ the right to refuse to take delivery and make payment may be vested in him in principle until the seller cures the non-conformity either by repair or by replacement. However, it must take into account the good faith principle;⁷³⁾ the right is certainly not allowed for minor non-conformity.⁷⁴⁾ All in all, the right may be available for him where non-conformity in accordance with the contract has attained a certain degree of seriousness which is enough to enable him to invoke one of the remedies stipulated under the CISG, whereas it should not be allowed for minor non-conformity in light of the underlying principle of good faith.⁷⁵⁾

68) CISG Art. 46(2).

69) CISG Art. 49(1)(a).

70) CISG Arts. 45(1)(b), 74, 77.

71) CISG Art. 46(3).

72) CISG Art. 50.

73) CISG Art. 7.

74) Maskow, Bianca/Bonell (ed.), supra n. 16, at 392.

75) Insofar as the buyer does not take delivery, he has to preserve the goods pursuant to art. 86 in a way that protects the seller's interests. Thus, if he decides to refuse to take delivery of the goods before he receives them, he must take possession of them and take reasonable steps to preserve them in accordance with art. 86(2). Note that in this paper, unlike the argument by Enderlein and Maskow, the term 'received' in art. 86 does not have the same meaning as the terms 'take over' in art. 60: the terms 'taking possession' or 'receipt of the goods' in art. 86 does not necessarily constitute a 'taking delivery' in art. 60. This interpretation seems to resolve the problems caused by the argument of Enderlein and Maskow (see supra n. 42) in a way that art 86 covers all the possible cases of the buyer's duty of preservation before he takes the seller's delivery.

III. English law

1. Availability of the buyer's right to withhold performance

1) Defects in quality or quantity

The starting point to investigate whether English law recognizes the buyer's right to withhold performance in the event of the seller's delivery of goods which are defective in quality or quantity is to examine the relationship between the right of termination and the right of rejection: is the right of rejection treated separately from the right to treat the contract repudiated and terminate it? It seems that the distinction between the right of termination and the right of rejection is rather blurred in English law; in English law many of the same rules apply to both rights. This point is reflected in English legal terminology, which often refers to both rights as the right of termination (or rescission).⁷⁶⁾ The reason for this seems that neither the SGA nor the case law has clearly distinguished between these two rights.⁷⁷⁾ Therefore, before embarking upon a more difficult discussion as to how English law could possibly recognize the buyer's right of rejection separate from the right of termination, it seems necessary to deal with a preliminary point relating to its unique idea of classification of contractual terms. This is because, in English law, the question of whether the buyer has a right to refuse to accept the goods delivered and to terminate the contract basically depends upon classification of contractual

76) Cf. For a criticism of the use of the terminology 'rescission', *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] AC 827, 844, 851; McKendrick, *Contract Law*, (1997), at 344.

77) For the evidence of the unclear position as to the relationship under the SGA and the case law, see Bradgate and White, "Rejection and Termination in Contracts for the Sale of Goods", in: Birds and Bradgate (ed.), *Termination of Contracts*, (1995), at 57 et seq.; Jafarzadeh, *supra* n. 44, at 33 et seq.

terms as 'conditions', 'innominate terms' or 'warranties'.⁷⁸⁾ The right of rejection and termination is available only where the seller's breach of contract goes to the root of the agreement: that is, where it is a breach of condition or where it is a breach of innominate term which may deprive the buyer of substantially the whole benefit which it was intended that he would obtain from the contract.⁷⁹⁾ In this light, insofar as the seller's delivery of goods which are defective in quality is concerned, such delivery is likely to be a breach of one of the implied conditions stipulated in the SGA ss. 13-15 so that the buyer may be entitled to reject the goods and to terminate the contract.⁸⁰⁾ In addition, although, unlike any implied condition as to quality, the seller's duty to deliver the correct quantity is not expressly classified as a condition in the SGA, it is submitted that the buyer's entitlement to reject the whole of the goods delivered in the SGA s. 30 means in substance that the seller's delivery of the wrong quantity is deemed a breach of condition.⁸¹⁾

78) Its understanding that a contractual term must be either a condition or a warranty is based on the wording of statute in the SGA s. 11(3) which distinguishes between conditions and warranties. *Wallis, Son & Wells v. Pratt & Haynes* [1910] 2 KB 1003. For the authority there being an innominate (or intermediate) term as the third category notwithstanding the SGA s. 11(3) which recognizes condition and warranty as the only classifications of contractual terms, see *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (the leading case which has expressly addressed this category of contractual terms); *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44 (the first sale of goods case which held that the Hong Kong Fir doctrine was a common law rule that was not inconsistent with the SGA); *Bunge Corpn. Tradax Export SA* [1981] 1 WLR 711.

79) On the other hand, where the term broken by the seller is merely a warranty, the buyer will be entitled to claim damages for losses arising out of the seller's breach. The SGA ss. 11(3), 61(1).

80) Note that a contractual term may be also regarded as a condition if it has previously been recognized as such by judicial classification (e.g., *Bowes v. Shand* [1877] 2 App. Cas. 455; *State Trading Corporation of India Ltd v. M Golodetz* [1989] 2 Lloyd's Rep. 277; *The Naxos* [1990] 1 WLR 1377) or if it appears that it was the intention of the parties that a particular term is a condition (e.g., *Bettini v. Gye* [1876] 1 QB 183; *Schuler A.G. v. Wickman Machine Tools Sales Ltd.* [1974] AC 235; *Lombard North Central plc v. Butterworth* [1987] QB 527).

81) Atiyah and Adams, *Sale of Goods*, (1995), at 109 et seq.; Treitel, *supra* n. 15, at 364; Beale, *supra* n. 16, at 36. Contra: Bradgate and White, in: Birds and Bradgate (ed.), *supra* n. 77, at 75; Bridge, *The Sale of Goods*, (1997), at 199

Having said that, it still remains to answer our primary question as to whether/how English law recognizes the buyer's right of rejection separate from the right of termination. Although it seems unclear under its statute and case law, there have been two opposing views as to the existence of the separate right of rejection. On the one hand, it is argued that the right of rejection is treated as if it were merely a component of the general right to terminate a contract for breach.⁸²⁾ According to this view, there is no room for the buyer to withhold his performance without bringing the contract to an end. On the other hand, it is contended that the right of rejection is separate from the right of termination⁸³⁾ and rejection involves the buyer refusing to perform his primary duty to accept the goods in a sense that it is a specific example of the right to withhold performance.⁸⁴⁾ This view is based on the idea that a condition stated under the SGA is described for a term that defines a party's duty to perform, compliance with which is a condition precedent to the other party's duty to accept the performance.⁸⁵⁾ Thus, the seller's delivery of the goods conforming to the terms of the contract is the pre-condition of the buyer's duty to accept and

(they argue that as long as it is not classified as a condition in the SGA, s. 11(3) cannot come into play so that the seller's delivery of the wrong quantity does not immediately allow the buyer to terminate the contract).

82) *Kwei Tek Chao v. British Traders & Shippers Ltd.* [1954] 2 QB 459, 480, per Devlin J; *The Hansa Nord* [1976] QB 44, 83-84, per Ormerod LJ. Cf. For non-sale of goods cases, *Wickman Machine Tools Sales Ltd. v. Schuler A.G.* [1972] 1 WLR 840, 850, per Lord Denning M R; *Photo Production Ltd. v. Securicor Ltd.* [1980] AC 827, 849, per Lord Diplock. See also Carter, *Breach of Contract*, (1991), at para. 628, 940; Treitel, *The Law of Contract*, (1991), at 690.

83) Atiyah and Adams, *supra* n. 81, at 449; Beale, *supra* n. 16, at 20, 80; Bradgate and White, in: Birds and Bradgate (ed.), *supra* n. 77, at 57, 61 et seq.; Bradgate, *Commercial Law*, (2000), at 309 et seq.; Furmston, *Sale and Supply of Goods*, (1995), at 158 et seq.; Goode, *Commercial Law*, (1995), at 362 et seq.; Treitel, *The Law of Contract*, (1995), at 670, 704; Bridge, *supra* n. 81, at 162 et seq.; Reynolds, Guest (ed.), *Benjamin's Sale of Goods*, (1997), at para. 12-028.

84) Bradgate and White, in: Birds and Bradgate (ed.), *supra* n. 77, at 57 et seq.; Bradgate, "Termination for Breach", in: Birds and Bradgate (ed.), *supra* n. 77, at 45 et seq.; Bradgate, *supra* n. 83, at 311. Cf. Beale, *supra* n. 16, at 18 et seq., 28 et seq.

85) Bradgate and White, in: Birds and Bradgate (ed.), *supra* n. 77, at 57 et seq.

pay in exchange for that.⁸⁶⁾ In this light, where the seller fails to tender the goods which conform to the contract, it will justify the buyer in withholding performance of his duty to accept the goods and to pay the price agreed.⁸⁷⁾

2) Defects in documents

In documentary sales, English law may confer on the buyer (and his

86) Cf. The SGA ss. 27, 28.

87) According to this view, the buyer's right of termination must be justified on another ground. It is argued that all cases of non-conforming delivery with a condition would render the seller in a breach of condition and confer a right of termination on the buyer immediately after he lawfully rejects the goods where the contract is non-severable (See Bradgate and White, in: Birds and Bradgate (ed.), supra n. 77, at 75 et seq.; Bradgate, supra n. 83, at 312 et seq.; Bridge, supra n. 81, at 162 et seq. and 197 et seq.; Carter, supra n. 82, at paras. 308, 407, 569, 572; Atiyah and Adams, supra n. 81, at 445 et seq.; Reynolds, Guest (ed.), supra n. 83, at para. 10-027; Guest and Harris, Beale (ed.), *Chitty on Contracts*, (1999), at para. 43-042; Treitel, supra n. 15, at 259 et seq., 361 et seq. Cf. The use of may in s. 11(3) is significant in that it is applicable to the cases where the contract is severable. See Reynolds, Guest (ed.), supra n. 83, at para. 10-028; Bradgate and White, in: Birds and Bradgate (ed.), supra n. 77, at 69; Bradgate, supra n. 83, at 247). On the other hand, some contend that as long as the time for delivery has not expired, non-conforming delivery of goods would not necessarily place the seller in a breach of condition so that the buyer would not be conferred an immediate right of termination because their understanding is based on the idea that the seller's duty is to deliver in compliance with condition within the contractual due time (See Goode, supra n. 83, at 362 et seq.; Beale, supra n. 16, at 90 et seq.; Lord Devlin, "Treatment of Breach of Contract", (1966) *C.L.J.* 192, at 194; Apps, "The Right to Cure Defective Performance", (1994) *L.M.C.L.Q.* 525, at 534 et seq.). Therefore, the seller is entitled to cure a non-conforming delivery until the expire of the contractual time for delivery where the buyer lawfully rejects and the buyer will be allowed to terminate the contract in the following circumstances. First, the time for delivery which is of the essence of the contract has elapsed. Second, a reasonable additional time for the seller's conforming delivery set by the buyer has passed after the contractual time for delivery of which is not initially deemed of the essence of the contract (See *Raineri v. Miles* [1981] AC 1050; *Hartley v. Hymans* [1920] 3 KB 475, at 495, per McCardie J. Cf. For more detail about the notice procedure to set an additional time which makes time essential, see Carter, supra n. 82, at paras. 554 et seq.). Third, a frustrating time has passed after the contractual time for delivery of which is not deemed of the essence of the contract (See *Universal Cargo Carriers Corp. v. Citati* [1957] 2 QB 401). Fourth, the seller's conduct is tantamount to a repudiation; e.g., insisting on his first non-conforming delivery, refusing to cure, attempting to cure in a way that indicates his unwillingness or inability to perform his contract or in a way that destroys the buyer's confidence (See Goode, supra n. 83, at 365 et seq.; Beale, supra n. 16, at 91 et seq.; Lord Devlin, *id.*, at 203).

bank in the case of payment through documentary credit) the right to reject shipping documents which do not correspond with the contract.⁸⁸⁾ The documents consist essentially of a bill of lading, insurance policy and sale's invoice in accordance with the requirements stated in the contract.⁸⁹⁾ The buyer's right to reject the documents may be justified on the ground of the same general principles as explained in the case of the buyer's right to reject the goods delivered in that his duty to accept the seller's performance is subject to the condition that such performance is in conformity with the contractual terms.⁹⁰⁾ Thus, the seller's failure to tender documents in accordance with the contract may entitle the buyer to refuse to accept them and to pay the price.⁹¹⁾

Having identified the right to reject the non-conforming documents in English law, the question is whether the buyer may be entitled to a further right to reject non-conforming goods when the documents which appear perfectly in accordance with the contract have been accepted by the buyer, but it turns out later that the goods which are the subject of the documents are not conformed with the contract. The position in English law is very clear that the buyer has two separate rights to reject non-conforming goods

88) E.g., *Finlay (James) & Co. v. NV Kwick Hoo Tong* [1929] 1 KB 400 (in this case, goods were shipped out of time under a falsely dated bill of lading and it was held that the seller was in breach of contract as to not only his duty to ship the goods on time but also his duty to date the bill of lading accurately which entitles the buyer to reject them).

89) The contract may require the seller to tender additional documents, such as a certificate of quality, origin or inspection (as to the state of the goods at the time of shipment) (see e.g., FOSFA 53 Clause 14; *Ficom SA v. Sociedad Cadex Lda* [1980] 2 Lloyd's Rep. 118; *Berger & Co. Inc. v. Gill & Duffs SA* [1984] AC 382; *Cremer v. General Carriers SA* [1974] 1 All ER 1), performance guarantees (e.g., *Sate Trading Corp. of India v. M. Golodetz Ltd.* [1989] 2 Lloyd's Rep. 277), licences or permits required in connection with the shipment, or advance notice of the arrival of the ship on which the goods carried at the port of destination (e.g., *Nova Petroleum International Establishment v. Tricon Trading Ltd.* [1989] 1 Lloyd's Rep. 312). However, one must note that not all documents required by the contract necessarily constitute 'shipping documents', the tender of which is a condition of obtaining payment. This generally depends upon the interpretation of the contract.

90) Jafarzadeh, *supra* n. 44, at 60.

91) Jafarzadeh, *supra* n. 44, at 60.

and documents.⁹²⁾ This is based on the fact that in a documentary sale there are two separate duties relating to the documents and to the goods: a duty to ship⁹³⁾ and a duty to tender proper shipping documents in accordance with the contract.⁹⁴⁾ The clearest example can be found in *Kwei Tek Chao v. British Traders and Shippers Ltd.*⁹⁵⁾ In this case concerning the CIF Hong Kong sale of a certain chemical, shipment occurred in fact on 3 November instead of the contractual shipment requirement no later than 31 October, but the bill of lading was falsely dated to show a 31 October shipment. Devlin J was of the view that the right to reject non-conforming documents is distinct from the right to reject non-conforming goods; the former arises on tender of the documents and the latter when the goods are landed and found not to comply with the contract.⁹⁶⁾ ⁹⁷⁾ Therefore, the goods may be rejected, even though the buyer has previously accepted documents which were deemed to be perfectly in accordance with the contract, if the goods suffered from some defect not apparent on the face of the documents.⁹⁸⁾ However, one must note that where the buyer takes up a

92) Cf. Treitel, "Rights of Rejection under CIF Sales" (1986) *LMCLQ* 565.

93) Or a duty to appropriate to the contract goods already afloat, which the seller may have shipped himself or purchased directly or indirectly from the shipper.

94) E.g., *Finlay (James) & Co. v. NV Kwick Hoo Tong* [1929] 1 KB 400 (in this case, goods were shipped out of time under a falsely dated bill of lading and it was held that the seller was in breach of contract as to not only his duty to ship the goods on time but also his duty to date the bill of lading accurately).

95) [1954] 2 QB 459.

96) *Id.*, at 480.

97) However, the existence of two separate rights can be denied in the following three cases; first, where the goods arrive before the shipping documents and the buyer takes delivery or otherwise deals in a way that accepts them (see *Tradax International SA v. Goldschmidt SA* [1977] 2 Lloyd's Rep 604), second, where the breach of contract as to the documents and the breach as to the goods are in effect not two distinct breaches but one breach only and the buyer accepts the documents (see *Panchaud Freres SA v. Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53; *Bremer v. Vanden Avenne-Izegem* [1978] 2 Lloyd's Rep 109; *Bremer Handelsgesellschaft mbH v. C Mackprang Jr* [1979] 1 Lloyd's Rep 221), third, where a dealing with documents may affect the buyer's power to reject the goods in practice, e.g., if the buyer has resold the documents, the buyer may find that it is hard to reject the goods unless the sub-buyer himself rejects (equally he is unlikely to want to reject except in this case) Atiyah and Adams, *supra* n. 81, at 467 et seq.; Bridge, *supra* n. 81, at 191.

document which apparently shows a defect in the goods, he may be deprived of his right to reject the defective goods on their arrival on the ground of analogous doctrine of waiver, estoppel or acceptance rules stated in the SGA s. 35 unless a different defect not revealed by the document becomes apparent on delivery.⁹⁹⁾ Equally, the buyer may be entitled to reject documents which do not correspond with the contract, whether or not the goods themselves are conformed to the requirements stated by the contract¹⁰⁰⁾ or whether or not a defect of the goods on their face would, of itself, have allowed him to reject the goods.¹⁰¹⁾ Yet, the position may be different if the document which reveals a defect in the goods is not, per se, a defective document.¹⁰²⁾ For instance, a certificate of quality is not a defective document merely because it indicates that the goods contain a slightly higher percentage of impurities than is permitted by the contract.¹⁰³⁾ Consequently, such a indication in a certificate of quality may not, per se, confer on the buyer the right to reject the documents, although it may entitle him to reject the goods in certain cases where the certificate shows that the goods have a defect that amounts to a breach of condition and if either the goods actually suffer from such a defect or the certificate is conclusive as to their quality or description under a certificate clause.¹⁰⁴⁾

98) *Suzuki & Co v. Burgett and Newsam* [1922] 10 Ll LR 223; *Kwei Tek Chao v. British Traders and Shippers Ltd* [1954] 2 QB 459.

99) *Panchaud Freres SA v. Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53; *Bremer v. Vanden Avenne-Izegem* [1978] 2 Lloyd's Rep 109; *Bremer Handelsgesellschaft mbH v. C Mackprang Jr* [1979] 1 Lloyd's Rep 221. For the detailed discussions as to loss of the right to reject the goods on the basis of waiver, estoppel or acceptance, see Treitel, Guest (ed.), supra n. 83, at para. 19-129 et seq.

100) *Tamvaco v Lucas* (No.1) [1859] 1 E & E 581; *Re General Trading Co Ltd and Van Stolk's Commissiehandel* [1910] 16 Com Cas 95.

101) *Cehave NV v. Bremer Handelsgesellschaft mbH* (The Hansa Nord) [1976] QB 44.

102) Treitel, Guest (ed.), supra n. 83, at para. 19-126 et seq.

103) *Tradax Internacional SA v. Goldschmidt SA* [1977] 2 Lloyd's Rep 604; Treitel, Guest (ed.), supra n. 83, at para. 19-126. Contra: Debattista, *Sale of Goods Carried by Sea*, (1990), at 242.

104) *Tradax Export SA v. European Grain & Shipping Co.* [1983] 2 Lloyd's Rep 100; Treitel, Guest (ed.), supra n. 83, at para. 19-126 et seq.

Nevertheless, it seems true that the buyer may be also entitled to reject the documents if the defect in the goods is apparent on the face of the documents and such as to justify rejection of the goods not because they are in themselves defective, but because they show a defect in the goods that allows him to reject the goods.¹⁰⁵⁾

2. Seriousness of a defect

Given that a separate right to withhold performance is admitted in English law, any breach of condition specified in ss. 13-15 may, in principle, permit the buyer to reject the goods delivered and to refuse to pay the price agreed without terminating the contract whether or not the consequence of breach is serious. It does not, however, apply in non-consumer sales where the breach is so slight that it would be unreasonable for the buyer to exercise the right.¹⁰⁶⁾ Similarly, although the seller's delivery of either excess or deficient quantity of the goods may basically grant the buyer the right to reject all the goods delivered, the business buyer may not be entitled to reject the whole where the deficiency or excess is so slight that it would be unreasonable to reject the whole.¹⁰⁷⁾ The purpose behind ss. 15A and 30(2A) is to prevent rejection in bad faith, where the breach is really so insignificant that, as a matter of fact, rejection should not be permitted.¹⁰⁸⁾

Insofar as a defect in documents is concerned, it seems that the right of rejection is, in principle, so strict that, no matter how trivial the defect is, the buyer may be entitled to the right to reject the documents since ss. 15A and 30(2A) are only applicable to the cases of qualitative or

105) *Vargas Pena Apeztegui y Cia v. Peter Cremer GmbH* [1987] 1 Lloyd's Rep 394, 396, 398.

106) The SGA s. 15A(1).

107) The SGA s. 30(2A).

108) Law Com. Final Report, *Sale and Supply of Goods* (Law Com. N. 160, Cn. 137, 1987) at 4.18.

quantitative defects stated in ss. 13-15, 30. However, it should be noted that where the buyer intends to reject the documents on the ground that, although they are not defective in themselves, they disclose a defect in the goods,¹⁰⁹⁾ his right to reject the documents is likely to be subject to ss. 15A and 30(2A). Therefore, a certificate of quality indicating that the goods contain a slightly higher percentage of impurities than is permitted by the contract¹¹⁰⁾ cannot be rejected because it would be unreasonable to allow the buyer to reject the goods.¹¹¹⁾

IV. Korean law

1. Availability of the buyer's right to withhold performance

1) Defects in quality or quantity

Whether the buyer's right to withhold performance in the cases where the goods delivered suffer from discrepancies in point of quality or quantity is recognized in Korean law is, it is suggested, unclear. The reason for this is that it is uncertain about whether the seller is assumed to take a contractual duty to deliver non-defective goods in the sale of specific goods which is deemed to be a cornerstone in the foundations of the buyer's right to withhold performance; that is, insofar as one assumes the absence of the duty, it means to deny reciprocity between the seller's duty to deliver non-defective goods and the buyer's duty to accept the goods delivered and make payment, and consequently the buyer is not entitled to rely his refusal to perform on the seller's delivery of defective goods. Furthermore, it is not

109) *Vargas Pena Apezteguia y Cia v. Peter Cremer GmbH* [1987] 1 Lloyd's Rep 394, 396, 398.

110) As is in the case *Tradax Internacional SA v. Goldschmidt SA* [1977] 2 Lloyd's Rep 604.

111) The SGA s. 15A.

as clear as is thought even in the cases of the sale of generic goods because Korean law does not plainly answer to what extent arts. 374¹¹²⁾ and 462¹¹³⁾ can be applicable to the cases of the sale of generic goods. The uncertainty is the central issues in the disputes as to the legal nature of the seller's guarantee liability (*Ha-ja-dam-bo-chaek-im*) which are divided into two groups in a broad level: the legal liability theory (*Bup-jeong-chaek-im-seol*)¹¹⁴⁾ and the contractual liability theory (*Chae-moo-bul-e-haeng-seol*).¹¹⁵⁾

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- 112) Article 374 (Duty of an Obligor to Deliver a Specific Thing with Good Manager's Care) If the delivery of a specific thing is the subject of a claim the obligor is bound to preserve such thing with the care of a good manager until it is delivered.
- 113) Article 462 (Delivery of a Specific Thing in its Existing Condition) If the delivery of a specific thing is the subject of the obligation, the obligor must deliver the thing in the condition in which it exists at the time when the delivery thereof is due.
- 114) For the scholars in favour of this theory, see Tae-jae Lee, *Chae-kwon-gak-ron* (Particulars in Obligatory Law), (1982), at 173; Ki-sun Kim, supra n. 2, at 133; Seok-woo Kim, *Chae-kwon-bup-gak-ron* (Particulars in Obligatory Law), (1978), at 182; Young-hwan Lee, "Jong-ryu-mae-mae-wa Ha-ja-dam-bo-chaek-im (Generic Goods Sales and the Guarantee Liability for Defective Goods)", (1977) 7(6) *Bup-jeong* 115; Young-hwan Lee, "Ha-ja-dam-bo-chaek-im-eoi Bon-jil-ae-kwan-han E-ron-eoi Jae-gum-toe (Re-examination of the theories as to the Nature of the Seller's Guarantee Liability)", (1989) 16(12) *Ko-shi-yoen-koo* 109; Jeung-han Kim, supra n. 2, at 146; Hyun-chaek Kim, *Joo-seok-chaek-kwon-gak-chik* (Commentary on Particulars in Obligatory Law), Book I, (1989), at 541; Hyun-tae Kim, *Shin-go-chaek-kwon-bup-gak-ron* (New Edition of Particulars in Obligatory Law), (1975), at 117 et seq.; Won-lim Jee, "Chae-moo-bul-e-haeng-eoi Yu-hyung-ae-kwan-han Yeon-koo (A Study as to the Categories of Non-performance)", (1997) 15 *Min-sa-bup-hak* 374, at 400 et seq.; Yeon-eoi Eo, "Ha-ja-dam-bo-chaek-im-eoi Bon-jil (The Nature of the Guarantee Liability for Defective Goods)", (1989) 226 *Pan-rae-wol-bo* 19, at 21 et seq.; Yun-jik Kwak, supra n. 2, at 227 et seq. (He argues that the seller's guarantee liability is regulated under the name of legal liability due to its historical development, even though it is generally admitted that the nature of the seller's guarantee liability is a contractual one). For the cases in favour of this theory, see e.g., the Korean Supreme Court Cases, 30/10/1957, 4290 *Min-Sang* 552; 21/4/1960, 4292 *Min-Sang* 385.
- 115) For the scholars in favour of this theory, see Hyung-bae Kim, supra n. 2, at 309 et seq.; Hyung-bae Kim, *Chae-kwon-chong-ron* (General Rules in Obligatory Law), (1998), at 224 et seq.; Eun-Young Lee, supra n. 2, at 206 et seq.; Juk-in Hwang, "Ha-ja-dam-bo-chaek-im-eoi Bup-jeok-seong-jil (The Legal Nature of the Guarantee Liability)", (Mar., 1979) 24(3) *Ko-shi-gae* 81; Kyu-chang Cho, "Mool-kun-eoi Ha-ja-dam-bo-chaek-im (The Guarantee Liability for Defective Goods)", (1983) 21 *Bup-hak-non-jip* (The Institute of Legal Study of Korea University) 221; Joo-soo Kim, *Chae-kwon-gak-ron* (Particulars in Obligatory Law), (1995), at 198 et seq.; Sang-hoon Kim,

Some maintain the view that where the specific goods are concerned, it denies the seller's contractual duty to deliver non-defective goods and limits the duty to the delivery of the goods in status quo at the time of delivery on the basis of the principle of specific goods dogma which is effectively expressed in art. 462.¹¹⁶⁾ According to this view, it seems natural to say that the buyer is not entitled to the right to refuse to perform his part of the contract (refusing to take the seller's delivery of defective goods¹¹⁷⁾ and to make payment¹¹⁸⁾ because it is understood that, once the seller delivers the goods as they are at the time of delivery, the seller is deemed to have completed his contractual duty of delivery.¹¹⁹⁾ Even if the buyer may not be permitted to refuse to perform his part of the contract, he may be entitled to claim damages provided that the seller is found a fault in the

"Ha-ja-dam-bo-chaek-im-eoi Bon-jil-ron (The Nature of the Guarantee Liability for Defective goods)", (1984) 24 *Bup-jeong-non-chong* (The College of Law, Choong Ang University) 75; Dae-jeong Kim, "A Study on the Seller's Guarantee Liability", The Graduate School of Sung Kyun Kwan University, (1990), PhD Thesis, at 199 et seq.; Bup-young Ahn, "Mae-mae-mok-jeok-mool-eoi Ha-ja-ro-in-han Son-hae-bae-sang (Damages for Defective Goods)", (1995) 11, 12 *Min-sa-bup-hak* 194; Choon-soo Ahn, "Ha-ja-dam-bo-bup-sang-eoi Jae-moon-jae (Problems under the Guarantee Liability Law)", (1995) 11 *Min-sa-bup-hak* 419; Sang-kwang Lee, "Ha-ja-dam-bo-chaek-im-eoi Ki-bon-moon-jae (The Basic Matters in the Seller's Guarantee liability)", (1998) 5(1) *Bee-kyo-sa-bup* 283, at 283 et seq. For the cases in favour of this theory, see e.g., the Korean Supreme Court Cases, 14/11/1989, 89 *DaKa* 15298; 14/4/1992, 91 *Da* 17146.17153; 30/6/1995, 94 *Da* 23920.

- 116) Yun-jik Kwak, *Chae-kwon-chong-ron* (General Rules in Obligatory Law), (1999), at 48 et seq.; Seok-woo Kim, *Chae-kwon-bup-chong-ron* (General Rules in Obligatory Law), (1976), at 45 et seq.; Sang-yong Kim, *Chae-kwon-chong-ron* (General Rules in Obligatory Law), (1996), at 47 et seq.; Yong-han Kim, *Chae-kwon-chong-ron* (General Rules in Obligatory Law), (1983), 44 et seq.; Kyung-hak Jang, *Chae-kwon-chong-ron* (General Rules in Obligatory Law), (1992), at 39 et seq. In addition, most scholars who support the legal liability theory as to the legal nature of the seller's guarantee liability which is based on the principle of specific goods dogma seem to be within this view. See supra n. 114; Sik Choi, "Mae-joo-eoi Dam-bo-chaek-im-kwa Bool-wan-jeon-e-haeng-kwa-eoi Kwan-kae (The Relationship between the Seller's Guarantee Liability and Incomplete Performance)", (Nov., 1961) 16(11) *Bup-jeong* 49.
- 117) For the duty to take the seller's delivery, see Yun-jik Kwak, supra n. 2, at 260 et seq.; Hyung-bae Kim, supra n. 2, at 308; Eun-young Lee, supra n. 2, at 205 et seq.
- 118) For the duty to make payment, see KCC Arts. 563 and 568(1).
- 119) Yun-jik Kwak, supra n. 116, at 486.

performance of his duty to preserve the goods with the care of a good manager until they are delivered and the goods become defective because of the fault.¹²⁰⁾ ¹²¹⁾ In addition, irrespective of his entitlement to claim damages depending upon the seller's fault, he may rely on the remedies specified under the rules of the seller's guarantee liability which are termination, damages and price reduction in the cases¹²²⁾ where a balance in terms of value for money has been upset due to the existence of a defect.¹²³⁾ In relation to the sale of generic goods, it is argued that the rules explained above are correspondingly applicable to the cases of generic goods as from the time when the generic goods are specified because it is understood that once the generic goods are specified, the goods are to be treated as specific goods.¹²⁴⁾ In this light, the buyer may be allowed to refuse to perform his part of the contract provided that a defect occurs prior to the specification of the generic goods and the goods are delivered as they are at the time of specification, whereas a defect formed after the specification may not confer on him the right.

On the other hand, others contend that art. 462 does not deal with the matter of whether or not the seller's delivery of defective goods as they are at the time of delivery is treated as a complete performance of his duty of delivery.¹²⁵⁾ The meaning of art. 462 is rather restricted to that in the sale of specific goods the buyer may be allowed and obliged to deliver the goods as they are at the time of delivery as long as an identity of the goods agreed can be retained even in the existence of a defect and such existence does not necessarily mean that it is related to an impossibility of

120) KCC Art. 374.

121) *Supra* n. 116.

122) KCC Arts. 574, 580.

123) *Supra* n. 116.

124) Yun-jik Kwak, *supra* n. 116, at 56 et seq.; Yong-han Kim, *supra* n. 116, at 54 et seq.; Sang-yong Kim, *supra* n. 116, at 54 et seq.; Seok-woo Kim, *supra* n. 116, at 52 et seq.; Kyung-hak Jang, *supra* n. 116, at 49 et seq.

125) Choon-soo Ahn, *supra* n. 115, at 426; Eun-young Lee, Min-bup-hak-gang-eoi (Lectures in Civil Law Study), (1996), at 529 et seq.; probably Hyung-bae Kim, *supra* n. 115, at 56.

performance case.¹²⁶⁾ According to this view, the seller is assumed to take a contractual duty to deliver non-defective goods in the sale of generic goods and even in the sale of specific goods, denying the principle of specific goods dogma.¹²⁷⁾ Thus, the seller's delivery of defective goods may amount to an incomplete performance of his duty of delivery so that it may entitle the buyer to refuse to perform his part of the contract.¹²⁸⁾ The buyer's right to refuse to perform his part of the contract in the case of specific goods is, however, limited to the cases where a defect can be repairable without unreasonable costs and inconvenience.¹²⁹⁾

2) Defects in documents

The KCC seems silent on the question of whether the buyer has a separate right to refuse to take up documents which are not in accordance with the contract because it does not specifically in the first place deal with whether the seller takes a duty to tender documents relating to the goods in accordance with the contract. In addition, there is not much discussion by academic writers on the question at present, although some maintain that the seller is under the duty to tender documents proving the transfer of property.¹³⁰⁾ The KCC and academic writers seem also silent on the issue of whether the buyer may be entitled to a further right to refuse to take the seller's delivery of non-conforming goods even where the buyer

126) Choon-soo Ahn, *supra* n. 115, at 426.

127) This view seems to be also supported by most scholars who are in favor of the contractual liability theory regarding the legal nature of the seller's guarantee liability. See *supra* n. 115.

128) Hyung-bae Kim, *supra* n. 115, at 311 et seq., 342 et seq.; Choon-soo Ahn, *supra* n. 115, at 432 et seq. See also KCC Arts. 536, 588.

129) Choon-soo Ahn, *supra* n. 115, at 434.

130) Yun-jik Kwak, *supra* n. 2, at 223; Hyung-bae Kim, *supra* n. 2, at 304; Eun-young Lee, *supra* n. 2, at 203. ; Tae-hee Lee, "Kook-jae-mae-mae-gae-yak-ae-kwan-han UN-hyup-yak-sang-eoi Dang-sa-ja-eoi Eoi-moo (The Obligations of the Parties under the UN Convention on the International Sale of Goods", in: Hong-keun Im and Tae-hee Lee (ed.), *Topics on the UN Covention on the International Sale of Goods*, (1991), at 117.

accepted documents which are perfectly in accordance with the contract themselves, but indicate defects in the goods. Nevertheless, it is submitted that the buyer's acceptance of such documents may deprive him of the right to refuse to take delivery of the goods unless at the time of acceptance of the documents he had no knowledge of the existence of defects and no means to know them on the ground of the principle of good faith underlying the KCC.¹³¹⁾

2. Seriousness of a defect

Given that the buyer's right to refuse to perform his part of the contract in Korean law is conferred upon him where the seller delivers defective goods or documents, the availability of the right depends upon whether a defect takes an important or trivial part of the goods as a whole.¹³²⁾ The buyer, therefore, may not be able to rely on the right provided that his exercise of the right would be contrary to the principle of good faith, having regard in particular to the relatively slight or trivial nature of the defect.¹³³⁾

V. Evaluation

1. Availability of the buyer's right to withhold performance

1) Defects in quality or quantity

In the event of the seller's delivery of the goods which are defective in

131) For the principle of good faith under the KCC in general, see Yun-jik Kwak, supra n. 116, at 14 et seq.; Hyung-bae Kim, supra n. 115, at 17 et seq.

132) Yun-jik Kwak, supra n. 2, at 106 et seq.; Hyung-bae Kim, supra n. 2, at 152.

133) Yun-jik Kwak, supra n. 2, at 106 et seq.; Hyung-bae Kim, supra n. 2, at 152.

terms of quality or quantity, this study has shown that each jurisdiction lacks in any specific provision or case law a buyer's right to withhold performance. Nevertheless, each jurisdiction has tried to recognize the right in their own way, having regard to their own particular liability system, on the basis of the sales contract being deemed of the synallagmatic nature. In contrast, it seems also true that there has been a strong argument in English law which is against recognizing the right to withhold performance within its own liability system.¹³⁴⁾ Although non-recognition of the right in English law might be plausible under the interpretation of its own existing law, it is doubted in that it has taken into enough account the primary functions and benefits of withholding performance in practice which were examined at the beginning of this study;¹³⁵⁾ insofar as one admits that the right plays significant roles in practice with real or perceived benefits and it is not hard in practice to witness the exercise of the right by the parties, it seems to be problematic not to have the right. This could be supported by the recognition of the right to withhold performance, although not in a specific manner, under the CISG¹³⁶⁾ which is appraised worldwide as a model law because of its modernity and highly developed system.

In relation to unavailability of the right to withhold performance in Korean law argued by some scholars, the principle of specific goods dogma on which it is based may be justified where non-substitutable and non-repairable specific goods are concerned because there is no point in allowing the buyer to withhold performance as long as the defective goods delivered are not substitutable or repairable. However, its problem is in that the principle may extend to substitutable and repairable goods; the seller's delivery of the goods in status quo at the time of delivery is deemed to be fulfillment of his contractual duty of tender and consequently the buyer may not be entitled to the right to withhold performance even if the buyer's

134) See supra n. 82 and accompanying texts.

135) See supra n. 13-29 and accompanying texts.

136) See supra n. 45-49 and accompanying texts.

payment is made in exchange for non-defective goods and the defective goods delivered are substitutable or repairable. The principle may turn out at variance with one's ordinary expectation in the context that the buyer's expectation from his payment is generally satisfied with fulfillment of the seller's contractual duty to deliver the goods in the same condition 'as they should be' rather than 'as they are'.¹³⁷⁾ In addition, the position taken by the CISG and English law that the seller is under the contractual duty to deliver the non-defective goods in the sale of both generic and specific goods which is linked with the buyer's duty to pay and take the seller's delivery seems to suggest that the principle of specific goods dogma should be reconsidered in Korean law.¹³⁸⁾

2) Defects in documents

Where the seller tenders documents which do not conform with the contract, the question arises, first, whether the buyer may be given the right to reject non-conforming documents and, second, given that he has the right, whether he may be granted a further right to reject the defective goods even if he has accepted the documents which appears to be perfectly in accordance with the contract, but it turns out later that the goods are not conformed with the contract.

Although the CISG has arguably recognized the right to reject non-conforming documents by reading arts. 30 and 53 as referring to each other,¹³⁹⁾ it does not seem to properly answer the second question. The position in Korean law seems even poorer because of its silence both in the KCC and in academic writings as to the matters of documentary sales.¹⁴⁰⁾

137) Juk-in Hwang, *supra* n. 115, at 83 et seq. For the further argument that the seller takes a contractual duty to deliver the goods as they should be, see Byung-Mun Lee, *A Comparative Study on the Seller's Liability for Non-conforming Goods under CISG, English law, European Law and Korean Law*, Doctoral thesis in Univ. of Warwick, (2001), at 68 et seq.

138) See *supra* n. 45-49, 78-81, 83-87 and accompanying texts.

139) See *supra* n. 50-63 and accompanying texts

140) See *supra* n. 130-131 and accompanying texts.

In contrast, it has been found that English law has addressed the issues in detail. By classifying the seller's duty to tender conforming documents in accordance with the contract as a condition, the buyer is conferred the right to reject them for any lack of conformity.¹⁴¹⁾ In addition, English law has recognized the right to reject non-conforming documents separate from the right to reject non-conforming goods.¹⁴²⁾ Thus, the buyer may be entitled to the right to reject non-conforming documents even though the goods themselves are perfectly in accordance with the contract;¹⁴³⁾ and he may not lose the right to reject non-conforming goods even after accepting the documents only if the goods suffered from a defect does not appear on the face of the documents.¹⁴⁴⁾ These rules in English law, it is submitted, could be utilized as a guideline to fill the gap in the CISG and Korean law as long as it seems difficult to see any problem in light of the practicability and appropriateness to control documentary sales.

2. Seriousness of a defect

As to the right of withholding performance where a defect in the goods is minor, the position in English law regarding commercial sales, Korean law, and the CISG seems more or less same in that a minor defect may not entitle the buyer to withhold performance because otherwise it would be contrary to the principle of good faith.¹⁴⁵⁾ On the other hand, insofar as a defect in documents is concerned, the study has shown that the position in English law may yield a significant departure from that in the CISG and Korean law in that while the former is so strict that the buyer may be granted the right to reject the documents irrespective of minor nature of a

141) See *supra* n. 90-91 and accompanying texts.

142) See *supra* n. 92-97 and accompanying texts.

143) See *supra* n. 100-105 and accompanying texts.

144) See *supra* n. 98-99 and accompanying texts.

145) See *supra* n. 66-75, 106-108, 132-133 and accompanying texts.

defect,¹⁴⁶⁾ the latter may unexceptionally rely on minor nature of a defect. It seems true that there is a danger in that some degree of unavoidable vagueness in stating the requirement of minor nature of a defect may be an undesirable element of uncertainty as to when a breach will entitle the buyer to reject the documents and to refuse payment.¹⁴⁷⁾ However, a flexible approach made by each jurisdiction in light of the principle of good faith can be appraised in the context that sufficient flexibility in the requirement of minor nature of a defect may enable justice to be done in individual case. In addition, although it is conceivable that there may be a case requiring a strict approach, it is submitted that an analogical interpretation of the minor nature of a defect along with the principle of good faith could achieve the same results as a strict approach. Furthermore, any resultant uncertainty may be resolved as time goes on because as the cases as to what breach would amount to a minor defect are accumulated the rules may become clearer with the assistance of modern communication.

VI. Conclusion

The study has found that each jurisdiction does not have any provision or case law specifically dealing with the buyer's right to withhold performance where the seller delivers the goods which are defective in terms of quality or quantity. The absence of such provision or case in each jurisdiction has resulted in either disputes or uncertainty. However, the study executed in light of the primary functions and benefits of the right in practice and the discipline of comparative law has revealed that, first, the view in English law which is against recognizing the right may not be justified when one considers the practical importance of having the right

146) See supra n. 109-111 and accompanying texts.

147) Treitel, supra n. 15, at 350; Collins, *The Law of Contract*, (1997), at 334 et seq.; Beale, supra n. 16, at 98 et seq.

and the position taken by the CISG as a well developed and modernized law. Secondly, the view in Korean law which argues that the principle of specific goods dogma on which it is based is extended even to substitutable or repairable goods cannot be also justified on the ground of one's ordinary expectation and the position under the CISG and English law which imposes on the seller a contractual duty to deliver non-defective goods insofar as the buyer's payment is deemed to be made in exchange for the seller's delivery of non-defective goods and they are substitutable or repairable. Regarding the right to withhold performance in the event of the seller's tender of defective documents, the study has shown that the relatively detailed rules in English law may be utilized as a guideline to fill the gap in the CISG and Korean law in terms of the practicability and appropriateness to govern documentary sales. Furthermore, it has been found that the position in English law which confers on the buyer the right to withhold performance for a trivial defect in documents may be unreasonable in terms of one's need to enable justice to be done in individual cases.

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ABSTRACT

A Comparative Study on the Buyer's Right to Withhold Performance for the Seller's Delivery of Defective Goods and Documents in International Sales within the CISG, English law and Korean law

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The study is a comparative and analytical study which comprises of the analysis of the rules of the buyer's right to withhold performance where the seller delivers defective goods or documents of three legal systems; the CISG, English law and Korean law. The purposes underlying this study are twofold. The first is to clarify the current position as to the right of withholding performance in the event of the seller's tender of defective goods or documents in Korean law, CISG and English law so that it may assist the parties in drafting the buyer's right to withhold performance in their own contract. The second is to compare the rules of one jurisdiction with those of other jurisdictions and to evaluate the rules in light of the practical functions and benefits of the right to withhold performance and the discipline of comparative law the basic question of which is whether a solution from one jurisdiction may facilitate the systematic development and reform of another jurisdiction.

It shows that each jurisdiction does not have any provision or case law specifically dealing with the buyer's right to withhold performance where the seller delivers the goods which are defective in terms of quality or quantity. The absence of such provision or case in each jurisdiction has resulted in either disputes or uncertainty. However, the study executed in light of the primary functions and benefits of the right in practice and the discipline of comparative law reveals that, first, the view in English law which is against recognizing the right may not be justified when one

considers the practical importance of having the right and the position taken by the CISG as a well developed and modernized law, second, the view in Korean law which argues that the principle of specific goods dogma on which it is based is extended even to substitutable or repairable goods cannot be also justified on the ground of one's ordinary expectation and the position under the CISG and English law which imposes a contractual duty to deliver non-defective goods on the seller insofar as the buyer's payment is deemed to be made in exchange for the seller's delivery of non-defective goods and they are substitutable or repairable. Regarding the right to withhold performance in the event of the seller's tender of defective documents, the study shows that the relatively detailed rules in English law may be utilized as a guideline to fill the gap in the CISG and Korean law in terms of the practicability and appropriateness to govern documentary sales. Furthermore, it is found that the position in English law which confers on the buyer the right to withhold performance for a trivial defect in documents may be unreasonable in terms of one's need to enable justice to be done in individual cases.

Key Words : CISG, International Sale of Goods