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A Comparative Study on Change Circumstances in International Commercial Contracts

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I. Introduction

'Principle of Change Circumstances'(clausula rebus sic stantibus ; change of circumstances) means the legal principles that in case it occurs the unreasonable results against the principle of good faith to maintain/enforce the validity of the relevant legal behavior or the contract conditions like that as the circumstance existing at the time when the legal behavior, especially, contract was concluded or the situation doing such behavior is obviously changed, the legal validity of the contract shall be changed to be proper to new circumstance or negate it. Namely, the principle of change

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circumstances, as the piece of the concrete application among the legal behaviors of the principle of good faith, is the legal principles of private law that is mainly applied to the continuous contract in particular among the legal behaviors.

However, despite the principle of change circumstances is widely recognized under the domestic positive law of every nation and norm of the international law, the standards to apply this is not regular, and for example, there is the case that it has been retained to the substantive enactment, and that the judicial precedent has been retained to the recognition of the court like our country.

Under the circumstance of the complicated international commerce, the trend of the modern contract law has been expanded in the sequence that the principle of change circumstances is also strictly applied under the principle of 'Contract shall be surely observed'(pacta sunt servanda ; pacts must be respected), and in this coherence, such principle of change circumstances is expressively regulated or applied by the international uniform laws also such as United Nations Convention on Contracts for the International Sale of Goods (here-in-after called as 'CISG')¹⁾ of United Nations Commission on International Trade Law (UNCITRAL), Unidroit Principles of International Commercial Contracts (here-in-after called as 'PICC')²⁾ announced by International Institute for the Unification of Private Law (UNIDROIT)³⁾, Principles of European Contract Law (here-in-after

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- 1) The treaty countries, which have ratified this pact and made it into the domestic law until this study is submitted, are totally 75 ones. As our country submitted the application for this pact to UN on February 17, 2004, it has become the domestic law from March 1, 2005 as per Term (2), Article 101 of the said pact. So, as for the international goods trade, between our civil/commercial law and CISG, the former occupies the general law while the latter occupies the position of the special law, and CISG is applied with priority between the special law and general law.
 - 2) Being it known, PICC has been newly supplemented as UNIDROIT Principles 2004. The example for the regulations here-in-after is made as per the revised and enlarged edition ; *UNIDROIT PRINCIPLES of International Commercial Contracts*, UNIDROIT, 2004.
 - 3) www.unidroit.org/english/members/main.htm ; The member countries, which have

called as 'PECL')⁴⁾ established by Commission on European Contract Law (here-in-after called as 'CECL')⁵⁾ and etc.

This study will look into the implications relative to the legal standards and legal enactment for the change circumstances being centered on the norm of international uniform contract, namely, the regulated contents of CISG, PICC and PECL and the judicial precedent.⁶⁾ The reasons to select the individual legal norm as the comparative legal analysis device are originated from ① The fact that the individual legal norm aims at the same legislative purport in proper part both in name and reality, ② The fact that can provide the legal actual benefit in recomposing the common legal principles of the international commercial contract, ③ The fact that PECL and PICC have been historically and legislatively legislated with the mutual close connection in its birth as CISG becomes the mother-body both in name and reality,⁷⁾ ④ The fact that CISG has been applied as it

entered in this association until this study is submitted, are totally 63 ones inclusive of our country.

- 4) The establishment history of PECL is European Parliament Directorate General for Research, "Study of the systems of private law in the EU with regard to discrimination and the creation of a European Civil Code", *Working Paper, Legal Affairs Series, JURI 103 EN*, 1999, 6, Chapter III, pp.127~136. ; Jong-seok Shim, "Comparative Study between General Regulations and Contract Validity of PECL and Regulations of CISG and PICC", *Korea International Commerce Review*. Vol. 19(1), Korean Academy of International Commerce, March, 2004. ; Premise of PECL comes from www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002. or www.lexmercatoria.org as per the hyperlink, 'International Trade Law', 'Private International Commercial Law', 'Contract Principle', 'Principles of European Contract Law'(completed and revised version : 2002).
- 5) Riedl, R., *The Work of the Lando-Commission from an Alternative Viewpoint*, Kluwer Law International, 2000, Issue 1.
- 6) As for use of 'Judgment' in this study, unless otherwise expressed in the contest as per Article 1.11 of PICC and Term (2), Article 1.103 of PECL, it means the one unifying the 'Judgment' as per the arbitral tribunal.
- 7) PICC and PECL are the general principles on the unified laws without binding force. However, both principles can be called the restatements of International or European Law through the comparison of the laws for a long time. Naturally, despite that both principles pursues the different purposes each other, a lot of parts are unanimous. As for the detailed contents of whether these are unanimous, Yang-ho Song, "Principle of

became the domestic law in our country from March 1, 2005 as it went through the entry course for the time, and © The fact that it is essential for PICC also, which has played the 'supplementary role' (gap-filling role)⁸⁾ of CISG, to re-compose the research for comparative law by fixing and announcing the 2004 revision and etc.

As this study attaches the importance to the position of the norm of individual international uniform contract that has realized the appearance of the reasonable and ideal contract law in the international commerce, it will look into such legal standards and indications through the mutual observation of the comparative law among the norms of the individual law within the regulation system of the principle of change circumstances. It will present the meanings of the legal principles/commercial affairs as the basis to raise the possibility for the legal expectation and the safety among the traders who have participated in the international commerce by recognizing the relevant regulations from this.

II. Legal Standards of Change Circumstances and Force Majeure

1. Legal Requisites and Limit of Change Circumstances

Provided that it is recognized to terminate the contract at random as it is attributed to the principle of change circumstances, which reflects the degree of the subjective recognition, during performance of the international commerce contract, as it may occur the results against the principle of good faith⁹⁾ and the contractual equity and equilibrium, the following limited

European Contract Law and Korean Law" *Study of Commercial Law*, Vol. 21(2), Korea Commercial Law Association, 2002, p.141.

8) 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.

requisites will generally follow for the change circumstances to be valid.¹⁰⁾

Namely, ㉑ The circumstance at the time when the contract was concluded or the one doing such behavior shall be obviously changed in view of the contract conditions, ㉒ The relevant change circumstances shall not be the one that is originated from the reason being attributable to the person concerned, ㉓ Not only the one that the person concerned could not expect the change circumstances and also that is abnormal to be unexpected, ㉔ But also the one, which binds the party concerned under the original contract conditions in view of the change circumstances, shall be contrary to the reasonable standards¹¹⁾ in the principle of faith or in the fair dealing.¹²⁾

9) As the principle of faith is the general principle or 'fundamental principle' to be generally observed as per the contract law under the code of law and various legal systems, it is respected to play the role to exclude the bad faith, but it has the characteristics that as the objective and concrete concept is not defined separately, it is different in degree of the recognition, approaching view, application standards and etc. on the code of law or legal system. Also, as the principle of faith is the concept against the unconscionability, it, as the case may be, becomes the abstract/comprehensive concept and legal fiction such as fairness, fair conduct, reasonableness, reasonable standards in the fair trade, a spirit of solidarity, decent behavior, honesty in fact, white heart, empty head, and etc., or it is regarded as the same. However, the principle of faith, even in any case, put the fundamental function 'to protect the expectation in order to respect and increase the spirit of agreement between the parties concerned'. So, the party concerned enjoys the actual benefit to reduce the proper expenses beyond necessity through the expectation that the party concerned can put a lot of contingent foundations in future, which could not be considered or foreseen during the negotiation to make the contract, on application of the principle of faith. This is the characteristics of the principle of faith that can be pursued in the economic aspect. Finally, the principle of faith can acquire the identity as 'Standards to unite or guarantee the mutual understanding in exercise of the right and performance of the obligation between the parties concerned'. ; Lücke H. K., "Good Faith and Contractual Performance", *Essays on Contract*, The Law Book Company Ltd., 1987, p.160. ; Klein J., "Good Faith in International Transactions", *Liverpool Law Review*, 1993, p.116~117. ; Sim D., "The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods", *Pace Law*, Pace Law School Institute of International Commercial Law, 2001, II. A.

10) As the regulations of the civil law of our country, which is expressed as the principle of change circumstances, Articles 218, 312-2, 286, 557, 599, 628, 661, 698, 716, 720 and etc.

11) 'Reasonable', which is used in this study, unless otherwise expressed in the context, will be used 'Proper' in case it is related to the period, while it will be used 'Reasonable' in case it is related to other behavior/status of the party concerned.

In short, the principle of change circumstances has the contents that generally requests the other party to correct the contract conditions or to cancel or terminate the contract toward the future, and only 'obvious change circumstances' and 'realization of the contract conditions' are confronted as the legal actual benefit to pursue the mutual harmony, on the level of the benefit and protection of the law to consider the contractual equity and equilibrium.¹³⁾

2. Relations between Change Circumstances and Force Majeure

As the irresistible force (force majeure ; unforeseen event) is the unavoidable situation even if the measure, which is recognized to be generally necessary against the fact of the occurred impediment, is taken, it is the concept to be mostly used as the basis to be exempted from the legal liability or debts or other disadvantage.¹⁴⁾ Namely, force majeure is the more strict idea than the common faultless, and as it is the basis to limit it in case of taking the absolute liability regardless of whether there is any intention/mistake, it has been developed as the exceptional exemptible reason for the receiving liability(Receptumhaftung)¹⁵⁾ of Roman Law(ius gentium) in the history of law.

To tell the truth, the force majeure occupies the legal position as the exemptible reason on the contract or the illegal behavior, but meanwhile, as

12) Farnsworth E. A., "Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws", *Tulane Journal of International and Comparative Law*, 1995, V. ; Klein, *op. cit.*, Chap. I. A.

13) As for the theory and development of the history of law for the principle of changed principle, Sang-yong Kim *Comparative Contract Law*, Bebyeongsa 2002. p.44-49.

14) As the contents of the force majeure, 'Acts of God', 'Acts of government', 'Political reasons such as wars, riots, Civil Commotions and etc.', 'Economic/social factors such as strikes, accidents in transportation and etc. are indicated as the examples.

15) It is the legal principle recognized from Roman Law as the liability for results (Erfolgs haftung) to bear legally the damage/loss of the article or baggage deposited by the clients who run the business for the marine/in-land transport or the hotel. As an example, our commercial law also imposes the similar liability on the public service business by calculating this. (Articles 152 and 154)

the contained meaning is very wide, it has the characteristics that such concept is not always same as the case may be. However, if the force majeure is classified as the one contents of the change circumstances, it can be largely summarized into three theories.

First, it means that the damage occurrence, which happens from the change circumstances, is the unavoidable circumstance despite all the measures, which are necessary to prevent such matter, are taken. In this case, it is not the matter whether the relevant change circumstances can be predicted (foreseeability) or how much damage has been occurred. Therefore, the damage from the force majeure means the one that can not be prevented even if all the necessary measures are taken in the concept of the commerce. In this case, the transaction concept is based on the fact that the damage results can not be prevented even if the reasonably-expected considerable attention was taken through the possible method and consideration and that the accident occurrence was not expected by the person concerned.

Second, this eclecticism is again divided into the theory of subjectivity and the theory of objectivity, and firstly, as per the theory of subjectivity, it is recognized as the accident from the force majeure only if any unavoidable damage inevitably occurred even if the person concerned paid the considerable attention. However, this theory is improper in case of applying the exemptible reason besides the unfaulty liability based on the principle of liability with fault, and also the limit, which is difficult to identify the common attention from the considerable attention, is immanent there.

Third, meanwhile, as for the theory of the objectivity, the force majeure is limited only to the damage occurred as the damage reason, which is originated from specific domain [business] of the outside, is accommodated to the inside domain. However, it shall be premised that the occurrence reason of the outside domain and the damage result can not be expected, and in this case, as for the concept of force majeure, the legal principles is premised that the person to bear the liability will be released from such liability, and also that the benefit, which any person is naturally lost, is relieved, and as the case may be, to realize the equity.

3. Interim Conclusion

As for the legal treatment of the force majeure like the legal treatment of the change circumstances, in case the substantive enactment is also legislated, it will be sufficient if it conforms to the relative regulations, but it may become the matter in case the substantive enactment is not legislated.

In this case, the legal treatment standards of the relevant force majeure can be largely classified into ③ The case that if the party concerned exercises the nonfulfillment (non-performance¹⁶⁾ ; Nichtserfüllung¹⁷⁾ as per the contract

16) 'Performance' is generally translated as 'Fulfillment' but also translated as 'Repayment' or 'Payment'. Looking into it, it seems that it shall be respectively used in division 'In view of the fact that the performance is the behavior to nullify the credit' and 'In view of the fact that the repayment is the status called the nullification of credit', but this study regards it that such actual contents are same both in name and reality, and for reference, it is specified as the performance here-in-after.

17) Nonfulfillment (non-performance ; Nichtserfüllung) is generally the one that the performance is not exercised as per the contents of the mutual obligation made between the parties concerned forming the legal relations, namely, as the one that the proper performance is not made in view of the regulation of the law, contractual purport, commercial practice, 'principle of good faith' and etc., this consists of the violating behavior together with the illegal behavior. However, as for the non-performance, the difference of the viewpoint exists to some degree between the international private law and/or the legal system in forming the legal principle for such type/validity, and for example, under the continental legal system following German Law inclusive of our country, it is generally divided into the performance delay, insolvency and incomplete performance as the types of the non-performances, and it recognizes the actual compulsory execution, claim right for indemnity, claim right for complement, claim right for provision of complete one and contract termination as the respective legal effect. Meanwhile, under the legal system of England and USA, it comprehends the type of performance as one legal fact called the breach of contract only, and in this case, the legal effect is composed in the respective discrimination as per the degree of the breach of contract. Namely, the difference substantially exists on the point, which the legal system of England and USA puts 'whether the obligation corresponding to the relevant contract requisites is violated on the requisites for the breach of contract, being different from the continental legal system. As for such difference, it can be reasoned that the legal system of England and USA, for example, puts the keynote on the equity of the legal principle that in case the non-performing party completes the indemnity against the other party, the relevant contract can be terminated, while as for the viewpoint of the continental legal system, it stresses the contractual liability that 'The promise shall be surely observed'. (pacta sunt servanda ; pacts must be respected); Farnsworth, Farnsworth on Contracts, 2nd ed., Aspen Publishers, 1998. p.449.

conditions, being different from the civil law of our country, the nonfulfillment becomes concluded unless it requires the intention/mistake as the relevant requisite like the following CISG¹⁸⁾, but in case the force majeure is recognized, the exemption from liability of the party concerned is recognized even in case of exercising the nonfulfillment, and ⑥ meanwhile, the case that if case the faulty reason occurred from the intention/mistake of the party concerned is premised as the concluding requisites of the nonfulfillment like the status of our civil law, the nonperformance from the force majeure is not recognized. However, in this respect, the exemption from liability of the party concerned, which is originated from the force majeure, is recognized both in name and reality, but such legal constitution can be made as per the analogic application of the regulation of the legal principles for the risk bearing or as

18) Comparing the liability system for the non-performance under the norm of international commercial contract, PICC and PECL contain the similar contents of regulation. (The reason is based on the fact that the constituent members participating in PECL[CECL] actually participate in PICC[UNIDROIT]. For example, Professors Bonell and Lando and etc. wholly participate in the working group of PICC and PECL.) Summarizing the common contents, the following are the bold differences; ① The point that the nonperformance of obligation or the breach of contract is uniformly regulated as the non-performance, ② The point that in case the liability for security, including the primitive incompetency, is not performed regardless of the faulty reason, it is naturally regulated that the breach of contract is constituted, ③ The point that imposes the obligation for mutual cooperation on the performing party, ④ The point that the material performance is regulated as the reason for the contract termination, ⑤ The regulation system that the contract termination does not constitutes the contract termination, ⑥ The point that the right for the contract termination and the claim right for indemnity can not exist together and etc. CISG also conforms to this. However, as for PICC, ① The point that remises the wider possibility for the complement of the performing party as to the improper performance compared with PECL, ② Furthermore, the point that it owns the more detailed regulations in its method, ③ The points that it considers whether the nonperforming party is damaged out of balance as the results for such preparation or performance in case of the contract termination and etc. ④ In this addition, the point, which the party concerned is not allowed to rely on the nonperformance of the other party within the extent that the nonperformance is originated from the commission or omission of the said party concerned or that it is originated from the specific event that such party concerned bears the risk, is the regulation of PICC only, which is not owned by PECL. Jong-seok Shim, "Comparative Study between Nonperformance and Legal Relief under Principle of European Contract Law", *International Trade Law*, Vol. 62(1), Ministry Justice, April, 2005.

per the principle of change circumstances.

The force majeure presents the standards for the mutual selective legal application as per the legal standards for the risk bearing and the principle of change circumstances. However, as for application of the positive law of each country, the change circumstances is recognized only to the force majeure, as per the legislative status of the positive law of each country as the case that the extent of the change circumstances is recognized narrowly, France, England and etc., and meanwhile, there is the case that recognizes it both in name and reality not only in case of force majeure but also of other change circumstances as the case that the extent of the change circumstances is recognized widely, Korea¹⁹⁾, Germany.²⁰⁾

III. Application of Principle of Change Circumstances under Norm of International Contract

1. CISG

CISG has not owned the expressive regulation for the change circumstances. However, as for the effect of the change circumstances, it is regulated that in case the party concerned verifies that the nonperformance of the relevant liability as per the contract conditions was originated from the impediment²¹⁾

19) For reference, the judicial precedents in our country are as follows (Judicial precedent of Supreme Court). December 24, 2004, Da53715. ; March 10, 1995, 94Da56708. ; August 12, 1994, 93Meu1259. ; July 13, 1993, 92Da33251. ; February 27, 1990, 89Daka1381. ; September 9, 1986, 86Daka792. ; March 28, 1978, 77Da2298. ; March 12, 1974, 73Da1620. ; September 19, 1967, 67Da966 and etc.

20) Sang-yong Kim, Op. Cit., pp.61-62.

21) In this case, the meaning of the impediment is limited only to the objective/outside reason disturbing the performance, which is made so that the impediment may be more narrowly and objectively interpreted. In short, in interpreting the objective/outside impediment, it disregards whether it is originated from the natural/social/political reason or from the physical or legal impediment, while it is noticed that the subjective/inside circumstance, mistake of law and etc. are not the impediment being applicable to Article 79, CISG ; Hae-kwan Heo/Byeong-wan Han, "Study on Exemptible Regulations for International Goods Trading", *International Trade Law*, Vol. 61, Ministry of Justice, February, 2005, pp.69-70.

being uncontrollable to the party concerned and that it could not be reasonably expected to consider such impediment or to avoid or overcome such impediment and its results, it can be exempted from the liability for indemnity under the said agreement by reason of any nonperformance [Article 79 (1)], and in this case, the exemption will occur the validity only during the time when the impediment exists. [Article 79 (3)]

Especially, CISG regulates in (4) of the same article that the nonperforming party shall notify (notice : Nachfrist) the other party of the relevant impediment reason and the effect given to the non-performing party itself, and namely, it specifies that as for the relevant notice, in case such notice fails to arrive at the other party within the proper period from the time when the non-performing party knows or must know the impediment, this party shall bear the liability for the damage occurred from such non-arrival.

In short, CISG circularly recognizes the legal effect of the change circumstances (impediment) through the related regulations, but such requisites is very strict compared with other norms. Namely, as for the contents of the change circumstances, not only it limits such period but also it makes the permission on the premise that the exemption of the party concerned shall corresponds to the force majeure but not the simple change circumstances.

2. PICC

As for the principle of change circumstances in PICC, it owns the more detailed regulations system. Namely, it is premised that in case the performance becomes the more hardship to the party concerned, such party shall perform the relevant liability for the hardship despite of it [Article 6.2.1],²²⁾ and it defines the change circumstances as 'occurrence of events fundamentally alters' 'equilibrium of the contract' by reason that the performance expenses of the party concerned is increased or the performance

22) Article 6.2.1(Contract to be observed). : "Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship."

value received by the party concerned is reduced as the requisites that the change circumstances is recognized.[Article 6.2.2]

In this addition, such contents are ㉓ In case the time when the relevant accident occurs or the time when the party concerned taking the disadvantage becomes known such accident is the time after the contract is made, ㉔ In case the party concerned, which takes the disadvantage when the contract is made, could not expect the accident reasonably, ㉕ In case the relevant accident loses the control of the party concerned taking the disadvantage, ㉖ In case the risk of such accident is not undertaken by the party concerned taking the disadvantage [Article 6.2.2 (a)~(d)].²³⁾

Therefore, it can be noticed that PICC exceptionally recognizes the change circumstances premising the sincere contract performance shall have the priority over the changed principle. Namely, it presents the legal standards that the change circumstances can be recognized only in case the equilibrium of the contract is altered, and unless the sincere contract performance is secured, it can not be recognized.

The effects, which occurs in case the requisites of the change circumstances is satisfied as per the above individual article of PICC, are as follows. Firstly, ㉗ The party concerned taking the disadvantage becomes had the right to request the *renegotiations of the contract conditions*, but it becomes the conditions that such request shall be made without improper delay, and as it is based on the renegotiations, the reason shall be specified. ㉘ Also, it is regulated that in case the renegotiations is requested, the party concerned taking the disadvantage does not have the right to request the relevant

23) Article 6.2.2(Definition of hardship). : "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party."

performance, and © It has been considered that in case the agreement can not be made within the proper period, each party requests the court to recover the equilibrium of the contract. ④ In this respect, in case the court reasonably recognizes the impediment, it lets them terminate the contract as per the designated time and conditions or alter the contract, in the view to recover the equilibrium of the contract.

Meanwhile, as PICC regulates that in case the party concerned verifies that the nonperformance of this party is originated from the impediment being uncontrollable by the said party and that it could not be reasonably expected to consider or avoid such impediment when the contract is made or to overcome such impediment or result, it is exempted[Article 7.1.7],²⁴⁾ it remains the room for exemption by reason of the force majeure being different from the impediment. Therefore, it can be said that the exemption effect by reason of the force majeure comparatively more strict than the impediment containing the effect for renegotiations, which means that as for the impediment, it gives the keynote to the contract performance if possible while as for the force majeure, it gives the keynote to protection of the performing party by reason of the change circumstances.²⁵⁾

24) Article 7.1.7(Force majeure). : "(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. (4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due."

25) Kang-hyeon Ahn, "Hardship in UNIDROIT International Commercial Law", *Study of Commercial Law*, Vol. 21(1), Korea Commercial Law Association, 2002. pp.198-200 ; Joseph, M. P., "Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts", *Tulane Journal of International Comparative Law*, 1997, p.20.

Therefore, PICC recognizes the change circumstances but narrows such scope of application. Namely, the change circumstances is applied only when the equilibrium of the contract is materially changed, and as for such application also, it lets the court adjust or release the contract conditions as per the claim of the party concerned. In this addition, even if the reason for the change circumstance occurs, it is applied to the benefit of the contract to be performed in future, but it is not applied to the benefit previously performed.

3. PECL

As PECL is the one unifying and presenting the principle of the contract law that can be commonly applied among the member countries, as for its scope, it is applied to all the contracts inclusive of the simple domestic contract, the contract between merchant and consumer and etc. both in name and reality. Therefore, it constitutes the similar system to PICC comprehending the payment impediment or the liability for nonperformance in the contractual relations in the view of the unified law,²⁶⁾ but as PECL intends to be applied as 'general rules of contract law in the EC among the member countries'[Article 1:101]²⁷⁾, it is basically divided from PICC putting the international commercial contracts as the scope of application.²⁸⁾ Also, the

26) Some 70 texts among total 119 ones of PICC are the same texts as those of PECL. The relief of the detailed contents of the relevant common texts are Bonell, *An International Restatement of Contract Law : The UNIDROIT Principles of International Commercial Contract*, 2nd ed., Transnational Juris, 1997. pp.89~91.

27) Article 1:101(Application of the Principles). : "(1) These Principles are intended to be applied as general rules of contract law in the European Communities. (2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them. (3) These Principles may be applied when the parties: (a) have agreed that their contract is to be governed by 'general principles of law', the 'lex mercatoria' or the like; or (b) have not chosen any system or rules of law to govern their contract. (4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so."

28) In view of the unified viewpoint of the international private law, PICC and PECL

difference exists in the aspect of the scope of application from CISG limiting it to the international sale of goods.

Similar to PICC, PECL owns the substantive enactment as per the principle of change circumstance, and regulates such contents. As for the relevant regulations, even if the hardship of the payment become the more onerous as the performance expenses of the payment is increased or the value of the consideration falls, the party concerned shall perform its liability,[Article 6:111 (1)],²⁹⁾ but in case the relevant payment becomes 'excessively onerous' in the contract performance owing to the change circumstance, the parties concerned shall commence the negotiation to adapt or terminate³⁰⁾ the contract on

have the common point as the norm of the uniform contract established by the non-legislative organization, but it seems that as its origin and application scope are different, both these may not be actually competed in the international commerce.

Because PECL is applied in the limit to the regional scope established to be used among the member countries in Europe, while PICC becomes the applied law in case the party concerned is the non-member country being out of area in the international commerce. ; Bonell, *op. cit.*, IV, 2..

29) Article 6:111(Change of Circumstances). : "(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that: (a) the change of circumstances occurred after the time of conclusion of the contract, (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear. (3) If the parties fail to reach agreement within a reasonable period, the court may: (a) terminate the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing."

30) As for use of the terms in the law of England/USA, it expresses 'Rescission (from the breach of contract)' as 'cancellation' and other '(contract) rescission (extinction)' as 'termination' (for example, Article 2-106, UCC). PECL has used 'termination' by unifying the case that the contract relation becomes extinct inclusive of the case that the contract is terminated within the liability system for the nonperformance.

conditions that ① the change circumstance occurs after the contract is made, and ② the possibility for the change circumstance is not the one that could be considered when the contract was made, and ③ the party concerned taking the disadvantage shall not bear the risk occurred from the change circumstance like this.[Article 6:111 (2), (a)~(c)]

Also, it is regulated that in case the parties concerned can not reach the agreement within 'reasonable period', the court can let them terminate the contract with some specific time and conditions, or order the parties concerned to amend the contract conditions, for just and equitable distribution among the parties concerned.[Article 6:111 (3), (a), (b)]. However, being different from PICC, it owns the regulations that in case the relevant negotiation is rejected or annulled being contrary to the faith/sincerity and fair trade, it lets the court order the compensation for the damage given by the party concerned[Article 6:111 (3), (c)].³¹⁾

In short, PECL, by accommodating the principle of change circumstance in the regulation system, not only has prepared the concrete legal standards to adjust the interest of the party concerned properly that may be occurred from the change circumstance but also has legislated it so that the court may positively participate in this.

Meanwhile, the regulation of 'excuse due to an impediment'[Article 8:108]

31) As the principle of faith in PECL is the subjective concept, it means 'honesty and equity in the consciousness', and for example, under the circumstance that no benefit is given to the person concerned in exercising the remedy, in case it is purposed to damage the other party, such exercise is not allowed. Meanwhile, the fair trade actually means the observance of fairness objectively judged. The unique point is that PECL owns the expressive regulation for reasonableness that CISG and PICC do not own in the similar concept of the principle of faith. Namely, the reasonableness under this principle is judged as per the point that the person concerned behaving with the faith concludes as the reasonableness under the same circumstance. Especially, it is regulated that 'as for evaluation of what is reasonable, the characteristics and purpose of the contract, all concrete circumstances, and the practice and customs of the trade and the relevant occupation shall be considered (Article 1:302)'. So, it presents such standards in interpreting the concept related to the reasonableness mentioned in the individual regulation.; 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 D.

of PECL is the one related to Article 79 of CISG and the exemption clause[Article 1.1.6] and force majeure[Article 7.1.7] of PICC. However, despite of the regulation of force majeure, PICC has additionally specified the contract termination of the party concerned, deferred performance and the claim right for interest against the credit amount.[Article 7.1.7]

Being contrary to this, it is the characteristics that PECL has separately retained the regulations to limit or exclude the relief means except the case that it is contrary to the sincere/reliable and fair trade to assert any limit or assertion as 'clause limiting or excluding remedies'[Article 8:109]³²⁾

It is provided in the contents of the regulation by impediment of PECL that in case it is verified that the nonperformance was originated from the impediment beyond the liability domain influenced by the party concerned and also this impediment could not be considered when the contract was made or it could not be reasonably expected to prevent or overcome such impediment or results, the nonperformance of the party concerned will be exempted, and specifies that in case of the temporary impediment, the exemption for the relevant regulations has the validity only during the time when such impediment exists but in case the delay is applicable to 'fundamental non-performance', the party concerned [the obligee] can be treated in the same way as 'fundamental non-performance'.³³⁾

32) Lando,Beale, *Ibid.*, Art. 1.106. Comment E. ; Flambouras, D. P., "The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis", *Pace Law*, *Pace International Law Review*, 2001, V. A.

33) For reference, in case of comparing the liability system for the nonperformance, PICC and PECL have the similar contents of regulations. Summarizing the common contents , ① The point that the nonperformance of debts or the breach of contract is regulated uniformly, ② The point that in case the liability for security is not exercised regardless of whether there is any imputation comprehending the primitive incompetence, it is regulated that the nonperformance is naturally concluded, ③ The point that imposes the obligation for mutual cooperation on the performing party, ④ The point that the material nonperformance is regulated as the reason for the contract termination, ⑤ The regulation system that the contract termination does not constitutes the retroactive effect and etc., ⑥ The point that the right for the contract termination and the claim

4. Interim Conclusion

First, CISG does not own the expressive regulations for the change circumstance, but as for recognition of the legal effect for the change circumstance, it takes the very limited position compared with PICC and PECL. In short, it limits not only the contents of the change circumstance but also such period, and as for the exemptible reason of the performing party, it premises that it is not simply the change circumstance but shall reach the level of force majeure.

Second, the change circumstance of PICC is more detailed compared with CISG, and the point is set that as the requisites of the change circumstance premising that the relevant obligation for the impediment shall be performed, only in case the event, which alters 'equilibrium of the contract' materially, occurs, the relevant change circumstance occurs after the contract is made, and in case the it could not be reasonably expected, and in case such risk is not accepted by the party concerned taking the disadvantage. PICC gives the keynote on the sincere contract performance having the priority over the change circumstance, and even limited, it exceptionally recognizes the change circumstance, in the wider way compared with CISG.

Third, PECL has prepared the regulation system being similar to PICC, but the difference being discriminated from PICC is based on the point that it lets the court order the make the indemnity against the damage given by the party concerned, which rejects or annuls the relevant negotiation being contrary to

right for indemnity can not exist together. and etc. As for CISG, it conforms to it. However, as for PICC, the followings are the regulations that are not owned by PICC: ① The point that premises the wider possibility for the complement right of the party concerned making the improper performance, ② Furthermore, the point that owns the detailed regulation in its method, ③ As for the contract termination, the point that considers the whether the performing party is damaged out of balance as the results of its preparation or performance and etc. are the differences to be emerged. ④ In this addition, the point, which regulates the perty concerned is not allowed to rely on the nonperformance of the other party within the extent that it is originated from the commission or omission of the other party or that it is originated from the separate event that the party concerned bears the risk.

the faithful/sincere and fair trade. Namely, PECL presents the legal standards that can positively arbitrate the interest of the party concerned by reason of the change circumstance by permitting the court to intervene in it.

IV. Judicial Precedent for Principle of Change Circumstances³⁴⁾

1. Exemption for the force majeure³⁵⁾

The claim arose out of a contract between a German seller and a US buyer, where the former agreed to sell and deliver 15,000–18,000 metric tonnes of used Russian railroad rail to the latter. The buyer alleged breach of contract and fraud relating to the seller's failure to deliver the goods and applied for summary judgement.

The seller contended that its failure to perform should be excused on force majeure grounds as it was precluded from shipping the rail by the fact that St. Petersburg port unexpectedly froze over at the time of delivery, preventing vessels from entering and exiting the port.

The parties agreed that their contract was governed by CISG. Since the contract did not contain any express force majeure provision, the Court examined article 79 CISG. This provides that 'a party is not liable for failure to perform any of his obligations if he proves that failure was due to an impediment beyond his control and that he could reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences.' In applying Article 79 CISG the Court used as a guide case-law interpreting analogous provisions of the domestic law on excuse, an approach used by other Federal Courts.

The Court applied a three stage test: ① whether an impediment occurred,

34) Refer to the footnote 7) for the above.

35) 'U.S. District Court, Northern District of Illinois, East. Div.', 「03 C 1154」, 2004.

ⓑ whether the impediment made performance impractical and ⓒ whether the impediment was foreseeable.

The Court stated that summary judgement may only be granted where there is no genuine issue as to material fact. As questions of fact existed as to whether the early freezing of the port prevented the seller's performance and was foreseeable, the Court dismissed the buyer's application for summary judgement and stated that the seller's force majeure defence may be viable.

2. Unforeseen of change circumstances³⁶⁾

An economic unit of the German Democratic Republic and an economic unit of another East European country concluded a contract for the delivery of machinery. The applicable law was that of the German Democratic Republic. When, following the reunification of Germany, Western markets were opened to the enterprises of the former G.D.R., the machinery in question lost all value for the German importer. Consequently the latter, invoking the radical change of circumstances existing at the time the contract was concluded, refused to take delivery of the goods and to pay the price.

The Arbitral Tribunal decided in favour of the German importer and, in order to prove that the principle according to which a substantial change in the original contractual equilibrium may justify the termination of the contract is increasingly accepted at international level, referred to the provisions on hardship contained in the PICC.

3. Faithful performance of contract³⁷⁾

The award concerned a contract between a Spanish and a French company for the construction of works in a third country. Faced with a number of unforeseen difficulties which substantially increased the cost of the construction, the contractor requested the renegotiation of the contract

36) 'German Arbitral Tribunal'(Schiedsgericht Berlin), 「SG 126/90」, 1990.

37) 'ICC International Court of Arbitration'(Paris), 「8873」, 1997.

invoking hardship according to Articles 6.2.2 and 6.2.3 of the PICC. According to the contractor, although the contract contained a choice of law clause in favour of Spanish law, the PICC were applicable as they represent veritable trade usages which the Arbitral Tribunal had at any rate to take into account under Article VII of the 1961 Geneva Convention on International Arbitration and Article 13(5)³⁸⁾ of the ICC Rules of Arbitration and Conciliation³⁹⁾.

In deciding against the applicability of the PICC, the Arbitral Tribunal first of all recalled that, according to their Preamble, they are applicable only where the parties have so expressly agreed or where the contract refers to "general principles of law", the *lex mercatoria* or the like as the applicable law. As to the argument that the PICC represent veritable trade usages to be taken into account even where, as here, the parties have chosen a particular domestic law as the law governing their contract, the Arbitral Tribunal held that the provisions of the PICC on hardship do not correspond, at least presently, to current practices in international trade.

4. Interim Conclusion: Indication of Judicial Precedent

Arranging the indication of the above judicial precedent, it can be summarized as ① the fact that in case it is verified that the impediment is the one originated from the uncontrollable circumstance by the party concerned and the one to overcome such impediment could not be reasonably expected, the relevant contractual liability can be exempted, ② the fact that as for application of Article 79 of CISG, the impediment shall be the one previously

38) Article VII(Applicable law). : "1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages. 2. The arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration."

39) Article 13(Terms of Reference). : "(5) In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages."

occurred and not only the impossibility for performance but also unforeseeable one, © the fact that only if it is obvious that the change circumstance shall be the one from the outside fact beyond the control of the party concerned and it could not be reasonably expected to consider or avoid such impediment, or to overcome the impediment or such results, it is legal for the purchaser to notify the contract termination actually, Ⓓ as for whether the change circumstance is proper, the general principle of the international commercial contract and actual international commercial practice can be considered and etc.

V. Summary and Conclusion

This study respectively presents the legal standards meaning and indication for the principle of change circumstance by being centered on CISG, PICC and PECL, and by linking the judicial precedent relative to application of the individual regulation. The research results of this study are summarized as follows.

First, the principle of change circumstance means the legal principle that shall alter the contract to conform to new circumstance or negate it in case it occurs the unreasonable result against the principle of good faith to maintain/enforce the contract conditions being untouched as the circumstance is obviously changed in view of the contract conditions that the circumstance existed when contract was concluded. However, as for the principle of change circumstance, the standards for its application is not uniform despite it is widely recognized in the domestic positive law of every country and under the norm of international contract.

Second, in the case of the subjective recognition is reflected on the principle of change circumstance during performance of the international commercial contract, as it may occur the results being contrary to the equilibrium of the contract, as for the requisites for validity, the circumstance of the time when the contract was made shall be obviously changed, and the change

circumstance shall not be the one originated from the reason being attributable to the party concerned, and the change circumstance shall be the abnormal one that was unforeseen and could not be unforeseen, and it is contrary to the principle of faith to bind the party concerned to the original contract by reason of the change circumstance.

Third, as the force majeure is the unavoidable status even in case of taking the measure, which is recognized to be generally necessary, against the impediment fact occurred from the outside, it is the concept generally used for the standards to be exempted from the legal liability, liability or other disadvantage. However, as for the force majeure, it has the characteristics that as the contained meaning is too wide, such concept is not always same.

Fourth, CISG has not owned the expressive regulation for the change circumstance but as for the effect of the change circumstance, in case the party concerned verifies that the nonperformance of the obligation as per the contract conditions is originated from the impediment beyond the control of the said party and that it could not reasonably expected to consider such impediment or to avoid or overcome the said impediment or its results, the party concerned is exempted from the liability for indemnity under the said agreement against the nonperformance of the liability. In this case, the exemption will occur the validity during the time when the impediment exists. Finally, CISG has circularly recognized the legal effect of the impediment, but such requisites is very strict compared with other norms.

Fifth, the principle of change circumstance has owned the more concrete regulations compared with that of CISG. Namely, it is defined as the case that the event, which basically alters the equilibrium of the contract, occurs as it premises the sincere contract performance with priority. The contents of the change circumstance are the case that the change circumstance occurs after the contract is made, the case that the change circumstance could not be reasonably expected, the case the change circumstance is out of control by the party concerned, the case that the risk of the change circumstance is not undertaken by the party concerned and etc. PICC stresses the sincere contract performance with priority and exceptionally recognizes the change

circumstance. Namely, the change circumstance of PICC is applied only if the equilibrium of the contract is basically changed, and it is applied to the payment of the contract to be performed in future.

Finally, PECL not only has prepared the concrete legal standards to adjust the interest of the party concerned, which may be occurred from the change circumstance by accommodating the principle of the change circumstance in the regulation system, but also has legislated it so that the court may positively intervene in it. However, the difference being discriminated from PICC is the point to let the court order to indemnify the damage given by the party concerned, who rejects or annuls the relevant the negotiation being contrary to the faith/sincerity. Namely, PECL has presented the legal standards to adjust positively the interest of the party concerned by reason of the change circumstance by permitting the court for intervention.

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ABSTRACT

A Comparative Study on Change Circumstances in International Commercial Contracts

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This Study attempts to compare and analyze on Principle of Change Circumstances under the CISG, PICC and PECL which are covered international commercial contract.

In many international commercial contract, time is very important because delays in performance are sanctioned heavily by substantial penalty clauses. When change in circumstances affects contract performance, the contract will often not be suspended or terminated. Therefore, principle of change circumstances is being prepared of fluidity of contract environment and its effect in general.

Taking into consideration the problems relating to the renegotiation or adaptation in the cases of radical change of circumstances where the CISG applies, it is suggested that the contracting parties should make clear their intentions, that is, whether they will provide for the possibility of renegotiation where the price of goods has been altered by inserting a hardship clause or for the possibility of mutual discharge from liability in the cases of economic impossibility or hardship by inserting a force majeure clause.

Such provision will be desirable especially in situations where there is a long term contract, the price of goods sold tends to fluctuate in the international commerce, or where especially in contracts subjected to arbitration, the parties subject their contract to legal sources or principles of supranational character.

Therefore, this study has shown that the hardship provisions in the CISG, PICC and PECL has similarities to each a validity defense and an excuse defense. it was provisions that CISG governs this issue in Article 79, PICC Article 6.2.1, 6.2.2, 6.2.3 and PECL Article 6.111.

Key-Words : Change Circumstances, Force Majeure, Hardship, CISG,
PICC, PECL