

A Comparative Study on Requirements for the Buyer's Right to Withhold Performance for the Seller's Actual Non-Performance under the CISG and the CESL*

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Abstract

Purpose – The buyer's right to withhold performance is a useful and important self-help remedy to protect himself from the seller's breach of contract, and it is also the coercive means to induce the seller to perform his part of contract. However, the buyer's exercise of such a right often exposes himself to the risk of breaching the contract. This is generally due to his ignorance when he is entitled to the right and also uncertainties inherent in the law. Therefore, the purpose of this paper is to examine what the requirements should be fulfilled before the buyer exercises the right for the seller's actual breach of contract.

Design/methodology – In order to achieve the purposes of the study, it executes a comparative study of the rules as to the requirements for the buyer's right to withhold performance for the seller's actual non-performance under the CISG and the CESL. It mainly focuses on performance due, the seller's non-performance, the buyer's readiness to perform and the requirement of notice.

Findings – The main findings of this comparative study can be summarized as follows: Although the CISG has no expressive provision for the buyer's general right to withhold performance for the seller's actual non-performance, it may be inferred from the general principles the CISG underlies, synallagmatic nature of the contract. In addition, it can be drawn by analogy from relevant provisions of the CISG. On the other hand, the CESL expressively provides that the buyer has a general right to withhold performance where the seller fails to tender performance or perform the contract. Therefore, it seems that the position of CESL is rather easier and more apparent to allow the buyer to withhold performance for the seller's non-performance.

Originality/value – Most of the existing studies on the right to withhold performance under the CISG have centered on the right to withhold performance for an anticipatory breach of contract. On the other hand, there have been few prior studies on the right to withhold performance for the actual non-performance during a contractual period of performance. Therefore, this paper examined the requirements for the buyer's right to withhold performance under the CISG and the CESL in a comparative way for the seller's actual breach of obligation. In this conclusion, it may provide practical and legal considerations and implications for business people who are not certain about the right to withhold performance.

Keywords: Breach of Contract, Requirement for Withholding of Performance, Right to withhold Performance, Withholding of Performance

JEL Classifications: K12, K40

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1. Introduction

In case of a contract for the international sale of goods which is premised on the bilateral obligations of the parties, the buyer undertakes to perform his part of the contract in the expectation that the seller will also likewise perform (Schwenzer, Hachem and Kee, 2012, 548). However, if the seller is anticipated to fail or actually fails to perform his obligation, the buyer will face the difficult problem of having to decide whether to perform his obligation such as taking delivery of goods or paying the price (Schwenzer, Hachem and Kee, 2012, 548). If he decides to perform the contract, he may be exposed to the risk of the non-performance of the seller, and if he does not, he may be in breach of contract (Schwenzer, Hachem and Kee, 2012, 548). As such, where the seller fails or is anticipated to perform the contract, the right to withhold performance is an important remedy that the buyer protects himself from the seller's breach of contract (Schwenzer, 2016, 1003), and it is also a means to coerce the seller to do his contractual obligations without putting an end to the contract (Nyer, 2006, 41). From the buyer's perspective, the main functions and benefits of the right to withhold performance are as follows; First, as the buyer withholds his obligation without terminating a contract, the right to withhold performance is to preserve the contract and also to offer the buyer a reasonable and convenient means of protecting himself (Kröll, Mistelis and Viscasillas, 2018, 887; Schulze, 2012, 514-515). Second, the buyer can prevent from incurring unnecessary costs or losses in the future by withholding his performance (Kröll, Mistelis and Viscasillas, 2018, 888), and also can save money compared to solving problems through courts and other dispute-solving bodies (Kröll, Mistelis and Viscasillas, 2018, 887). Third, the buyer can induce or encourage the seller who has failed or is anticipated to perform the contract to do his obligation by exercising the right to withhold performance, such as refusal of taking delivery of goods, or payment (Bianca and Bonell, 1987, 390; Kröll, Mistelis and Viscasillas, 2018, 888). Forth, the buyer can enjoy an immediate effect by responding quickly to the seller's violation through the right to withhold performance instead of using judicial remedies or other methods (Lee Byung-Mun, 2002, 256). Finally, the right to withhold performance can solve problems by providing opportunities for amicable agreements through cooperation between the parties (Kröll, Mistelis and Viscasillas, 2018, 887), and if an amicable agreement is difficult, it makes the termination of the contract be made more clearly and easily. Furthermore, it can also help to proceed with compensation issues more effectively (Kröll, Mistelis and Viscasillas, 2018, 887-888; Schulze, 2012, 514).

Until now, most of the previous studies on the right to withhold performance under the UN Convention on Contracts for the International Sales of Goods (hereinafter referred to as "the CISG")¹ have centered on the right to withhold performance for an anticipatory breach of contract. On the other hand, there have been few prior studies on the right to withhold performance for the actual non-performance during a contractual period of performance. This seems due to the fact that unlike the right to withhold performance for the anticipatory breach of contract, there is no expressive provision for the actual non-performance under the CISG. It has caused a lot of confusion in legal and business practice when the breached party is entitled to exercise the right in the case where the breaching party fails to perform a

¹ The CISG is an international unification norm that governs the International Sales of Goods, which is the basis of international trade, being considered as the successful international treaty (Suk, Kwang-Hyun, 2010). Korea has joined the CISG on February 17, 2004, and became the contracting state of the CISG from March 1, 2005 (Oh, Won-Suk and Kang-Hun Ha, 2013). As of March 20, 2020, 93 countries all over the world including USA, China, Germany, France, and Canada have joined the CISG (https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/the_CISG/status) and it is playing a role as the most famous international unification law.

contract.

Having said that, this study purports to examine in particular the requirements for the buyer's right to withhold performance for the seller's actual non-performance under the CISG; performance due, the seller's non-performance, the buyer's readiness to perform, and the requirement of notice. In addition to the examination of those requirements under the CISG, it attempts to compare them with the Common European Sales Law (hereinafter referred to as "the CESL") and evaluate them in light of the discipline of comparative law.² One of the reasons why the CESL is chosen for the law to be compared with the CISG is that it is the most recently unified law in the area of sale of goods and has a clear and expressive provision for the right to withhold performance. Furthermore, on the basis of this comparative study, it may render practical and legal considerations and implications to those who are not certain about the right to withhold performance.

2. Performance Due

2.1. The CISG

The first requirement for the buyer's right to withhold performance for the seller's actual breach of contract is that the time for the buyer's performance in the contract becomes due (Schwenzer, Hachem and Kee, 2012, 550). Although such a requirement is not expressly stipulated under the CISG, it is a generally accepted requirement because otherwise there would be no breach from the side of the buyer which does not in turn need us to protect him.³

The time of the buyer's performance should be at the same time with or after the seller's performance (Schwenzer, Hachem and Kee, 2012, 551). For the former case, it may be inferred from the provision for the time of payment in the CISG (CISG Art. 58(1)). It provides that if the buyer is not obliged to pay the price at any other specific time, the buyer must pay when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and the CISG (CISG Art. 58(1)). In other words, the buyer's obligation of payment can be seen as a concurrent obligation of the seller's delivery of either goods or documents controlling their disposition. As such, it is a generally recognized principle that the parties' respective obligations to deliver and to pay are

² In addition to the CISG, there have been various discussions for the unification of law in the area of international trade, and one of the most recent and representative works is the CESL, which can be the result of efforts for unification of sales law within the European Union. (We, Kye-Chan, 2015, 1647-1648). The values of the study on the CESL can be argued as follows. First, the CESL was introduced as the unified law in the area of contracts for the sale of goods in the European Union which was intended to be a governing law based on the parties' voluntary agreement (Ha Kyung-Hyo et al., 2014, 2-5). Second, on the one hand, since the success of the CISG in harmonizing the law in the area of international sale of goods, the Unidroit Principles of International Commercial Contracts (*hereinafter* referred to as 'the PICC') and the Principles of European Contract Law (*hereinafter* referred to as 'the PECL') or the Draft Common Frame of Reference (*hereinafter* referred to as 'the DCFR') have been introduced as either model laws or products of the academic research project. On the other hand, the CESL takes the form of firm law which was proposed for adoption by the European Commission. In this respect, the value of the study on the CESL is significant considering the ripple effect of the PICC, the PECL, and the DCFR on business and academic fields (Paek, Kyoung-Il, 2013, 436). Third, it can be provided as a valuable practical reference for Korean companies that are already in EU market or have a plan to advance to the market at the time when the trade is gradually increasing since the conclusion of FTA between Korea and EU (Shim, Gap-Young and Chong-Seok Shim, 2015, 54).

³ The requirement of performance being due should be also same for the seller's performance because the seller's actual breach assumes it.

concurrent obligations unless otherwise agreed in the contract (Schwenzer, Hachem and Kee, 2012, 551).

Despite of this principle, the parties can fix order of performance freely in their contract which allocates the risks between them (Schwenzer, Hachem and Kee, 2012, 551). Therefore, depending upon the contractual order of performance, either the seller or the buyer takes the risk of the other party's non-performance. This means that if the buyer agrees to pay the price before the seller's performance, the buyer is not generally allowed to exercise the right to withhold performance on the basis that the seller has not performed his part of contract. However, he may exceptionally do so only if it becomes apparent that the seller will commit an anticipatory breach of contract which amounts to non-performance of a substantial part of his obligations (CISG Art. 71(1)). All in all, the buyer's right to withhold performance may be granted if the time of performance in the buyer's part becomes due where the buyer is supposed to perform his obligation at the same time as or after the seller's performance (Schwenzer, Hachem and Kee, 2012, 548).

2.2. The CESL

There is no explicit provision as to a requirement for the buyer's right to withhold performance in the CESL that the time for the buyer's performance in contract becomes due. Nevertheless, it can be inferred from articles 113 and 126 of the CESL. The former clearly provides that the buyer who is supposed to perform his obligation at the same time as or after the seller performs can withhold his performance until the seller's performance has been rendered or the seller has performed in accordance with the contract (CESL Art. 113(1)). This explains that if the buyer wants to exercise his right to withhold performance, it must be foremost satisfied with a requirement that the time for his performance must become due. The time for the buyer's performance is generally arranged by the contract and by virtue of such arrangement, it may become due at the same time as or after the seller has rendered performance or has performed. Where the contractual arrangement requires the buyer to perform his part of contract before the seller's performance, the buyer is not generally allowed to withhold his performance even if the time for the buyer's performance becomes due. However, the buyer may be exceptionally entitled to exercise the right to withhold performance if it is reasonable for the buyer to believe that the seller will not perform the contract when the seller's performance becomes due.

In addition to article 113(1) of the CESL, the requirement that the buyer's performance become due can be also inferred from article 126 of the CESL. It provides a default rule for the time of performance that the time when the buyer has to pay the price comes due at the time of the seller's delivery of goods (CESL Art. 126(1)). Therefore, unless otherwise agreed by the parties, the buyer may be entitled to withhold to pay the price because the seller's non-delivery of the goods causes the time for the buyer's payment not to become due (Schulze, 2012, 515). This seems to underly the synallagmatic nature of the contract as a basis for the buyer's right to withhold performance in which the seller's delivery of goods and the buyer's payment are reciprocal to one another.

2.3. Comparison and Assessment

As shown above, it is natural to say that there is a requirement for the buyer's right to withhold performance that the time for the buyer's performance becomes due. This is because if the time of performance has not come, no obligation of the buyer to perform is raised, and thus the buyer does not need to exercise the right to withhold performance (Schwenzer, Hachem and Kee, 2012, 550). Notwithstanding no expressive provision both under the CISG

and the CESL, the requirement that the time for the buyer's performance becomes due has been found by analogical interpretation of the related provisions under the CISG and the CESL. However, it is deemed that the CESL which has a general right to withhold performance for the seller's non-performance is rather clearer than the CISG for us to infer the requirement. It is because, unlike the CISG, the CESL provides that the general right to withhold performance is granted to the buyer only when he has to perform at the same time as or after the seller's performance. This explains that the buyer is entitled to the general right to withhold performance where the time for the buyer's performance becomes due at the same time as, or after the seller's performance.

3. Non-Performance by the Seller

There is no doubt in that the buyer is entitled to the right to withhold perform the contract where the seller has totally failed to perform some of his obligations like obligations to deliver the goods, to pass the property of goods, to hand over the documents relating to the goods and some others. However, unlike those cases of the total failure to perform, the awkward question arises where the seller delivers goods that are not in conformity with the contract in terms of quality, quantity, or packaging (CISG Art. 35), or which are not free from any right or claim of a third party (CISG Arts. 41, 42). The same situation arises where the seller fails to perform some other incidental obligations (Schwenzer, Hachem and Kee, 2012, 551). The following accounts discuss those intractable cases, first, where the goods delivered or the documents tendered are not in conformity with the contract, and second, where they are not free from a third party's right or claim, third, where the seller fails to perform any of his incidental obligations.

3.1. Non-Conformity and Third Party's Rights or Claims

3.1.1. Existence of Non-Conformity of Goods or Third Party's Rights or Claims

a) The CISG

The CISG provides for the buyer's remedies for the seller's breach of contract (CISG Art. 45) and expresses that the buyer is entitled to the right to refuse to take the delivery of goods only in specific cases such as early delivery and the delivery of the excess quantity (CISG Art. 52). As such, while the CISG recognizes the buyer's right to withhold performance only in those specific cases, it is not clear whether it grants a general right to withhold performance to the buyer where the seller delivers defective goods, especially the ones with defects in quality, packing, lack of quantity or defects in title (Schwenzer, Hachem and Kee, 2012, 549; Bianca and Bonell, 1987, 390).⁴ However, some commentaries argue that a right to withhold performance can be derived by analogy from the related provisions under the CISG (Bianca and Bonell, 1987, 389; Enderlein and Maskow, 1992, 229; Jafarzadeh, 1998, 121). Their arguments are as follows.

First, it is argued that the buyer's right to withhold performance can be inferred through

⁴ Many of countries of civil law systems that have basis on Roman law do not recognize a right to withhold performance for the seller's delivery of non-conforming goods but for the case of impossibility of performance and delay. On the other hand, traditionally structured civil law legal systems and modernized civil law systems seem to recognize the buyer's right to withhold performance if the seller performs improper performance, for example in case of delivering non-conforming goods (Schwenzer et al., 2012, 552).

the bilateral relations, although not specifically stated, between articles 30 and 53 of the CISG that provide the main obligations of the parties under the CISG (Jafarzadeh, 1998, 123; Lee Byung-Mun, 2002, 262; Lee Byung-Mun and Kim Dong-Young, 2020, 805). This is based on the general principle of the CISG that the seller should deliver the goods that conform to the contract and the CISG and if they were otherwise, the buyer is not obliged to take delivery of the goods (Jafarzadeh, 1998, 122). In other words, the buyer is obliged to pay the price and take delivery of the goods only when the seller is ready to deliver goods, has the intention to do so, and actually performs in accordance with the contract and the CISG (Jafarzadeh, 1998, 123). This means that if the seller does not perform his duty under article 30, it can be assumed that the buyer is allowed to refuse to perform his obligations under article 53 of the CISG (Jafarzadeh, 1998, 123).

Second, although article 58 of the CISG empowers the buyer to refuse the payment only where the seller does not deliver the goods or documents controlling their disposition, it is asserted that the right to withhold performance applies to the other obligations by virtue of a general principle drawn from article 71 of the CISG (Schwenzer, 2016, 882; Kröll, Mistelis and Viscasillas, 2018, 817). Article 71 of the CISG provides that a party may withhold his performance if it becomes apparent that the other party will not perform a substantial part of his obligations. Here the right to withhold performance under article 71 of the CISG is generally understood to be applied to some other obligations of the party than delivery and payment (Schwenzer, 2016, 1004-1006). Therefore, as long as the anticipatory breach of those obligations allows the buyer to withhold performance, he should be also allowed to withhold performance for the actual breach (Schwenzer, 2016, 882 et seq.; Kröll, Mistelis and Viscasillas, 2018, 817).

Third, they also argue that the buyer's right to withhold performance can be inferred through article 86(1) of the CISG (Bianca and Bonell, 1987, 390; Enderlein and Maskow, 1992, 229 et seq.). They presuppose that the buyer's right to reject the goods under article 86 of the CISG is basically same as the right to refuse to take delivery of the goods as in article 52 of the CISG (Bianca and Bonell, 1987, 390; Enderlein and Maskow, 1992, 229). In addition, they maintain that the right to refuse to take delivery of the goods can be drawn by analogy from article 58 which provides that the buyer's payment is subject to the seller's delivery of the goods which are in accordance with the contract (Bianca and Bonell, 1987, 391; Enderlein and Maskow, 1992, 229). Furthermore, they assert that article 46(1) and 47(1) of the CISG are to recognize the buyer's right to refuse to take delivery under certain circumstances (Bianca and Bonell, 1987, 390; Enderlein and Maskow, 1992, 229). This argument seems plausible in the sense that it answers the question of how the buyer's general right to withhold performance for non-conformity of goods can be inferred from the existing provisions under the CISG (Lee Byung-Mun, 2002, 259).⁵

Fourth, Article 52(2) of the CISG provides the buyer's right to refuse to take delivery of the excess quantity, whereas the CISG does not express for whether the buyer has a right to refuse to take delivery in the case of a shortage in quantity. Nevertheless, it is argued that the buyer's right to withhold performance can be inferred from Article 51(2) of the CISG which provides that the buyer can avoid the contract as a whole if the seller's non-performance or non-conformity amounts to a fundamental breach of the contract (Jafarzadeh, 1998, 124). Namely,

⁵ On the other hand, some scholars contend that the right to reject the goods in article 86 is in its nature different from the right to refuse to take delivery of the goods (Jafarzadeh, 1998, 122; Lee Byung-Mun, 2002, 259). Their argument is based on the former can arise regardless of whether the goods have been taken by the buyer in the first place. This explains article 86 is not justifiable as a provision which deduces a general right to refuse to take delivery of the goods as in articles 52 or 71 (Jafarzadeh, 1998, 122; Lee Byung-Mun, 2002, 259).

it can be assumed that if the shortage in quantity amounts to a fundamental breach of the contract under Article 25 of the CISG, the buyer may refuse to take delivery of the goods and to pay the price until the seller tenders complete delivery pursuant to the contract (Jafarzadeh, 1998, 124; Schwenzler, Hachem and Kee, 2012, 548). Then here the questions remain in the case where the shortage in quantity does not amount to a fundamental breach of contract. In this context, it may be controversial concerning the right to withhold performance being available to the buyer, and if it is, to what extent of the buyer's part of performance the buyer can withhold. It is maintained that even in the case of shortage in quantity, the buyer's right to withhold the performance can be similarly derived by analogy from the bilateral relations between articles 30 and 53 of the CISG (Jafarzadeh, 1998, 123; Lee Byung-Mun and Kim Dong-Young, 2020, 805). And there are some arguments that even if the less quantity is trivial, the right to withhold performance should be recognized because it is the remedy to protect the aggrieved party from the other party's breach of contract, and is a means of coercing the other party into full performing (Nyer, 2006, 41). Assuming that the buyer has such a right, it is commonly recognized that the buyer's right to withhold performance in the case of shortage in quantity must be exercised by the ratio (Jafarzadeh, 1998, 124; Lee Byung-Mun and Kim Dong-Young, 2020, 805; Schwenzler, Hachem and Kee, 2012, 551).

Lastly, the CISG does not also express on whether the buyer's right to withhold performance is rendered in the case where the seller delivers the goods which are not free from a third party's right or claim. However, it can be inferred in the same way as non-conformity of goods based on the bilateral relations between articles 30 and 53 of the CISG (Jafarzadeh, 1998, 123; Lee Byung-Mun and Kim Dong-Young, 2020, 805). In other words, the buyer is allowed to refuse to pay the price and take delivery of the goods as long as the seller has delivered the goods which are not in accordance with the contract and the CISG. The seller's delivery of goods which are not in accordance with the contract and the CISG undoubtedly include the cases where the seller delivers the goods which are not free from a third party's right or claim. Therefore, based on the general principle of the CISG, if the seller fails to deliver the goods which are not free from a third party's right or claim as required in articles 41 and 42 of the CISG, it can be assumed that the buyer is not obliged to take delivery and to pay the price (Bianca and Bonell, 1987, 392; Lee Byung-Mun and Kim Dong-Young, 2020, 805).

b) The CESL

The CESL explicitly provides that the buyer can withhold performance until the seller has tendered performance or has performed (CESL Art. 113(1)). However, it is not clear whether this explicit provision can be applied even for the cases where the seller delivers the goods which are not in conformity with the contract in terms of quality, quantity, or packaging, or not free from the third party's rights or claims. Even though there is no explicit provision in the CESL for those cases, it is considered that the right to withhold performance should be accepted for the following reasons.

First, the commentary book of the CESL states that the buyer can exercise the right to withhold performance for the complete failure to perform. In addition, it says that the right can be extended to the cases of the partial non-performance or the non-conformity of the goods (Schulze, 2012, 516).

Second, recognizing there is the buyer's right to withhold performance for non-conformity, the CESL provides that the buyer can withhold the whole or part of his duty to the extent justified by the seller's non-performance and the buyer may withhold his performance partially where the seller's obligations are to be performed in separate parts or are otherwise divisible (CESL Art. 113(3)). This seems to justify that the buyer's right to withhold

performance for non-conformity is not limited to the complete failure to perform, but extended to other non-conformity.

Third, although not specifically stated under the CESL, one can draw bilateral relations from articles 91 and 123 of the CESL which provide respectively the seller's and the buyer's main obligations. On the basis of the bilateral relations, the right to withhold performance under article 113 of the CESL should be interpreted in a way that renders it applies to the cases of non-conformity of the goods. Thus, if the seller fails to ensure that the goods conform to the contract, the buyer may be allowed to exercise the right to withhold performance pursuant to article 113 of the CESL (Schulze, 2012, 516). This interpretation can be similarly applied to the cases where the seller delivers the goods which are not free from third party's rights or claims. The reason for that can be found in that the concept of non-conformity under the CESL includes not only the cases where the seller delivers the goods which are not in conformity with the contract in terms of quality, quantity, description, or packaging, not supplied with accessories or instructions (CESL Art. 99(1)), but also the cases where the seller delivers the goods which are not free from the third party's rights or claims (CESL Art. 102).⁶

Furthermore, as regards the non-conformity of the goods in quantity, the CESL also explicitly provides about the buyer's right to refuse to take delivery not only for the excess quantity but also for the lack of quantity (CESL Art. 130(2), (3)). However, one must note that the buyer may refuse the lack of quantity only where he has a legitimate interest (CESL Art. 130(2)). Otherwise, the buyer shall take delivery of the goods that are lack in quantity (We, Kye-Chan, 2015, 1670). If the buyer refuses to take delivery of a quantity of the goods less than that of the contract, the buyer can withhold an entire payment under the CESL. On the other hand, if the buyer decides to take the delivery of them, he may withhold the payment only in relation to the non-delivered part of goods (Schulze, 2012, 516; CESL Art. 130(2)).

c) Comparison and Assessment

As discussed above, although the CISG explicitly expresses the buyer's right to withhold performance for certain cases, it does not provide a general right to withhold performance (CISG Art. 52). Due to the lack of an expressive provision under the CISG, it caused uncertainties as regards the question of whether the right to withhold performance is recognized as a general right where the seller delivers the goods which are not in conformity with the contract in terms of quality, packing and quantity and are not free from third party's rights and claims. Despite the uncertainties, many scholars have tried to draw the buyer's general right to withhold performance by virtue of gap-filling rules under the CISG (CISG Art. 7). That is, they seem to treat the matter of uncertainties as one of the matters which is not expressly settled under the CISG, but can be done by virtue of a general principle to be drawn from relevant provisions of the CISG. On this basis, they have struggled to introduce the buyer's general right to withhold performance within the existing regulatory framework of the CISG in various ways. The first and most important way to infer the right under the CISG was to find out the bilateral relations between articles 30 and 53 of the CISG which

⁶ In this case, the buyer can withhold the whole or part of his performance within the scope which can be justified pursuant to the degree of the seller's non-performance (CESL Art 113(3); Schulze, 2012, 516). In case the seller's non-performance can be divisible, the buyer can refuse to pay the price only for the relevant part.⁶ If there is a partial non-conformity of goods, the buyer should assess the significance of the non-conformity and may withhold to pay the price to the extent justified by the significance of the non-conformity of goods (Schulze, 2012, 516). The entire payment can be also withheld depending on the contents of the seller's non-performance (Schulze, 2012, 516). In addition, the scope of withholding performance by the buyer will be determined in relation to the remedies that the buyer exercises (Schulze, 2012, 516).

provide the main obligations of the parties. In addition to this, it was argued that on the basis of a general principle drawn from article 71 of the CISG, the buyer's right to refuse the payment under article 58 of the CISG could apply to the cases of the seller's failure to perform other obligations than the delivery of goods and handing over of documents controlling their disposition. Furthermore, it was also argued that the buyer's right to refuse to take delivery as another type of the right to withhold performance can be derived by analogy from articles 58, 46(1), 47(1) of the CISG another right on the premise that the buyer's right to reject the goods under article 86 of the CISG is equivalent to his right to refuse to take delivery under article 52 of the CISG.

In contrast with the position of the CISG, the CESL expressively provides that the buyer has a general right to withhold performance where the seller fails to tender performance or perform the contract. It does not specifically deal with the cases of all kinds of lack of conformity. However, as we examined above, it was not difficult to see the buyer's right to withhold performance in the case of non-conformity of the goods. This is evidenced by the fact that the CESL posits the specific provision for the general right to withhold performance at the forefront of such right and it is followed by other specific provision for the buyer's right to withhold performance in the case of the seller's partial or divisible performance, early delivery, shortage and excess delivery in quantity. This explains the buyer's right to withhold performance should be, as clearly stated in its commentary book, also applied to the partial non-performance or the lack of conformity.

As such, the position of the CESL which has a specific provision for a general right to withhold performance was rather easier and more apparent to allow the buyer to withhold performance in the case of the lack of conformity. The position of the CISG also recognizes such right on the basis of analogical interpretation of relevant provisions under the CISG but may be open to criticism due to the absence of a specific provision for a general right to withhold performance and unnecessary and inefficient analogical interpretation. In this regard, it is submitted that it may cause the unnecessary misunderstanding and disputes between the contractual parties about the buyer's right to withhold performance, particularly where the seller delivers the goods which are not in conformity with the contract and not free from the third party's rights or claims. Therefore, in order for the contractual parties to avoid those situations, they must fully keep in mind and it is desirable to clearly specify in their contract in what cases they have a right to withhold performance.

3.1.2. Non-Conformity of Documents

a) The CISG

It is not clearly provided under the CISG whether the buyer can exercise his right to withhold performance where the seller tenders the defective documents (Jafarzadeh, 1998, 126). However, it can be argued that this problem may be solved by inferring from article 58(1) of the CISG, which provides that the buyer must pay when the seller places the documents that control the disposition of goods at the buyer's disposal in accordance with the contract and the CISG (Jafarzadeh, 1998, 126). According to this article, as the buyer is obliged to pay only when the seller places the documents that control the disposition of goods at the buyer's disposal if the seller does not do so, it means that the buyer is entitled to refuse payment (Jafarzadeh, 1998, 126). However, one must note that this article is not applied to all kinds of documents but limits to the documents controlling the disposition of goods (Jafarzadeh, 1998, 126). If so, the issue is whether the buyer can refuse to take delivery of documents or withhold the payment if the seller tenders the documents that do not conform to the requirements of the contract in the case where they are not kinds of the documents

controlling the disposition of goods (Lee Byung-Mun, 2002, 262 et seq.; Lee Byung-Mun and Kim Dong-Young, 2020, 806). In this regard, insofar as the documents concerned in article 58(1) of the CISG are those controlling the disposition of the goods, one may assume the buyer is not allowed to refuse to pay the price where the seller tenders a defective document which does not control the disposition of the goods. However, it is submitted that the documents stated in article 58(1) of the CISG include not only documents of the title but also those used for the seller to perform his obligation to deliver the goods pursuant to articles 30 and 34 of the CISG (Enderlein and Maskow, 1992, 219 et seq.; Schwenzler, 2016, 878 et seq.; Kröll, Mistelis and Viscasillas, 2018, 815 et seq.). This interpretation seems to extend the buyer's right to refuse to pay the price to the cases of some other documents than documents of title. In addition, it is argued that, even if the documents tendered are not kind of those controlling the disposition of the goods, the buyer is still entitled to reject a non-conforming document and refuse to pay the price. This argument is based upon the bilateral relations between articles 30 and 53 of the CISG that provide the main obligations of the parties under the CISG (Jafarzadeh, 1998, 127; Lee Byung-Mun, 2002, 263 et seq.). Furthermore, as it is provided in the CISG, the refusal of documents which do not control the disposition of the goods and conform to the contract accords to usages and practices that are widely applied and accepted between the contractual parties (CISG Art. 9). That is, if the documents tendered by the seller are not in accordance with the contract, the buyer may in practice treat them in the same way as if the goods themselves do not conform to the contract and thus reject the documents and refuse to pay the price (Bianca and Bonell, 1987, 428 et seq.; Enderlein and Maskow, 1992, 219 et seq.; Lee Byung-Mun, 2002, 264; Lee Byung-Mun and Kim Dong-Young, 2020, 806).

b) The CESL

Article 91(e) of the CESL provides that one of the seller's main obligations is to deliver documents representing or relating to the goods or documents relating to the digital content as may be required by the contract. Like its counterpart, article 123(1)(c) of the CESL provides that the buyer is under the obligation to take over such documents representing or relating to the goods as may be required by the contract. These two provisions provide the main obligations of both parties and these obligations shall be interpreted pursuant to their bilateral contractual relation (Schulze, 2012, 534). Based on this bilateral contractual relation and the buyer's right to withhold performance under article 113 of the CES, it should be interpreted that the buyer is allowed to withhold his performance until the seller tenders documents representing or relating to the goods.

However, the question remains whether the buyer's right to withhold performance may be granted even if there is a defect in the document provided by the seller. In this regard, it should be noted that Article 91(e) of the CESL requires that the seller has to tender the documents representing or relating to the goods which may be required by the contract. This means that a document to be procured by the seller must be in accordance with the type, form, and manner in which it must be handed over as required by the contract. So, if the seller fails to procure the documents as required by the contract, the buyer can exercise the right to withhold performance pursuant to article 113 of the CESL. Here the question is whether such right to withhold performance can be applied to the withholding of payment. As to this question, it is necessary to examine article 126 of the CESL which provides that the time of the payment comes due upon the delivery of goods. Here, the mode of delivery agreed between the parties may decide the time when payment must be made (CESL Art. 94). Insofar as the seller is required to procure documents enabling the buyer to take over the goods from the carrier or representing the goods in order to carry out his duty to deliver the goods, his

failure to procure such documents as required by the contract may allow the buyer to refuse to pay the price (CESL Art. 113). One thing to be noted here is that the documents would not include documents other than those for the disposal of goods unless agreed otherwise by the parties.

c) Comparison and Assessment

As discussed above, the CISG does not provide explicit provisions on whether the buyer can exercise the right to withhold performance in case of non-conformity of documents. However, it was argued that the buyer's right to withhold performance could be deduced through article 58(1) of the CISG. According to this article, the buyer has a right to refuse to take delivery of documents and to pay the price only if the seller fails to deliver the documents controlling the disposal of goods. Insofar as the documents to be tendered are those not controlling the disposal of goods, the buyer's right to refuse to pay the price could be derived by analogy from the bilateral relationship between articles 30 and 53 of the CISG, and this view was justified by usages and practices broadly accepted in documentary sales contracts. However, this view may open to criticism in that the bilateral relationship does not refer to the buyer's obligation to take over the documents tendered by the seller. This is because, contrary to article 30 of the CISG, article 53 of the CISG does not expressly provide the obligation to take over the documents as one of the buyer's main obligations.

The CESL does not have an expressive provision for the buyer's right to withhold performance in case where the seller tenders defective documents. However, compared to the position of the CISG, it was not difficult to infer that the buyer's right to withhold performance was able to be accepted through article 113 of the CESL which was provided for the buyer's general right to withhold performance. In addition, the bilateral contractual relation between articles 91 and 123 of the CESL justifies the buyer to refuse to take over documents that do not conform to the contract. Here contrary to the position of the CISG, those articles deal with the seller's obligation to tender documents (CESL Art. 91(e)) and the buyer's obligation to take delivery of documents (CESL Art. 123(1)(c)).

It was maintained both under the CISG and the CESL that the buyer might withhold the payment if the seller tenders the documents which are not in accordance with the contract. But this is applied only in the where the documents are those used for the disposal of the goods. In this regard, it is regrettable to say that they do not properly reflect practices and usages established in the area of documentary sale of goods. This may cause misunderstanding and disagreement on document requirements by the contracting parties in practice. Therefore, the parties should pay special attention to this and it would be desirable for them to explicitly agree on this to prevent unnecessary disputes in advance.

3.2. Severity of Non-Conformity

3.2.1. The CISG

The CISG does not provide how serious non-conformity would allow the buyer to withhold performance. It could be argued that it should reach the same degree of severity of non-conformity as amounting to being sufficiently serious or material to terminate the contract. However, it is generally understood that it does not require non-conformity to amount to a fundamental breach of contract which entitles the buyer to terminate the contract (CISG Art. 25; Lee Byung-Mun, 2002, 266).

Although not clearly stated under the CISG, the degree of severity of non-conformity which allows the buyer to withhold performance may be inferred from Article 71 of CISG which provides the right to withhold performance for anticipatory breach of contract (Lee Byung-

Mun, 2002, 266). This is because this article deals with the same right to withhold performance as in the case of an actual breach of contract. According to article 71 of CISG, the buyer may withhold his performance if it becomes apparent that the seller will not perform a substantial part of his obligations. Then, here the question is what “a substantial part of performance” in this article means. Although not clear, it is submitted that the ‘substantial part’ of the seller’s obligations does not belong to a fundamental breach which is specified in article 72 of the CISG (Bianca and Bonell, 1987, 519; Enderlein and Maskow, 1992, 286; Karton, 2009, 883; Kröll, Mistelis and Viscasillas, 2018, 888; Lee Byung-Mun, 2002, 266). Otherwise, article 71 of the CISG should have taken the same approach as article 72 does in terms of severity of breach (Lee Byung-Mun, 2002, 266; Schwenger, 2016, 1008). As the right to withhold performance is a self-help remedy which is intended to withhold the buyer’s performance and to coerce the seller’s performance without-avoidance of the contract, it seems that the buyer’s right to withhold performance does not need to be based on the seller’s fundamental breach (Jafarzadeh, 1998, 125; Lee Byung-Mun, 2002, 266).

Given that a fundamental breach of contract is not required for the buyer’s right to withhold performance, the next question is how serious non-conformity should be for the buyer to exercise the right. It is submitted that it should be decided by virtue of the principle of proportionality that the buyer’s withholding of performance should be consummated to the seller’s breach since the right to withhold performance is based on the principle of bilateral contractual relations (Nyer, 2006, 36-40). Therefore, as long as the seller’s breach allows the buyer to terminate the contract (CISG Art. 49(1)(a)) or claim replacement (CISG Art. 46(2)), the buyer should be vested the right to refuse to take delivery and pay the price (Lee Byung-Mun, 2002, 267). In addition, even if the seller’s breach amounts to a breach which does not allow the buyer to terminate the contract but only to claim damages (CISG Arts. 45(1)(b), 74, 77), price reduction (CISG Art. 50) or repair (CISG Art. 46(3)), the buyer may be still entitled to withhold performance until the seller cures non-conformity of goods or documents (Lee Byung-Mun, 2002, 267). However, in case of minor non-performance, the buyer’s right to refuse to take delivery of goods may not be granted pursuant to the principle of good faith (Bianca and Bonell, 1987, 392; Lee Byung-Mun, 2002, 267). In the same vein, one must also take into account the contract as a whole to decide what constitutes a substantial part of the obligations and find out a fair balance between the parties to be achieved after the exercise of the buyer’s right to withhold performance in a way to reduce the possibility of the buyer abusing the right (Kröll, Mistelis and Viscasillas, 2018, 889; Schwenger, 2016, 1009).

3.2.2. *The CESL*

As reviewed earlier, the CESL grants the buyer the right to withhold performance where there is any non-conformity in the goods or documents (Schulze, 2012, 516). However, it does not clearly provide the degree of severity of non-conformity which allows the buyer to exercise the right to withhold performance. What is clear is that the degree of severity of non-conformity for exercising the right to withhold performance is not the same as a fundamental breach of a contract which is required for the buyer’s right to terminate the contract (CESL Art. 114). This can be inferred from the fact that the provisions for the withholding of performance and termination of contract under the CESL are separated (CESL Arts. 113-114). If there is any non-conformity in the goods or documents, the extent to which the buyer will be able to withhold performance may be decided by virtue of the severity of non-conformity (Schulze, 2012, 516). Therefore, one must assess the severity of non-conformity as well as the remedies available to the buyer due to non-conformity (Schulze, 2012, 516). If the buyer can claim the replacement of goods, the buyer may be allowed to reject the goods or refuse to take over the documents and to withhold the entire payment (Schulze, 2012, 516).

The same can be applied if non-conformity entitles the buyer to claim repair by the seller (Schulze, 2012, 516). Where non-conformity of goods is to be repaired by the buyer, the payment may be withheld until the repair of goods is completed. At this time, the right to withhold performance may depend on the type of non-conformity and its impact on the functioning of goods (Schulze, 2012, 516).

3.2.3. *Comparison and Assessment*

As reviewed above, both the CISG and the CESL do not express clearly for the degree of severity of non-conformity which may allow the buyer to exercise the right to withhold performance. Although not clear enough, both the CISG and the CESL has shown us the same direction on this matter. First, the point is that non-conformity does not necessarily have to amount to a fundamental breach of contract for the buyer to exercise the right to withhold performance. Second, it seems that the right to withhold performance is depended upon the degree of severity of non-conformity as well as what remedies are available to the buyer pursuant to the principle of proportion. This position seems plausible particularly when one takes into account the right to withhold performance as a coercive measure which may hold the seller strict adherence to whatever agreed in the contract (Nyer, 2006, 36-40).

The only possible difference can be found in the question of how both jurisdictions deals with trivial non-conformity. The CESL looks not clear and no commentary on this matter, whereas the position of the CISG says the buyer should not be granted the right to withhold performance for trivial non-conformity based on the principle of good faith. However, this may not be true because the same principle is clearly provided in article 2 of the CESL and it can be interpreted without any doubt to prevent the buyer from abusing the right to withhold performance.

As examined above, those rules do not seem to give us a clear cut. However, the issue of conformity often arises in practice and causes disputes between the contractual parties about the severity of non-conformity for the right to withhold performance. Therefore, the contracting parties shall keep this in mind and be better off to specify the clear standard rule in the contract.

3.3. Non-Performance of Additional Obligations

3.3.1. *The CISG*

Additional obligations may be different from the nature of the bilateral obligations under the contract. Therefore, it has been debated whether the breached party is granted the right to withhold performance when such additional obligations are not performed (Schwenzer, 2016, 1006; Schwenzer, Hachem and Kee, 2012, 553).⁷ The CISG does not also express whether the buyer can exercise the right to withhold performance in relation to non-performance of the seller's additional obligations.⁸ However, it is submitted that the buyer

⁷ It is doubtful whether the right to withhold performance is properly applied in practice if this right is granted for the breach of additional obligations. For example, if the buyer's obligation to take delivery is classified as the additional obligation under the governing law, it does not seem reasonable for the seller to exercise the right to withhold performance to coerce the buyer into taking delivery (Schwenzer, Hachem and Kee, 2012, 553).

⁸ The CISG does not differentiate between main and additional obligations, or bilateral and non-bilateral obligations (Kröll, Mistelis and Viscasillas, 2018, 350; Schwenzer, 2016, 429-459). Thus, any breach of additional obligations that are not regarded as typical obligations of a contract for the sale of goods may still amount to a fundamental breach of contract (Kröll, Mistelis and Viscasillas, 2018, 350; Schwenzer, 2016, 429-459). If non-performance of additional obligations belongs to a fundamental breach of the

should be granted a general right to withhold performance at least in certain circumstances (Schwenzer, 2016, 1006; Schwenzer, Hachem and Kee, 2012, 553). They argue that the buyer's obligation which will be withheld and the seller's obligation which is not performed are not necessarily the equivalent of each other (Schwenzer, 2016, 1006). This view is derived from the principle underlying article 71 of the CISG, the importance of self-help remedy without judicial intervention and the general principle of reasonability (Schwenzer, 2016, 1006 et seq.). Therefore, for example, if the seller fails to perform the obligation to give prior notice about a delivery place as required by the contract, the buyer may withhold the payment (Schwenzer, 2016, 883). And the buyer is also allowed to withhold to pay the price where the seller fails to tender a receipt of payment as agreed in the contract (Schwenzer, 2016, 883). In addition, the buyer may be entitled to withhold payment if the seller has an additional installation duty and his installation has caused the buyer's working place unsafe (Schwenzer, Hachem and Kee, 2012, 553). Then the question remains whether the buyer should be allowed to withhold performance for the seller's failure to perform any kind of additional obligations. Although not clear, it may depend upon the actual circumstances of the case and the interpretation of the contract pursuant to article 8 of the CISG.

3.3.2 *The CESL*

Article 113 of the CESL which provides the right to withhold performance is, as examined above, based upon the reciprocal nature of contract (Schulze, 2012, 514). This might be interpreted that insofar as the seller's obligations are not reciprocal by their nature, the buyer's right to withhold performance cannot be applied to the breach of additional obligations. However, one must note that article 113 of the CESL explicitly provides that the buyer has the right to withhold performance where the seller has failed to perform or tender performance. And thus, it is necessary to examine the concept of the seller's non-performance under article 113 of the CESL to determine whether the buyer can exercise the right to withhold performance for the breach of additional obligations. Article 87 of the CESL defines the concept of the seller's non-performance such as non-performance, delay of delivery and delivery of defective goods (CESL Art. 87). However, the kinds of non-performance stated in Article 87 of the CESL are just the most common cases of non-performance. The list of these cases of non-performance is not exhaustive and mostly provides only illustrations to give guidelines on the concept of non-performance under the CESL (Schulze, 2012, 400). The concept of non-performance stated in Article 87 of the CESL is defined as the failure of the contracting party to fulfill his obligations and it also refers to the discrepancies between the party's obligations and actual performance (Schulze, 2012, 399). In other words, it is very a comprehensive concept that includes the failure to perform all kinds of obligations (Schulze, 2012, 399). Therefore, it can be inferred that any kind of failure to perform additional obligations also belongs to the concept of non-performance that is provided in the CESL. Based on this, it can be assumed that the buyer can withhold his performance if there is any seller's breach of additional obligations under article 113 of the CESL.

3.3.3 *Comparison and Assessment*

Both the CISG and the CESL do not explicitly provide whether the buyer has the right to withhold performance in relation to non-performance of the seller's additional obligations. In this regard, there has been a controversy over whether the right to withhold performance may be granted for the breach of additional obligations. This is because the right to withhold

contract, the buyer may exercise the right to withhold performance (Schwenzer, 2016, 884).

performance is based on the bilateral contractual relation but additional obligations cannot be defined as a bilateral obligation between the contract parties due to its nature (Schwenzer, Hachem and Kee, 2012, 553). Despite such controversy, it seems that we can infer that the buyer may withhold performance for the breach of the seller's additional obligations. However, it is doubtful whether it is possible to exercise the right to withhold performance for all cases of the breach of additional obligations. As regards this matter, it should be interpreted that the buyer's right to withhold performance is allowed for the seller's failure to perform any kind of additional obligations. This is justified when one takes into account the primary playing role of the right to withhold performance as a coercive measure to force the seller to comply with any of his additional obligations (Nyer, 2006, 36-40). However, as examined above, there would be misunderstandings or disputes between the parties as to the buyer's right to withhold performance for the seller's breach of additional obligations since there is no explicit provision and compromised view on this. Therefore, practitioners should establish clear and objective standards and clearly specify this in their own contract.

4. Buyer's Readiness for Performance and Requirement of Notice

4.1. Buyer's Readiness for Performance

4.1.1. The CISG and the CESL

The buyer's readiness and ability to perform his obligations can be considered as another requirement to exercise the right to withhold performance (Schwenzer, Hachem and Kee, 2012, 553; Schulze, 2012, 514). The CISG and the CESL do not provide explicitly for this requirement. However, it seems that it may be inferred through the bilateral relations between the buyer's and the seller's main obligations (CESL 91, 123; CISG Art. 30, 53; Lee Byung-Mun and Kim Dong-Young, 2020, 809). The relations explain, as noted before, that a contractual party undertakes to perform his part of the contract in the expectation that the other party will also likewise perform (Schwenzer, Hachem and Kee, 2012, 548). On the basis of such relations, it may be asserted that the seller's obligation to deliver the goods or documents may arise only when the buyer is ready to take delivery of the goods and pay the price, has the intention to do so, and actually performs in accordance with the contract (Jafarzadeh, 1998, 123). Namely, if the buyer is not ready to do his obligation or has no intention to do so, as there is no obligation of the seller to perform, the right to withhold performance may not be applied to this case (Jafarzadeh, 1998, 123). This is because it may be unreasonable if the right to withhold performance is granted to the buyer who seeks to avoid performing his obligation even where he is not ready to perform or has no intention to do so (Schwenzer, Hachem and Kee, 2012, 553). This requirement is also justified when one takes into account the fact that the buyer's obligation to take delivery of the goods includes not only taking over the goods but also all the acts which are necessary for the seller to deliver the goods.

4.1.2. Comparison and Assessment

Both the CISG and the CESL do not provide the buyer's readiness for performance as a requirement for the buyer to exercise the right to withhold performance. But the requirement could be derived through the bilateral relations between both parties' obligations. If this requirement is not accepted, the right to withhold performance can be used for the buyer as a means of avoiding his obligation even if he is not ready to perform or not intended to perform (Schwenzer, Hachem and Kee, 2012, 553). In other words, it may be meaningless to grant the buyer the right to withhold performance if the buyer already breaches one of his

obligations (Schwenzer, Hachem and Kee, 2012, 553).

As regards this requirement, in practice, the buyer seeking to withhold performance often faces the seller's claim for the buyer's breach of a contract based on the lack of readiness to perform his part of the contract. In order to avoid this situation, the buyer is advised to take a precautionary measure before he exercises his right to withhold performance, for example, the deposit of payment by the buyer or the performance (payment) guarantee by a third party. Furthermore, it would be reasonable to eliminate the room for controversy by explicitly providing in the contract what requirements must be fulfilled to show the buyer's readiness for performance before he exercises the right to withhold performance.

4.2. Requirement of Notice

4.2.1. *The CISG and the CESL*

The CISG has an expressive provision for a notice of withholding performance in an anticipated breach of contract (CISG Art. 71(3)). There has been controversy as to the consequence of failure to provide a notice of withholding performance in case of the other party's anticipated breach of contract. On the one hand, it is argued that the notice is required for the right to withhold performance in case of the other party's anticipated breach of contract (Kröll, Mistelis and Viscasillas, 2018, 904).⁹ On the other hand, the others contend that the notice is not necessarily regarded as a requirement for the right to withhold performance, but the failure to provide notice simply leads to a claim for damages by the other party (Huber and Mullis, 2014, 343; Schwenzer, 2016, 1015). In contrast, there is no explicit provision on the requirement of notice for the buyer to exercise the right to withhold performance for the seller's actual breach of contract under the CISG. However, in the case of the CISG, although arguable, the requirement of notice may be inferred from Article 71(3) of the CISG. This is based upon the idea that there is no reason to differentiate the notice requirement for the right to withhold performance between anticipated and actual breach of contract. In addition, it can be by analogy drawn from article 26 of the CISG which provides a notice requirement for the right to avoid the contract (Schwenzer, Hachem and Kee, 2012, 554). It is argued that this view is consistent with a general principle underlying the CISG under Article 7(2) of the CISG that the contractual parties can exercise their rights only by providing notice (Schwenzer, Hachem and Kee, 2012, 554). Once the buyer is determined to exercise his right to withhold performance, he is required to immediately notify the seller of his intention to do so (CISG Art. 71(3)). The meaning of such immediate notice is that the buyer has to provide a notice without any avoidable delay before or as soon as his withholding of performance (Kröll, Mistelis and Viscasillas, 2018, 904; Schwenzer, 2016, 1014). As regards the contents of the notice, it is submitted that it should indicate on which grounds the buyer exercises his right to withhold performance (Kröll, Mistelis and Viscasillas, 2018, 905; Schwenzer, 2016, 1014).

Unlike the position of the CISG, the CESL does not provide for the requirement of notice to exercise the right to withhold performance for anticipated and actual breach of contract (CESL Art. 113, 118). According to the commentary book of the CESL, the buyer can exercise the right to withhold performance without a separate notice if all the requirements are fulfilled (Schulze, 2012, 515).

4.2.2. *Comparison and Assessment*

As examined above, the CISG seems to, although no consensus reached among academics

⁹ This is a majority view taken by case holdings.

and courts, require the buyer to provide a notice of withholding performance as a precondition for the exercise of the right to withhold performance. On the other hand, the CESL does not provide any notice requirement for the right to withhold performance. The position of the CESL may be criticized as follows. First, it may not achieve the purpose of the right to withhold performance which encourages the parties to perfect the contract by an exchange of communication and cooperation and induces the other party to restate his commitment to the contract (Kröll, Mistelis and Viscasillas, 2018, 904). That is, if the buyer does not give any notice on the withholding of performance, the seller may lose the opportunity to take a timely cure on his non-performance (Schulze, 2012, 584). This result may not help at all to save the contract by enhancing communication and cooperation between parties. Second, the seller should investigate the reason by himself why the buyer refused to perform and the buyer is not even obliged to answer the seller's question about the buyer's refusal to perform (Schulze, 2012, 584). This is directly opposed to the provision of article 3 of the CESL that imposes the obligation to co-operate with each other to the extent that it can be expected for the performance of obligations under the contract (Schulze, 2012, 584). Third, where there is no notice of the buyer to withhold his performance, the seller may misunderstand the buyer's withholding of performance as an anticipatory breach that may induce the seller to terminate the contract pursuant to article 136 of the CESL. However, insofar as there is still controversy as to the existence of notice requirement, although the buyer may often provide a notice of withholding performance in his interest in practice, it is desirable for the buyer to do so without avoidable delay in order to remove any risk of losing the right to withhold performance and putting himself in breach of contract (Kröll, Mistelis and Viscasillas, 2018, 904). In addition, it is necessary for the parties to negotiate and agree to the requirement of notice in the contract to make this more clearly in practice.

5. Conclusion

This paper examined the requirements of the right to withhold performance through the comparative study based on the CISG and the CESL for the buyer's right to withhold performance by the seller's actual breach of obligation. In this conclusion, we will present the following considerations and implications required when practitioners designate and use the CISG and the CESL as the governing laws by focusing on the differences found through the analysis and review by the comparative study.

First, the CISG explicitly recognizes the buyer's right to withhold performance for a certain case such as the early delivery or excess quantity, but it does not explicitly provide whether the right to withhold performance is recognized where the seller delivers the goods with the defects in quality, packing, quantity, the documents or the right. However, many scholars have tried to draw the buyer's general right to withhold performance from relevant provisions of the CISG. In the case of the non-conformity of goods, we could infer that the buyer may withhold his performance under the CISG by the bilateral relations between articles 30 and 53 of the CISG which provide the main obligations of the parties. And, on the basis of a general principle drawn from article 71 of the CISG, it could be assumed that the buyer's right to refuse the payment under article 58 of the CISG may be applied to the cases of the seller's failure to perform other obligations than the delivery of goods and handing over of documents controlling their disposition. Furthermore, we could see that the buyer's right to refuse to take delivery can be recognized by analogy from articles 58, 46(1), 47(1) of the CISG on the premise that the buyer's right to reject the goods under article 86 of the CISG is equivalent to his right to refuse to take delivery under article 52 of the CISG. In case that the

seller delivers the goods, which are not free from a third party's right or claim, it can be also inferred in the same way like as non-conformity of goods based on the bilateral relations between articles 30 and 53 of the CISG. Lastly, where the seller delivers the defective documents, we could assume that the buyer may withhold performance through article 58(1), articles 30 and 34 of the CISG.

On the other hand, the CESL explicitly provides that the buyer has a right to withhold performance where the seller fails to tender performance or perform the contract. It also provides that the buyer may withhold his performance in case of early delivery, lack of quantity, and the delivery of excess quantity. But it is not clear whether it can be applied if there is any defect of goods or documents or non-conformity of the right. However, in case of the non-conformity of the goods, we could assume that the buyer may withhold performance to the extent that is justifiable based on the analogical interpretation of the relevant provisions of the CESL (Article 91, Article 99, Article 123, Article 126 and Article 113). In the case where the seller tenders the defective documents, we can also infer that the buyer may have the right to withhold performance through Article 113 and the bilateral contractual relation between both parties' obligations under articles 91 and 123 of the CESL.

As discussed so far, the CESL provides the right to withhold performance more specifically than the CISG, but the issue of defective goods or documents or non-conformity of the right is still not clear. This may result in disputes or uncertainties between the contract parties. Therefore, it would be appropriate for the contract parties to explicitly provide this part in the contract.

Second, both the CISG and the CESL do not explicitly provide whether the performance must be due as the requirement for the buyer's withholding of performance. However, we found that it was not difficult to accept it as the requirement of the right to withhold performance by inferring from the relevant provisions. This is because whether the buyer exercises the right to withhold performance for the seller's breach is, of course, applicable only when the time of performance comes due. In general, the time of performance of one party is the time when goods are delivered and payment is made unless agreed otherwise by the parties, and the risk of the parties is to be allocated when fixing the order of performance. Therefore, it is necessary for the parties to negotiate and specify the necessary conditions in relation to the exercise of the right to withhold performance in concluding the contract after the parties fully review the risk by the difference in the order of performance.

Third, both the CISG and the CESL do not clearly provide what degree of non-conformity entitles the buyer to exercise the right to withhold performance. As to this severity of non-conformity, there are some arguments that it should be the same level of seriousness to terminate the contract. However, we could infer that the degree of severity of defects is not required to be a fundamental breach of contract under the CISG and the CESL, and the defects should be significant enough to make one of the remedies be exercised to recognize the buyer's right to withhold performance. In addition, the right to withhold performance may be recognized proportionally depending on the degree of its severity, and it seems that it may not be accepted for very minor defects based on the principle of good faith. However, the ambiguity of the conformity standard may cause disputes between the parties about the severity of non-conformity for the right to withhold performance in practice. Therefore, it is necessary for the contract parties to keep this in mind and specify clear standards in the contract.

Fourth, it is not clearly expressed whether the buyer may withhold the performance in relation to the seller's non-performance of additional obligations in the CISG and the CESL. However, we could see that the right to withhold the performance may be granted to the buyer in specific circumstances under CISG. And in the case of the CESL, based on the

analogical interpretation that any kind of failure to perform additional obligations also belongs to the concept of non-performance that is provided in the Article 87 of the CESL, it can be also inferred that the buyer may withhold his performance if there is any seller's breach of additional obligations under article 113 of the CESL. However, this also may cause differences in interpretation and controversy. Therefore, it would be desirable for practitioners to establish clear and objective standards and specify this in the contract.

Fifth, both the CISG and the CESL do not provide the buyer's readiness for performance as the premise requirement to withhold performance. However, this principle could be assumed through the bilateral relations between the obligations of the buyer and the seller. If this principle is not accepted, the buyer may use this to simply avoid its obligations where he is not ready or not willing to perform its obligation under the contract. In addition, if the buyer tries to withhold performance without readiness to perform his obligations of a contract, the buyer may face the seller's claim for the buyer's breach of a contract. In order to avoid this situation, the buyer needs to take a precautionary measure such as the deposit of payment by the buyer or the performance (payment) guarantee by a third party before exercising his right to withhold performance. In conclusion, it would be desirable to eliminate the room for controversy by explicitly providing the requirement of the buyer's readiness for performance in the contract to prevent this issue in advance.

Lastly, it seems that the buyer can exercise the right to withhold its obligation through a notice under the CISG in case of being the seller's breach of the contract. However, there is no obligation for prior notice in the CESL. This may be controversial, but Article 113 of the CESL does not require the buyer to give a notice for the refusal of performance (Schulze, 2012, 516). However, as examined above, this may lead to disputes between the parties. Therefore, it would be advisable for the buyer to give a prior notice on the withholding of performance based on the principle of good faith. In addition, the parties are advised to specify the contents, method and time of notice in the contract in practice.

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