Study on a High Court Case the CISG Governed in Korea*

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I. Introduction

It has been already 7 years since The United Nations Convention on Contracts for the International Sale of Goods (the “CISG”) became effective in Korea.¹ Up to now, CISG has seventy-six member states; nine out of ten leading trade nations being member states. It can be estimated that about eighty percent of all international sales transactions are potentially governed by the CISG ² according to its own provisions as to the

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applicability\(^3\) unless the parties to the sales expressly avoid its application. That’s why CISG should be a primary sales law with worldwide acceptance.

Yet Korean courts have rarely encountered cases where they should apply CISG. This article (“Article” hereinafter) examines the recent high court case (the “Subject Case”) in Korea which applied the CISG as a primary governing rule in a civil matter. It reviews how the Korean court interprets CISG and applies to specific facts in order to evaluate the extent and manner of how the court recognizes and understand CISG in the circumstance where there has never been a preceding case in any other appellate (high) court or the highest court in Korea. When the trial court decision on this Subject Case came out, it received noticeable attention from several eminent Korean scholars\(^4\) because it was the first case in Korea where the main issues were the subject matters of CISG.

Although the overall advantages of the CISG are now undisputable, there still remain several criticisms and skepticism in Korea regarding its interpretation and application. This Article also presents a positive view to the future of CISG in Korea both in the law practice and academia based upon a closer look at the court’s manner in interpreting and applying CISG in the Subject Case, and the writer expects positive prospect toward the employment of the CISG by the Korean courts in the future. In addition, the writer hopes that this article, as is written in English, helps foreign practitioners and scholars understand the current status of CISG in Korean jurisprudence through this Article.

II. Case\(^5\) Summary

1. Facts:

A Chinese company (the plaintiff and appellant in the Subject Case) as the seller, made a contract (“Contract”) with a Korean company (the defendant and appellee in the Subject Case) as the buyer. The sale was for the delivery of 100,000 units of a specific product. The seller delivered the goods, but the buyer refused to pay the invoice. The seller then filed a lawsuit in the trial court, which ruled in favor of the seller. The defendant then appealed the case to the high court, which is the subject of this article.

\(^3\) See the Article 1 (1) of CISG


\(^5\) Seoul High Court 2009.7.23. Sentence 2008Na14857 Judgment (The “Subject Case” hereinafter)
Case), the buyer, on June 11th, 2005 for the sale of duck down under the following terms and conditions.  
1) Product and quantity: 50% pure washed white/gray duck down 88,855 kg; 50% pure washed white/gray duck down 11,145 kg  
2) Price: 50% pure washed white/gray duck down for US$ 13.00/kg; 75% pure washed white/gray duck down for US$ 24.00/kg  
3) Date for Shipment: From June 2005 to August 2005  
4) Destination: Door to door  
5) Payment: L/C and T/T  
6) Remarks: There will be 10% balance of total amount and quantity and the shipment time couldn’t be delayed. (This sentence was interpreted to mean that there can be 10% allowance in the total amount of the price and quantity, and the shipping time shall not be delayed.)

The parties also agreed that the appellant supply total 100,000 kg (88,855 kg + 11,145 kg) of the products in such installments as the appellee indicates. Though the appellant alleged that it supplied 73,598 kg of the products for $ 1,091,391, the appellate court recognized that the appellant supplied only 51,156 kg of the products for $ 764,349.10 in installments as the appellee instructed from June 22, 2005 to August 27, 2005 after considering all the evidences presented at the trial. According to all the relevant evidence regarding the amount of supply and the payment, the court found that, so far till the time of the lawsuit, the seller was paid US$401,980.00 ($369,992+$31,988) leaving $362,369.10 of unpaid balance for the products supplied.

The appellee refused the payment of the above-said balance contend that it avoided the Contract based upon the appellant’s failure of delivery and the balance was set-off with the damages he sustained against the appellant.

The Contract is such a contract under which the delivery of goods was to be made by installments. On the other hand, the appellee entered into another agreement (“Resale”) with another customer (“E-Land”) on June 9, 2005 under which the appellee should

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6 Id. at 3-4  
7 Id. at 5  
8 Id. at 6  
9 Seoul East District Trial Court, 2007.11.16. Sentence 2006GaHap6348 Judgment, at 5-6
resale to E-Land the products the appellant should deliver to the appellee under the Contract. The appellant knew about this Resale at the time of their making the Contract.\textsuperscript{10}

Though the appellant delivered the products several times during the Contract period, part of the products were not delivered in time due to carrier's failure to transship the products in Singapore. The products were shipped on August 12, 2005 and were bound to be delivered to Yangon Myanmar by August 25, 2005 according to the installment terms agreed on June 11, 2005 under the Contract. Meanwhile, the appellant did not respond to the appellee's request of transporting the kind of goods via air to Yangon Myanmar or another request that the appellant change the destination on the bill of lading from Myanmar to Singapore while the products were still left in Singapore.\textsuperscript{11}

2. Procedural Background

The trial court decided to apply the CISG to this case because the Contract was an agreement for the international sale of goods between Korea and China, which are both signatories to the CISG. The court applied article 49 and 25 and rejected the appellee's contention that the Contract was avoided by viewing that, “The mere fact that the appellant did not deliver part of the agreed amount of the products within the due time does not lead to the conclusion that the appellant caused damages to such extent as substantially deprive the appellee of what the appellee could expect under the Contract.”

The trial court, however, acknowledged that the appellant has the obligation to the appellee for the damages caused by the failure to supply the products in time and decided that the appellee should pay the appellant the amount remaining after setting off the damages from the unpaid price for the products already delivered.

The appellant appealed to the high court asking to change the trial court's decision to be same as its claim that the defendants jointly should pay 528,545,510 Korean Won and the interests accrued thereto with the rate of 6\% per year from September 15, 2005 and thereafter with 20 \% per year up to the date of full payment.

\textsuperscript{10} Id. at 4
\textsuperscript{11} Supra case in note 5 at 6
3. Judgment

(1) The high court changed the trial court’s decision against the appellee as follows:
1) The appellee shall pay the appellant 319,077,875 (“Principal”) Korean Won plus the amount calculated applying the interest rate of 5.22% per year to the Principal from October 15, 2005 to July 23, 2009 and the other amount calculated applying the interest rate of 11.52% per year from July 23, 2009 to the date of full payment of the Principal and the accrued interest thereto.
2) All other claims made by the appellant against the appellee are dismissed.

(2) The appeal by the appellant against the joint defendant Ki Young Yoon is dismissed.

(3) 50% of the portion of litigation expenses to be incurred by the appellant and the appellee shall be borne by the appellant, and the remaining 50% shall be borne by the appellee respectively, and the expenses for the appellant’s appeal against Ki Young Yoon shall be borne by the appellant.

(4) Preliminary enforcement may be available for the payment of the amount stated in the above 1.

III. Review of the Issues

1. Scope of Review

The Subject Case actually involves the issue as to whether the representative director of the appellee (a Korean corporation) is personally responsible for the appellee’s liability to the appellant as being an alter-ego of the corporation. Ki Young Yoon (Yoon), the representative director of the appellee was sued by the appellant as a joint defendant with the appellee at the original suit filed with the trial court. Since this article focuses only on the CISG issues, the writer omitted the research and analysis on this issue regarding Yoon. For the readers’ reference, paragraph 2 and part of paragraph 3 in the high court’s judgment are the decisions regarding the issues on Yoon’s part.
2. The law governing the claim:

The trial court had decided that the CISG govern this case after finding that the CISG entered into force both in Korea and China at the time of this case. On the other hand, the court also noted that the law to be chosen according to the rules of Private International Law of Korea will apply to the matters not governed by CISG since CISG provides only for the formation of sales contract and the rights and obligations of the parties arising out of the sales contract.

The above analysis by the trial court does not seem so inappropriate. However, the writer is not yet quite sure if the Korean courts are sufficiently considerate or correct in selecting the CISG as the governing law. In the trial court’s decision, the court pointed out merely the facts as the basis for the application of CISG that “---regarding the contract for the international sale of goods with China which is a signatory to CISG---” without sufficient analysis as to if both the parties’ places of business are located differently in Korea and in China respectively. The other commentators mentioned above also pointed out this problem before the decision of this Subject Case.

Though the high court mentioned the locations of the parties’ places of business in the basic-fact part of the Subject Case, it did omit the analysis in deciding the governing law again. Under the title II. 1. Na. Governing Law, the court merely mentioned that the CISG became effective in both Korea and China. The writer’s opinion is that the court should have stated in detail in its opinions on the governing law as to whether the parties’ places of business were located in Korea and China respectively considering the location of their head offices, factories, and the way of dealing with business.

3. Avoidance of the Contract:

The appellee declared the avoidance of the Contract on October 20, 2005 alleging that the appellant unilaterally refused delivery of the goods and sent its notice of the avoidance to the appellant. The notice arrived to the appellant soon.

12 Supra case in note 9 at 6
13 Supra case in note 5 at 5
According to the Article 73 of CISG, in the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment. If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time. A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

To help understand the fundamental breach of a contract as is stated in article 73, the article 25 of the CISG defines that a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

In the Subject Case, the contract is such a contract under which the delivery of goods was to be made by installments during the agreed term. With respect to one of the installment deliveries of the products, the appellant did not respond to the appellee’s request of transporting the goods from Singapore to Yang-on Myanmar while the goods were still left in Singapore due to the failure of transshipment despite the goods should have been delivered to Yangon under the Contract. In addition to this non-performance, the appellant did not supply the goods according to the purchase order made on September 29, 2005 accompanied by the L/C for the order. The court viewed that these facts establish the good grounds to conclude that a fundamental breach of contract with respect not only to the installments already failed to perform, but also to the installments to be performed in the future. Thus, the court decided that the appellee’s declaration of the contract was proper except for the portion of the contract already performed by the appellant’s delivery of 51,156 kg for $ 764,349.10.

In the former decision by the trial court on this issue, the trial court had rejected the
The appellee’s contention that it had ‘terminated’ the Contract on October 20, 2005 as a defense to the appellant’s claim for the damages caused by the appellee’s non-payment of the purchase price. The reason for the rejection was for the lack of facts satisfying the requirements set forth in article 49 and 25. One noticeable problem in the court’s statement was the court’s usage of the term “termination” rather than “avoidance” which has different legal effect from the former despite the fact that the CISG does not provide for the termination either in article 49 or 25. With respect to this problem, the high court properly used the term avoidance. In addition, the high court analyzed in much more detail than the trial court why the appellant’s non-performance amounted to the fundamental breach in the sense of article 49 and 25. The high court also analyzed if the avoidance of contract as a remedy for the breach in the installments contract when one installment was failed is appropriate only for the one installment or for the entire contract. In these respects, the writer evaluates that the high court’s decision has improved very much in the way of interpretation and analysis of the CISG to a substantial extent in a short period of time from the trial court decision.

4. Right to Claim Damages:

According to article 45, (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77. (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies. (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts.

In the Subject Case, as is stated in 3 above, the facts stipulated by the parties or recognized by the court show that the appellant did not perform its obligation under the Contract and thus the appellee has the right to claim damages for such failure. For this reason, the court decided that the appellee has the right to claim damages.

However, the appellant contended that when it shipped the goods in Shanghai on

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14 Korean Civil Act differentiates these two terms in its Article 544. Please refer to that provision for detail information regarding the difference.

15 This is same in the other provisions such as Article 26, 64, 72, 73, 75, 76, 81, 82, and 83 all of which are related to the remedies for the breach of either party’s obligation.
August 12, 2005, the risk of loss to the goods was shifted to the appellee and thus it is not the appellant’s failure of its obligation to deliver goods even though the goods were still left in Singapore due to the failure of transshipment to Yangon. Regarding this, the high court applied article 67 of the CISG.

The article 67 states that (1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk. (2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

However, in the Subject Case, the Contract states in its relevant provisions “Destination: door to door” with respect to the delivery, and thus the appellant’s contention that the risk of loss shifted to the buyer appellee by merely shipping the goods in Shanghai was not appropriate.

On the other hand, as its defense, the appellant alleged that it had the right to suspend its performance and thus did not respond to the appellee’s demand for supply. The appellant contended that the appellee should have made payment for the goods before or at the same time of the delivery or shipment of the goods, but it did not pay for the goods to be delivered to Yangon or make a clear confirmation on the payment. Upon this ground the appellant contended that he did not fail to perform its obligation. Regarding this issue, the high court applied the article 71 of the CISG. According to the article 71, (1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability of perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract. (2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which
entitles him to obtain them. The present paragraph relates only to the rights in the goods between the buyer and the seller. (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

The evidence upon which the appellant contended that it did not fail to perform its obligation is the term “payment condition” in the Contract which stated, “before delivery or before shipment”. However, the evidence presented was not the original but a copy thereof and the appellant said that it lost the original. On the other hand, the appellee contended that the evidence was altered or falsified. On this issue, the court decided that the evidence could not be accepted without a proof that the original existed and that it was properly established. Thus the court decided that there was no reason to accept the appellant's contention which was based upon the agreement on such payment condition.

The writer evaluates that the high court properly interpreted the relevant CISG provision regulating the issue of suspension of performance and reviewed the establishment of the necessary foundation to support the facts constituting the elements stated in the rules governing the issue.

5. Calculation of the Damages on the Part of Appellee

According to article 74, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract. In addition to this article, article 75 of the CISG states that if the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.
Here, the appellant alleges that it sustained the damages of $396,366.9 because, due to the appellant’s failure to perform its obligation to deliver the goods, the appellee had to purchase the goods from other supplier in order to provide the same goods to its customers and gave the purchase money directly to the customers. On this issue, the court noticed in the evidence it accepted that the appellee purchased 3,000 kg of 50% pure duck down for $53,400 ($17.8 per kg) on September 6, 2005 and 3,958 kg of 50% pure duck down for $70,933 ($17.8 per kg) on September 8, 2005 from other suppliers and incurred the air transportation charge of $52,387 in order to deliver to the appellee’s customers. Since the appellant agreed to supply the 50% pure duck down for $13 per kg under the Contract, the appellant has the duty to compensate $33,528 which is the difference between the agreed price and the appellee’s cost for the replacement purchase plus $85,911.5 of air transportation charges the appellee paid. The court did not accept other damages that the appellee claimed based upon other evidence because the court found that the evidence was not sufficient to prove the relevant facts. The court rejected the appellee’s contention that it gave the purchase money directly to its customer for the lack of sufficiency of the evidence. The court also recognized the demurrage of $20,000 as damages the appellee sustained because of the failure of transshipment of the goods at Singapore, saying that this kind of damages could be expected by the appellant. However, several other damages the appellee alleged to have sustained were rejected by the court for the reason that those had not sufficient evidence to prove or were not such kinds as could be expected by the appellant.

The appellee also claimed 128,713,000 Korean Won for the loss of operational income it could have achieved if the Contract was performed as agreed. However the court did not accept such claim for the reason that the claim did not have sufficient evidence to support. The court also denied the appellee’s claim that it lost 2,000,000,000 Korean Won, which could have been earned from a 10 year supply contract with another company called E-Land that was terminated due to the appellant’ failure to perform the Contract duty because of the insufficiency of evidence to support the claim, even though the court acknowledged that there was such contract with E-Land on June 9, 2005.

The high court’s analysis on the issue of the damages caused by the replacement purchase under article 75 was proper because it first decided that there was the avoidance of the Contract which is the prerequisite for application of article 75. The trial court had made a mistake by applying article 75 even after it decided that there was no
avoidance of the Contract.

In addition, the higher could review the damages on the part of the appellee based upon article 50 together with article 75 which could be an alternative ground for the appellee’s claim for its damages.

6. Calculation of Damages on the Part of the Appellant

The court in the Subject Case did not deal with this issue separately but included it in the issue of setting off with the appellee’s damages.

The appellant’s claim against the appellee for the unpaid amount for the goods (the ‘price’ in short) is also a kind of damage stated in article 74 of the CISG, because the non-payment of the price itself is the breach of the sales contract, and the unpaid price is what constitutes the loss suffered by the other party. However, the court in this Subject Case did not mention the unpaid price as damages. In addition, CISG has provision for the interest in its article 78, which states, “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.” Thus the damage for the delayed payment of the price is the interest in terms of article 74. Nevertheless, the court showed its misunderstanding about the interest by saying in its decision that “On the other hand, since the CISG does not govern the damages for the delayed payment of the price, the Chinese will govern this matter.” Of course the CISG does not provide for the interest rate for which the governing law will be selected by the relevant private international law of the forum state, which is the Chinese law here according to article 26 of Korean Private International Law.

7. Setting off the Claims

The appellee contended that it would set off the appellant’s claim against the appellee for the unpaid amount for the goods with its right to claim damages. The CISG does not provide for the sett-off of the claims. However, the appellant is a Chinese corporation having its place of business in China and the appellee is a Korean corporation having its

\[\text{\textsuperscript{16}}\] Supra note 5 at 16
place of business in Korea, and the Contract provides that the appellant provides the appellee with the duck down. Therefore the law governing the set-off will be Chinese law according to article 26 of Korean Private International Law. The court also stated that “In addition, CISG does not provide for the damages caused by the delay of the payment either, the Chinese law will govern this matter”. For this part the writer made a comment as above.

The court acknowledged the damage caused by the delay of the payment for the goods delivered, which was calculated by the interest rate decided by the Chinese law. The court added this damage to original claim amount against the appellee for the unpaid price for the goods delivered and set appellee’s total damages off from the appellant’s total damages. After the set-off, there remains balance of $258,007.5 on the part of the appellant’s damages against the appellee.

8. Currency Exchange Rate and the Standard Date

Regarding the currency exchange rate to apply between the US Dollar and Korean Won, when each of the two denotes the amount of each of the two different claims to be set-off respectively, the court applied Korean law for the reason that the exchange rate does not affect the substantial contents of the obligation but that it is a specific method to perform the party’s obligation. The court also decided that the place for the actual performance of the duty to pay the unpaid price is Korea. In addition to the exchange rate, the court decided the date for exchange rate to be decided on according to the rule set forth by a Supreme Court case\(^\text{17}\) for this matter; the court decided that the date should be the date of the conclusion of the court’s factual review.

IV. Conclusion

The last 6 years since the CISG entered into force in Korea, Korean courts have rarely encountered cases where they should apply CISG. This article examined how the high court reviewed a case appealed from a trial court which applied the CISG to decide the main issues in the case such as the applicability of the CISG, fundamental breach of

\(^{17}\) Supreme Court 2007.7.12. Sentence 2007다13640 Judgment
contract for the international sale of goods, avoidance of the contract, obligations of the buyer and seller, and the scope of damages. The trial court case was actually the first case in Korea in which the CISG governed such major issues and the purpose of the suit was claim for damages for the breach of a sales contract. This article examined how the high court interpreted CISG and applied it to specific facts in order to evaluate the extent and the manner of how the court recognizes and understand CISG issues.

The high court decision showed a lot of improvement in applying CISG in many aspects compared with the trial court’s decision, although it is not satisfactory enough in that it still lacks clear and full reasoning with respect to the non-delivery of one installment as a fundamental breach, scope of damages (the loss of expected profit), interest, set-off and the choice of the other laws applied due to the limited scope of CISG. Although the overall advantages of the CISG are now undisputable, there still remain the problems of unfamiliarity or unawareness in Korea.

This Article presents a positive view to the future of CISG in Korea both for the area of practice and academia based upon a closer look at the high court’s manner in interpreting and applying CISG in the Subject Case. The writer expects positive prospect toward the employment of the CISG by all the other Korean courts in the future.

* Regarding the cases and other authorities cited for this Article, please refer to the footnotes in this Article.

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CISG를 적용한 한국 고등법원 판례에 관한 연구

국제물품매매계약에관한유엔협약(CISG)은 미국 중국 및 일본과 유럽연합의 대부분이 가맹국이 됨으로써 이제 매매법에 관한 가장 영향력 있는 국제규범으로서 자리고 앉고 있다. 한국에서도 CISG는 2005년에 발효된 이래 별세 6년이란 시간이 지났다. 하지만 아직도 매매계약에 관한 분쟁을 다루는 재판에 있어서 CISG가 준거법으로 적용된 판례는 많지가 않아 한국의 법조계에서 이에 대한 인식이 충분하지 않은 상황에 있다.
본 글은 한국에서 CISG를 적용한 최초의 고등법원 판례에 관한 평석을 다룬 글이다. 본 사건은 1심 판결 이후부터 권위 있는 학자들로부터 비판이 있어서 주목을 끌었던 사건이다. 1심 판결에서 문제가 되었던 많은 쟁점들에 관하여 항소심에서는 법원이 CISG를 해석하고 적용하는 데에 있어서 많은 발전이 있었다고 판단되는 사례이다.

필자는 본 사건에서 준거법으로서 CISG, 계약의 해지, 손해배상청구권, 손해배상액의 산정, 상계 및 환율적용과 그 기산점 등에 관한 결정을 함에 있어서, 항소법원이 CISG를 해석하고 적용한 내용에 대하여 평석하였다. 필자는 본 글을 영문으로 발표함으로써 한국에서 CISG가 법원(법의 존재형식)으로서 가지는 위상과 그것을 해석하고 적용하는 한국법원의 관점과 태도를 국내뿐만 아니라 외국의 법조계에도 소개하고자 하였다.