The Present and Future Role of the CISG in Korea*

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I. Introduction

It has been already 5 years since The United Nations Convention on Contracts for the International Sale of Goods (the “CISG”) entered into force in Korea.1 It would not be improper to say that the CISG has now gained worldwide acceptance because as of today the CISG has seventy-four 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 can be potentially governed by the CISG 2 according to its own provi-
sions as to the applicability. This article ("Article" hereinafter) examines the current role of the CISG in the international trade for Korean businesses in its practical sense as well as its potential as a role model for reforming sales law on an international trade in Korea in the future. It discusses why the CISG is not yet recognized as a role model in international sales law in Korea despite its broad applicability. It also discusses why CISG cannot be employed more often rather than any other domestic sales law in Korean trade despite its overall advantages and superiority to any domestic sales law with respect to the international trade.

This Article briefly reviews the past experience the CISG had in the United States, China and Japan to get an insight for its future in Korea. Although the overall advantages of the CISG are now undisputable, there remain several criticisms and skepticism in Korea regarding its application to international commercial transactions. This article also presents a positive view to the future of CISG in Korean law practice based upon a closer look at the robust research activities of scholars and young practitioners’ positive attitude toward the employment of the CISG. This article views that the CISG will well fit for necessities of modern international trade for Korean businesses generally.

II. Background of CISG

The historical development of international sales law has so often been reported in many publications and is easily available at the various internet sources including the UNCITRAL website that there is no need for another full account. Thus this Article mentions only the most important milestones.

On January 1, 1988, the CISG entered into force after six decades of efforts by the world legal community toward a unification of international sales law from since the foundation of the International Institute for the Unification of Private Law (UNIDROIT) in 1926. In 1964 the well-known efforts of the UNIDROIT produced the Uniform Law on The Formation of Contracts for the International Sale of Goods (ULIS) and the Uniform Law on the International Sale of Goods (ULIS). Though these two uniform sales laws became the basis of the current CISG, they did not seem to have fulfilled the high hopes and expectation of the world legal community.

With the continuously increasing number of cases where the CISG applies, as of today, the CISG has

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3 See the CISG Art. 1(1) “This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States;” (The key point to understand is that the CISG will apply to cross-border sales of goods contracts between parties located in member nations unless the parties specifically opt out of the CISG in the written contract.)
seventy four member states. This number should be noticed in light of some important additional facts. Nine out of the ten leading trade nations in 2010 are member states, with the United Kingdom being the sole exception. Similarly, in 2010, five leading trading partners of Korea which produce most of all of its trade are now member states. In addition to the U.S, China, Japan, the twenty-three European Union members are also member states of the CISG.

III. Current Recognition of CISG in the World Legal Community

Lots of scholars and practitioners say in their writings that the unification process of international sales law successfully continued so far. Now the successful trend seems to have recently seen Japan become the seventy-first and Albania the seventy-fourth member state of the CISG. It has been already said for long time that the CISG have gained worldwide acceptance as the best recognized rule for the international sale of goods and now such statement is being proven with much heavier evidence.

Even though much has been written about the skepticism of commercial practice towards the CISG and its allegedly minor role in the legal community, today such skepticism may not overcome the apparent successful outcome evidenced by the drastically increasing number of cases applying the CISG and the overwhelming volume of writings supporting the success of the CISG all of which can be supported by such statistical data as appearing at the UNCIRAL data base and the Pace University’s CISG data base. There are already approximately 2,500 published court decisions and arbitral awards and several thousand scholarly writings, numerous conferences, all of which collectively show the prominent role the CISG plays in practice, legal academia and legal education. This Article does not even have to mention the combined economic power of its member states and its influence on domestic legal systems as well as uniform law projects for the purpose of a consistency and uniformity in interpretation and application of the law as is stated in the Article 7 of CISG.

However it is also true that still many articles say that though twenty two years has already passed since CISG’s entering into force, its success is still a fragile one despite the latest good news of Japan entering

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4 See the same UNCITRAL website, supra note 2
5 The Japanese Parliament has voted for the accession to the CISG on June 19, 2008. The Convention was ratified on July 1, 2008 and entered into force on Aug. 1, 2009
6 Albania joined CISG on June 1, 2010 after its accession on May 13, 2009.
10 See the supra note 8
11 See the supra note 9
the CISG community. While the CISG has had a harmonizing effect on domestic contract laws, the dangers of importing old domestic preconceptions into the CISG are still present. In other words, a uniform understanding and thus a uniform interpretation and application as required by Article 7(1) CISG has not yet been fully achieved, and it is obvious that courts, arbitral tribunals, and legal scholars will have to make further efforts to accomplish the mandate of that provision.

Together with the negative perspective of the writings as stated above the fact that the major industrialized states such as the United States, Japan and China which are most important trading partners of Korea have not yet sufficient cases where the CISG has actually been applied or cited casts another doubt on the practical status and role of the CISG in Korea. It is also true that despite the European states have already plenty of such CISG cases and active in law reforms which is consistent with the spirit of the CISG as is shown in the process of making the Principles of European Contract Law (PECL), the preceding three states are lingering in the progress of the CISG. The status of the CISG in the three states cast significant implication on the study of the CISG in Korea.

IV. The Current Recognition of the CISG in Korean Legal Community

It is a reality that Korean legal community is not sufficiently aware of CISG even after 5 years passed since Korean Congress ratified it. As evidence thereof there is only one high court case\(^\text{12}\) which applied the CISG in Korea. The reason for the lack of recognition or the reluctance of the attorneys to use the CISG in Korea will be explained in comparison with the major trading partner states hereunder Some reasons of such lack of recognition or reluctance to apply the CISG in Korea are of the same nature to those in the U.S. and some of the reasons are of the same nature to those in Japan or China. Some other reasons are unique in Korea in light of the fact that the CISG became effective substantially long time ago and the government, colleges and universities contributed a lot to introduce and educate the CISG for the last decade. Such fact is quite different from the circumstance of any of the major trading partner nations with Korea.

The writer of this Article conducted two-step research for the last three months through telephone interviews and personal interviews with thirty active attorneys,\(^\text{13}\) ten of them randomly selected from the Member Directory of The Korean Bar Association, ten of them personally known to the writer and


\(^{13}\) The writer continued the phone interview with the active attorneys randomly selected from the Member Directory of The Korean Bar Association until the number of such attorneys who actually responded to the interview reached 10 persons.
another ten active attorneys\textsuperscript{14} who are working at big law firms which have more than 50 attorneys and actually practicing international commercial law in Korea. The research was to get the attorneys’ opinions and responses to the current role of the CISG in Korean legal community with the four questions presented in the interviews as stated hereunder.

In the step 1 research, the questions to twenty attorneys belong to the first two group attorneys were:

1) Whether the attorney was aware of the CISG to any extent?
2) If the answer was positive to the question 1, whether the attorney has ever reviewed the CISG issue either in transactional work or dispute resolution work?
3) If the answer to the question 2 was positive, how many times and for what issue?
4) If the answer to the question 2 was negative, what is the reason?

In this step 1 research, the writer found that most of them (18 out of 20) gave negative answer to the question 1. The attorneys with the positive answer to the question 1 gave negative answer to the question 2 by saying that they have not reviewed the issue at all because they did not have the actual case where they should review such issue. They also replied that if they had such a case they would simply consult another attorney known to have knowledge as to the CISG for that issue. There was no need for further questions to these attorneys.

In the step 2 research, the writer asked the same questions to the last ten active attorneys working at big law firms and practicing international commercial law in Korea. In this research, more than half of the attorneys said “yes” to the question 1 and 2. However most of all the attorneys knew the content of the CISG very briefly but not the detail implications such as the different legal effects the CISG has with respect to specific key provisions as to the formation of a contract or remedies in comparison with the Korean Civil Code or the Uniform Commercial Code of the U.S (“UCC”). To the question 3, most of the attorneys had many occasions where they should review the CISG issues for mostly in the transactional work such as contract drafting or negotiation rather than in disputes. The issues the attorneys reviewed were on the governing law or choice of law either in drafting a contract or reviewing a contract drafted by the other party. The usual manner in presenting their opinions regarding such issue was opting out of the CISG by putting in a clause in the contract saying “The parties agree to exclude the

\textsuperscript{14} These attorneys were chosen after the writer’s inquiry to the attorneys as to whether they are engaging in the practice of international commercial transaction at any extent. They are working in the Law Offices of Kim & Chang, Law Corporation of Yulchon and Law Corporation of Jeong-Yul ( or Cho & Lee in English) all in Seoul, Korea The writer expresses special thanks to Mr. Yong Kap Kim, Esq. and Mr. Young Hoon Byun , Esq. at Kim & Chang , and Mr. Jong Chul Kim, Esq. at Cho & Lee for their help to this research. All of these three attorneys have been practicing law more than 25 years and frequently engaged in international business transactions.
application of the CISG in this contract” and to agree to other governing law because of (1) the unpredictability of the outcome, (2) the lack of awareness of the CISG on the counterpart, and (3) the concern about the cost and expenses to be incurred to interpret the provisions of the CISG in the trial or arbitration in Korea. Some of the attorneys said that the main substitute of the CISG were Korean Civil Code, Korean Commercial Code or the UCC all of which they are well familiar with for long time. In actual practice, these attorneys said that they frequently use a form contract which contained a standard governing law provision which includes the clause opting out the CISG.

The trend for the last 10 years

(Legal Education)
In Korea there are many good signs in terms of the recognition of the CISG indicating that the CISG will be generally and commonly known to Korean legal community and play a model role as a primary law in international trade in Korea. One of them is the effect of the Korean Bar Examination which has continuously tested the CISG as its exam subject for the last ten years though it is elective one. With the additional facts that most of all the colleges of law the number of which is more than 100 in Korea nation-wide have been teaching the same subject for almost 10 years, the CISG will no longer remain as a law not recognized by the majority of the practicing lawyers any longer. Korea expects more than 2,000 new attorneys majority of whom will come from the newly established law schools15 every year since 2012. These new attorneys will change the whole profile of the Korean legal community 16 making the lawyers with the American style law school background the majority.

(Emerging Law Firms)
The practitioners are joining law firms either by making new firms or by combining existing solo offices to be a firm The proportion of the solo practitioners in the whole population of the attorneys will significantly decrease and the size of the law firms will grow. The big law firms with more than 50 lawyers have specialized teams or departments to deal with the international transactions and thus the CISG will be no longer quite a law of novelty to the law firms and they will no longer feel risky for them to apply the CISG because of the lack of knowledge of the contents of the CISG.

(The Articles and Publications)

15 In Korea the 25 American style law schools were licensed for the first time by the Government in 2008 and started to teach 2,000 students since 2009. Thus now there are three kinds of institutions existing together in Korea for the time being: The colleges of law, Law Schools and The Judicial Research and Training Institution of the Supreme Court.
16 According to the Ministry of Justice, there are 9,644 attorneys as of Sept. 30, 2009 in Korea and more than 60% of them are
More than 100 articles including the dissertations written about the CISG can be found from the Database of the Korean Research Foundation. There are also more than 20 publications which have significant volume of distributions including the textbooks for the college students and bar preparation materials for the bar exam applicants. (The Lawyers Coming from Overseas International Law Training)

There are hundreds of lawyers who come back from overseas after their training in foreign countries such as the U.S., England, and other European states. They usually are akin to the international commercial laws including the CISG and are more likely to have substantial knowledge about the CISG.

Lessons from the Roles of the CISG in Key Member States Heavily Related to Korean Trade

As is stated above, today the CISG has entered into force in all major industrialized states except England in the world and it has been the most broadly recognized international sales law without any dispute thereon and most of all major trading partners of Korea are now member states, which may cause almost all of Korean trade to be governed by the CISG if the parties to the international sales contracts do not specifically exclude the application of the CISG. Having regard to this development, the trade statistics become all the more impressive. In 2009, the worldwide merchandise trade amounted to 25 trillion USD, about 3 times as much as when the Convention was drafted. For the same period the import and export from and to Korea grew 15 times to reach 687 billion USD. While the CISG obtained its recognition over the world, this Article focuses on what is the practical role of the CISG in Korea considering the same in the three states which are the most important trading partners with Korea both in terms of the trade volume and its nature but in which the CISG has not yet obtained such position as the ones the other states in Europe do.
Lessons from the United States’ Experience

The degree of the scope and importance of the CISG concerning U.S. trade is readily apparent when we note that the United States, Canada (the United States’ largest trading partner), and Mexico (the United States’ third largest trading partner), have all ratified the CISG. This means that the CISG is the sales law of the North American Free Trade Area created by NAFTA. Further, most of the European Union member states who are also the major trading partners of the U.S. have also ratified the CISG. In fact, given the nations that have ratified the CISG, it is not an exaggeration to say that the CISG should govern the majority of international sales contracts involving U.S. businesses. Even though awareness of the CISG appears to be spreading fast quite recently, as evidenced by the increasing rate of discussion of the CISG in U.S. court decisions, the degree of recognition of the implications of the CISG in the US legal community is still very low. Key facts to be borne in mind regarding the legal implication of the CISG can be summarized as the following and the same will be also of help to understand the practical status of the CISG in Korea. First, as a U.S. treaty the CISG preempts state law and governs virtually all contracts for the sale of international goods involving the nations of North America and Europe as is already explained in the above in this Article. Similarly under the Korean Constitution, CISG has the same legal effect as other Koran domestic law superseding lower regulations and , being a new law, it can also supersede the relevant parts of Korean laws on contracts for sale ( some part of which exists in the Korean Civil Code, and some part exist in Korean Commercial Code). Second, location of the parties, rather than the movement of goods across international borders, determines applicability of the CISG; therefore, even transactions which are ostensibly domestic transactions may be covered by the CISG. Third, the CISG mandates that courts attempt to attain uniformity in interpretation of its provisions by considering prior, relevant rulings by foreign courts. Finally, the CISG requires courts to

27 The European Union nations that have ratified the CISG are: Austria, December 29, 1987 (took effect January 1,1989); Belgium, October 31, 1996 (took effect November 1, 1997); Denmark, February 14, 1989 (took effect March 1, 1990); Finland, December 15, 1987 (took effect January 1, 1989); France, August 6, 1982 (took effect January 1, 1988); Germany, December 21, 1989 (January 1, 1991); Italy, December 11, 1986 (took effect January 1, 1988); Luxembourg, January 30, 1997 (took effect February 1, 1998); Netherlands, December 13, 1990 (took effect January 1, 1992); Spain, July 24, 1990 (took effect August 1, 1991); Sweden, December 15, 1987 (took effect January 1, 1989).
28 U.S. Const. art. VI, cl. 2.: “This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”
29 Korean Constitution Article 6 (1).
30 CISG Article 1
begin their interpretation of the provisions of the CISG itself and refer to principles and jurisprudence of domestic law only as a last resort.  

So far lots of sales contract between Korean parties and the U.S. parties chose UCC as governing law because of their familiarity with the same law for many reasons as is explained in the above, such tendency will change as time goes. With respect to the familiarity between the CISG and the UCC, there is an interesting article which pointed out that one of the main reasons for the lack of recognition of the CISG in the US legal community is the form of the CISG’s existence in the US i.e., as a self-executing treaty. The same article suggests the first clause of §2-102 of the UCC to read: “Unless the context appears otherwise, this Article applies to transactions in goods not covered by the Convention on Contracts for the International Sale of Goods as contained in Title 15 of the United States Code.” The article expects that such language would clarify coverage of the UCC with regard to international sales and would unmistakably announce the presence and location of the U.S. law which often supersedes the UCC. The writer also agrees to this point and expects that this idea will be a good reference to Korean legislators when they reform the Korean sales law as well.

The New Role of the CISG with respect to Chinese Trading Partners

China is the central role player in the new trends in the Korean trading environment either in terms of the volume or the nature of the trade. Since 1988 when the CISG initially entered into force, China has achieved prominence in global trading and established its relative positions. Korean trade with China has far exceeded the trade with the U.S. and now has become the number one in its volume and diversity. This trend strengthens the importance China as a trading partner not only for Korea, but for the entire world. Thus the Chinese parties to sales contracts will have strong leverage in negotiating on the applicable law in the contracts probably preferring to choose their own domestic law for that purpose. In this situation a uniform international sales law could be an extremely useful negotiating tool in this kind

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for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity”, 16 J.L. & Com. 257, 261 (1997) (criticizing the Delhi court because it “proceeded in its analysis in much the same manner as if it had been interpreting the Uniform Commercial Code or any other purely domestic statute. For guidance, it consulted exclusively U.S. decisions and U.S. commentators. In its approach, no international trace, such as non-U.S. sources or methods of analysis, can be found anywhere.”).  
34 Here, the "self-executory treaty" means the treaty which does not need the legislation process by the U.S. Congress to be effective in the U.S.
35 See the data at Korea Trade Association Website: at http://stat.kita.net/top/state/n_submain_stat_kita.jsp?menuId=01&subUrl=n_default-test_kita.jsp?lang_gbn=kor^statid=kts&
of environment because Korean parties could offer the CISG as a viable alternative to the domestic law of either party to the contract. Actually there are more CISG cases reported from China than any other states in Asia to the UNCIRAL and the Pace Univ. (The cases are mostly arbitration cases.) Korean legal community should pay deep attention to this fact considering its longer history of commercialization compared with that of China which is still a communism country.

With respect to governing law, the CISG will provide Korean parties with more flexibility than before, because the CISG provisions will automatically apply in international sale of goods contracts among parties from member nations unless the parties agree to exclude the application of the CISG in their contract. 36 Logically it can be also said that where a Chinese party insists on the application of Chinese law, a foreign party may now more credibly insist on the application of the CISG because the CISG will be part of both domestic law systems the CISG being more international standard. However, Korean parties should be more careful in this point because, in China, the situation for the CISG is less clear because of the sporadic and irregular application of the CISG by Chinese courts. 37 For this reasons choosing the CISG in a choice of law clause with a Chinese party may not be a predictable alternative to Chinese law not only for this reason. 38 Furthermore, where a party selects both the CISG and Chinese law as governing rules (on the theory that the CISG will apply under Article 1(1)(a)), it is unclear whether the CISG will be given priority by Chinese courts. 39 This phenomenon is not limited to China, as other important global trading partners, including the United States, have mishandled CISG cases. 40 Korea has yet only one case 41 where CISG was applied and a lot to learn from the U.S. and China through their experience of trials and errors.

36 See the supa note 3
38 Id. at 79-80 (noting the fact that in 2007 the Supreme People’s Court issued an “Interpretation Regarding the Choice of Law Problems in International Civil and Commercial Contractual Disputes” in which it rejected the CISG in favor of substantive national laws, the authors say that the Interpretation casts doubt on the authority afforded a clause selecting the CISG as the governing law, and that the substantive law of a “given country or region” are favored.
39 Id. at 81-82.
The CISG as a New Sales Law in Japan

Despite its active participation in the early meetings leading up to the drafting of the CISG and its support to the Convention it has passed more than 20 years until Japan deposited the instrument of accession with the United Nations on July 1, 2008 thereby, the CISG coming into force in Japan on August 1, 2009. The Japanese Government’s statement announced with this event still holds the same position as the one it took at the drafting stage of the CISG. However, Japanese Government did not make any comment on why it took so long time to join the same Convention in the same statement.

Though the announced reason for Japanese accession to the CISG is its desire to remove uncertainty regarding applicable law and to facilitate international trade, the real reasons for the accession to the CISG may be best explained by reviewing the environmental changes which made the delay meaningless. It is well established that in the area of international trade, industrialized countries maintain greater bargaining power than developing countries. In other words, business enterprises from an industrialized nation possessing considerable bargaining leverage over the other party from such nation as are developing or are underdeveloped. Especially in Asia region, the Japanese party like the U.S. parties in the whole Pacific region could usually insist on favorable choice of law and choice law forum clauses in their contracts with the other party from many other nations. Now such bargaining power is continuously decreasing as the influence of the other nations such as China and Korea in Asia and many emerging economies in the world increases in international trade. Another reason for the delay are because Japanese bar and judiciary are lacking the linguistic skills, experience and numbers of the constituents of the legal community necessary to provide essential legal infrastructure for interna-

41 See the supra note 11
42 See, at http://www.mofa.go.jp/announce/announce/2008/7/1181058_1030.html, last visited on May 6, 2010:

2. The Convention provides unified rules on contracts for the international sale of goods. It will apply to contracts of sale of goods mainly between parties whose places of business are different contracting states. It provides rules on the formation of contracts and the rights and obligations of the parties to the contract.

3. It is expected that the accession to the Convention will remove uncertainty regarding the law applicable to trade between Japanese parties and those of other contracting states, and will facilitate international trade involving Japanese parties.

4. The Convention has 70 contracting states including most of Japan’s major trading partners. Japan will be the 71st contracting state.”
43 Id.
This reason also became meaningless because Japan already opened its legal service market and foreign lawyers are already available any time in Japan. Maybe the real reason is simply because the CISG, having received virtually unanimous acceptance among industrialized nations, was no longer a risky proposition even to the risk-averse politicians and bureaucrats in Japan as is explained above in this Article. For this reason practitioners who expect to draft Japan-related sale of goods contracts must understand how the provisions of the CISG operate. However, it is reality that there is still strong reluctance by the Japanese practitioners to use the CISG. The various reasons for Japanese legal community’s reluctance to adopt the CISG is to a great extent similar to the reason why the CISG has not yet operate sufficiently enough as being a major law on international trade in Korea. Considering the fact that Japan has two CISG cases in CLOUT so far despite its adoption of the CISG last year and the fact that Korea has no case listed yet on the CLOUT as of the time of this writing even though 5 years has already passed since the CISG became effective, it seems that the barriers or the reluctance to the CISG in Korea is no less than in Japan or even more significant.

V. CISG as Role Model in Korean Sales Law

The CISG is now working as a role model in the area of unification of international laws regarding the international commercial transactions. This statement can be supported by the following facts in addition to the facts stated already in the above. When the first set of the UNIDROIT Principles of International Commercial Contracts (PICC) was launched in 1994, they closely followed the CISG not only in its systematic approach but also with respect to the mechanism of remedies. The same is true for the Principles of European Contract Law (PECL) published in 1999. Furthermore, the EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees must be viewed from the same perspective, because it took its definition of conformity of goods from Article 35 of the CISG and thus introduced this concept into the domestic sales laws of the EU member states.

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47 See the UNCITRAL website at supra note 7 for the cases reported.


50 EC Directive 1999/44/EC.

Over the last two decades, the CISG has also known to have been a decisive role model not only for the international level as stated in the preceding paragraph but also for domestic legislations of many countries. Finland, Norway, and Sweden brought into force the CISG in their countries on January 1, 1989 as an opportunity to enact new acts for domestic sale of goods which rely heavily on the CISG. This is true with regard to the Commonwealth of Independent States (CIS). Finally, the modernization of the German Law of Obligations is said to be strongly influenced by the CISG from its very beginnings in the 1980s.

In light of those records of performance by the CISG as a role model in sales law all over the world, it can be also a good role model for the reform of the Korean sales law. International trade now in Korea is subject to serious legal uncertainties with expansion of the global trade. Questions often arise as to whether the Korean law or foreign law governs the transaction, and the Korean traders and their counsel find it difficult to evaluate and answer questions based on one or another of the many unfamiliar foreign legal systems. With respect to the sales law, the reform of the Korean Civil Code will be inevitable soon in order to cope with the issues arising out of the current trend of global economy and to suit for the change of national status of Korea in the world economy. The CISG’s uniform rules and international features will offer effective answers to these problems.

VI Suggestion to the Korean Attorneys regarding Practice of the CISG in Korea

Despite the voluminous academic writings, discussions and debates on the CISG in the world legal community, practically it seems not improper to say that today as is indicated in the preceding result of the research the writer did on the Korean attorneys, even the existence of the CISG is not generally known among the lawyers working in the field of international trade in Korea. The writer thinks based upon the above-said research that most of the solo practitioners in Korea were not even aware of the existence of the CISG at all. In contrast, most of the attorneys working at big law firms which have more than 50 attorneys were substantially well aware the existence of the CISG but most of them still had not many occasions where they actually dealt with CISG issues or interpret or apply CISG. The most im-


portant reason for this is the reluctance of the attorneys to use the CISG as governing law in their transactions. This Article focuses on this issue and tries to offer the solution to overcome it by reviewing the reasons for the reluctance.

The Reluctance not based upon Relevant Logical Ground

Even when the attorneys knew well about CISG, there still seems to be a strong tendency to recommend the exclusion of the Convention in the contracts for trade of goods. This holds true in Korea as well. The reasons for such tendency are the following. First, even when the CISG is known to a significant extent to some of the Korean attorneys, the degree of familiarity with its application and functioning in the practice is still very low. Lawyers continue to prefer Korean domestic law or at minimum the familiar laws such as the UCC or Japanese law. They seem to stick to the way as has been done for long time. In Korea, such tendency seems stronger than the general tendency over the world or than the ones of the major trading partner states as is discussed in the previous section of this Article. Second, whenever the position of a party in the market allows that party to retain its own domestic law in a contract, it prefers to do so. Third, the parties (and the attorneys) are not yet convinced of the advantages of the CISG compared to domestic sales laws.

How to Overcome the Reluctance

By reviewing the real issues underlying the reasons for the above-said tendency, the writer tries to obtain some insight to make the CISG better recognized in Korea as is desired by the world legal community and used more frequently in practice in order to utilize the enormous time and energy the world legal community have spent for the last six decades in pursuit of the uniformity of the international sales law. In line with such efforts, Korean attorneys’ efforts to make the better use of the CISG will also greatly improve the Korean jurisprudence in terms of the international trade for the upcoming years.

55 In addition to the writer’s research mentioned in this Article, see also such surveys as, Martin Koehler, Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (CISG) in legal practice and the exclusion of its application (2006), available at http://www.cisg.law.pace.edu/cisg/biblio/koehler.html (last visited on May 15, 2010), states that 70.8% of participants from the United States and 72.2% of participants from Germany regularly excluded the CISG. For Switzerland, see the survey conducted by Corinne Widmer & Pascal Hachem, “The CISG in Switzerland, in The CISG and its Impact on National Contract Law”, 281, 285 (Franco Ferrari ed. 2008), where 62% of the participants have stated to regularly exclude the CISG.
The real issues in the Korean attorneys’ avoiding application of the CISG in their practice and the methods to solve the same issues can be reviewed in more detail as is stated hereunder:

1. It is uncontested that any case arising under the CISG involves increased time and energy to understand the international context of CISG, to review the precise articles under CISG, prior domestic and foreign decisions and scholarly writings that address the issues in the case. Until CISG obtains its position as a rule that enjoys wide familiarity among practitioners and a recognized tradition of fair interpretation in the courts, practitioners and merchants will be inclined to negotiate for application of the home advantage, i.e., applying the Korean Civil Code or the other party’s domestic sales law like the UCC when the other party is American. This issue, however, can be answered by the following facts. Even if a choice of law clause is recognized, a party insisting on its own domestic law may still encounter serious difficulties when litigating before the courts of a foreign country. First of all, the respective law has to be proven in the court. This implies not only the need to translate statutes as well as other legal texts, such as court decisions and scholarly writings, into the language of the court but usually also requires the procurement of expert opinions. In some countries the experts may be appointed by the court, in others each party will have to present its own, and often several experts may be needed. Needless to say, all this can be very expensive. This will be also true in Korea. To make matters worse, even if a party is willing to bear all these costs to prove a foreign law in court, it will still face a high degree of unpredictability regarding the interpretation and application of this law by the foreign court and a high possibility of error. So the practitioners in Korea should realize that avoiding the CISG is not the better option than getting familiar with it by learning from foreign cases and trying to interpret and apply the same in real cases thereby accumulating the precedents in Korea. In addition, pursuant to the operation of law under the rules of CISG itself and under the Korean Constitution, logically it will hold true that Korean contracting parties will increasingly be compelled to rely on the CISG, either by virtue of a tactical choice, or because they are not sufficiently aware of its automatic application and fail to opt out.⁵⁶

2. CISG is more likely a neutral law in practical sense. In many cases, parties seek to solve these problems by resorting to what they believe is a “neutral law,” although they often confuse political neutrality with suitability of the chosen law for international transactions.⁵⁷ If the parties choose such a

⁵⁷ See Christiana Fountoulakis, “The Parties’ Choice of ‘Neutral Law’ in International Sales Contracts”, 7 European Journal of
neutral (a third) state law, they may be even worse off than if they had chosen one of their home laws. To begin with, they have to investigate this foreign law. Furthermore, the trouble and costs in proving it are even more burdensome. Last, some domestic sales law can be unpredictable and not suitable to international contracts in some core regards because of its unique historical or social background. All these pitfalls of domestic laws are avoided by applying the CISG. The text of the CISG is not only available in six authoritative languages but also has been translated into numerous others including Korean\textsuperscript{58} Court decisions, arbitral awards as well as scholarly writings, are either written or at least translated into today’s business language of the globe, namely English. They are readily accessible not only in various books and journals but also on several websites.\textsuperscript{59} The abundant number of legal materials available makes it reasonable to expect that judges and arbitrators have access to the requisite information and will be able to apply the CISG in a predictable fashion.

3. It is true, of course, that today, more and more international sales law disputes are not litigated before national courts but are rather resolved by international commercial arbitration where the parties can choose the place of hearing, governing law and the arbitrator. Still, the problem of proving a domestic law to be best fit for the transaction remains if it is chosen as governing law. The issues of translations and proper interpretations are still necessary where this law is not accessible in English and there is not enough number of precedents Furthermore, it often remains uncertain, even in this context, how arbitrators, who often come from different legal backgrounds, will apply the domestic law.\textsuperscript{60} All these shortcomings are avoided by applying the CISG. The abundant number of legal materials available as is stated above makes it reasonable to expect that the arbitrators have access to the requisite information and will be able to apply the CISG in a predictable fashion.

In sum, the CISG, with its better accessibility and neutrality, saves time and costs, and it makes the outcome of cases more predictable. These are the main advantages of the CISG when compared to the application of domestic law.

\textsuperscript{58} Official translation is found at the website of Ministry of Foreign Affairs and Trade of Korean Government.

\textsuperscript{59} Most prominently UNCITRAL has initiated the Case Law on UNCITRAL Texts (CLOUT) database, available at http://www.uncitral.org/uncitral/en/case_ law.html, which contains court decisions and arbitral awards to increase international awareness of UNCITRAL texts and to facilitate their uniform interpretation and application. Further databases have since been established, see, e.g., http://www.cisg.law.pace.edu/ run at Pace University, New York, U.S.A., containing numerous materials, scholarly writings, court decisions, and arbitral awards; http://www.cisg-online.ch/ run by Professor Ingeborg Schwenger at the University of Basel, Switzerland, containing selected articles and numerous court decisions and arbitral awards; http://www.unilex.info/ run by Professor Michael Joachim Bonell containing materials, court decisions, and arbitral awards on the CISG as well as the UNIDROIT Principles of International Commercial Contracts 2004.

\textsuperscript{60} See, Christiana Fountoulakis, “The Parties’ Choice of ‘Neutral Law’ in International Sales Contracts”, 7 European Journal
VII. Conclusion

The role of the CISG in the world legal community shows that pursuing the unification of laws is the right way forward. The harmonizing effect the Convention has had on domestic legal systems in most of all the industrialized countries in the world, together with its influence on other uniform instruments and projects prove the superiority of the CISG. At the same time, these developments disprove the sticking to the familiar domestic sales laws help the Korean practitioners continuously maintain comforts and convenience in their practice and a viable perspective for the future of commercial law. Reducing transaction costs for commercial parties will only be possible by further harmonization and unification of commercial law. The CISG has significantly contributed to this goal. Korean practitioners should realize this and follow the global trend.

The scholars and the new generation lawyers including the new generation law students are already well aware of the nature and benefits of the CISG. It not only helps resolving disputes but its common language and common understanding of key concepts also facilitate negotiating and drafting sales contracts. In striving for the best solution in uniform instruments, competition among national legal systems may provide ideas, but it will not eliminate the need to put them into action in a uniform fashion.

So far to most practitioners and merchants, CISG has continued to evoke the general sense of discomfort that stems from the unknown. Education is only part of the remedy and now the Korean legal education has already contributed a lot to make the CISG known and applied in Korea. Now it’s the practitioners’ turn. Time may prove to be the other as more decisions applying CISG are published and courts develop a method of interpretation that takes into account the international context of CISG and produces predictable results within acceptable degrees of variation. While the old generation lawyers keep the reluctance to adopt the new law, the new generation lawyers are already waiting at the doorstep to take over business- a generation trained in the CISG and mindful of its advantages as well as a generation full of curiosity about the world beyond national law.


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<국문 요약>

한국에서 CISG의 현재와 미래의 역할

김용의

국제물품매매계약에관한유엔협약(CISG)이발효된지22년그리고한국이조약에가입하여
 국내에서발효된지발세5년이지났다. 2010년6월25일현재미국중국일본그리고대부분의
 유럽연합국가들을포함하여74개국이이협약의가맹국들이다.그동안주로유럽국가들을
 중심으로2500개가넘는판례와중재판정들이유엔과연구기관들에보고되었고수천편의
 연구논문과출판물동시CISG에관한연구내용을소개하였다.비록그해석과적용에있어서
 각국가의법원이나중재기관들에따라충분한통일성이확보되지않거나잘못적용되는
 등의문제들이있기는하나CISG는이제누구도부인할수없는물품매매계약법에관한
 전세계의모델이되었다.

이러한시점에서한국법조계가인식하고있는CISG의역할은아직도유럽선진국이나미국
 심지어중국과일본에비교하여볼때부족함이많다CISG는우리헌법이정한바에따라
 이며우리의국내법과같은효력을가지고있을뿐만아니라대부분의우리나라교역상대국이
그 제약국가기 때문에 우리 기업들의 국제 물품거래의 대부분에 (당사자가 명시적으로 그 적용을 배제하기로 함의 하지 않으면) 자동적으로 적용되도록 되어 있다. 그러나 한국에서는 아직 CISG를 적용한 관례를 찾아보기 힘들 뿐 아니라 실무에 종사하고 있는 대부분의 변호사들에게 거의 알려지지도 않았다. 많은 국제거래에 관한 법률 서비스를 제공하고 있는 대형 로펌의 변호사들에게도 CISG는 아직도 낯설고 또 회피되는 법이 되어 있다. 지난 60년간 국제적인 사법통일화를 위한 국제사회의 많은 노력의 성과물인 CISG는 2010년 지금 시점에서 미국 중국 일본 등 우리와 가장 밀접한 관계에 있는 통상 파트너들을 포함하여 세계경제를 주도하는 모든 국가들에서 점점 그 적용이 확대 심화되고 있다.

한편 우리나라에서는 실무 계의 CISG에 관한 무관심 또는 회피경향에도 불구하고 우리 학계와 교육계가 그 동안 지속적인 연구활동과 교육활동을 통하여 새로운 세대의 법조인들에게 CISG의 역할과 유용성에 대하여 알려 왔다. 법률시장의 개방과 로스쿨을 통한 새로운 법률교육제도의 출발에 즌한 이때 본 논문은 우리나라에서의 CISG에 대한 편견의 실체를 분석하고 국제거래에 있어서의 그 유용성과 우리 물품매매법의 개선 방향에 모델이 될 수 있음을 올바로 인식하는데 필요한 논거를 제시하고 미래에 대비하고자 하였다.

주제어: 국제물품매매계약에 관한 유엔협약(CISG), CISG의 배경, 한국에서 CISG의 역할, 한국에서 CISG의 적용 가능성, 한국에서 CISG에 대한 무지와 오해, 한국에서 CISG 적용의 회피 경향, 국제상거래법의 통일