

## An Arbitral Case Study on Burden of Proof for Non-Conformity of Goods Under CISG

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*The CISG does not stipulate the subject of the burden of proof, and in the arbitral award, the buyer is liable for proof compared to the seller for nonconformity of the product. Without a unified interpretation of the burden of proof of non-contractual goods, confusion of uncertainty may increase if the parties to the sale contract have a dispute due to the trade in goods. It is an important issue to create a unified regulation on this because the courts or arbitration agencies of the Contracting States of the CISG interpret and apply the "seller's obligation to conform to the goods contract" stipulated in this Convention in various ways. In this study, in the case of international Sales of Goods there is a tendency to prefer arbitration through arbitration agencies in the dispute, so the subject of burden of proof is analyzed through arbitration cases applied by CISG as the governing law. Most international commodity trading around the world is regulated by this Convention, but according to the rigid convention regulations, it is analyzed and interpreted through cases where this convention is applied to each country's international arbitration, suggesting the need for a rigid CISG revision.*

Key Words : arbitration award, CISG, Conformity of Goods, subject of burden of proof, product liability, buyer's remedy

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## I . Introduction

The increase in international trade in goods involves an increase in disputes. The choice of means for dispute resolution varies depending on the nature of the dispute. Unlike domestic commerce, in the case of lawsuits for international commerce, alternative dispute resolution measures are often used due to litigation difficulties. In the case of international commodity sales, arbitration through arbitration agencies tends to be preferred in the dispute. <sup>1)</sup>CISG and arbitration may seem like two different systems, but they are strongly linked.<sup>2)</sup>

In the CISG, the expression "seller's obligation to conform to the goods" is used, and if the goods are not suitable for the contract, the expression becomes "the lack of conformity of the goods." <sup>3)</sup>In the international sales of goods, neither the seller nor the buyer can exercise responsibility in some cases for the goods being moved in the characteristic of the goods being moved over a long distance or long period. In the case of article defects, it is frequently impossible to determine, even in which case, whose judgment caused the defect and whether the article defect existed by evidence. In most cases, when goods make different claims about non-compliance, the seller claims to have delivered goods that are not defective and suitable for the contract, and the buyer claims to have received defective and non-contractual goods. In this case, either the seller or the buyer has a problem with the burden of proof.

However, CISG does not directly stipulate the burden of proof for defects in non-contractual goods, resulting in various views.<sup>4)</sup> In interpreting and applying the "seller's obligation to conform to the goods contract" stipulated in this convention, the court or arbitration agency of the Contracting State of CISG interprets the issue of determining the subject of the burden of proof according to each country's legislation. Creating a unified principle on this issue is seen as an essential issue. In this matter,

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- 1) Na-Hee Han · Choong-Lyong Ha, "An Interpretation of the Formation of Arbitration Clause for the International Sale of Goods", JOURNAL OF ARBITRATION STUDIES, 27(4), 2017, p.92.
  - 2) CISG and arbitration share key characteristics based on the principle of party autonomy. Petra Butler, "Cisg and International Arbitration", 17 Int'l Trade & Bus. L. Rev. 322, 2014, p.322.
  - 3) Sung-Kyu Hong, "The Rules of Law on Warranty Liability in Contracts for the International Sale of Goods", JOURNAL OF ARBITRATION STUDIES, 24(4),2014, p.148.
  - 4) Ingeborg Schwenzer & Christiana Rountoulakis, International Sales Law, Routledge · Cavendish, 2007, p.276.

the product liability law is applied to respond to legal situations, damaged by unclear regulations, by defining the subject and scope of proof and applying the domestic product liability law to the product liability law.

## **II. Conformity of the goods and the Burden of proof**

CISG is one of the core areas of international trade law, which is an indispensable rule and a vital asset for international commerce based on global unity. Therefore, adopting CISG as the governing law in international commodity trading transactions will be a way to reduce the cause of disputes by enhancing the unity of the trading party's transactions.<sup>5)</sup>

Rosett(1984)<sup>6)</sup> argues that the burden of proof should be judged under domestic law, and the arbitration law<sup>7)</sup> considers that the law applied to the country's entity is designated as the law to be applied to the entity of the dispute. For disputes caused by defects in goods, the Product Liability Act, which has the purpose of liability for damages caused by defects in products, is applied in Korea. Therefore, this chapter discusses the CISG applied to disputes arising from international commodity trading and the Product Liability Act applied to disputes arising from defective goods in Korea.<sup>8)</sup> The CISG and the Product Liability Act consist of contractual liability and apply to

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5) Michale Joacjim Bomell, "The UNIDROIT Principles of International Commercial Contracts and CISG-Alternatives of Complementary Instruments?," 26 Uniform Law Review 1996, p.32.

6) Rosett, "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods", Ohio State Law Journal, Vol.45, 1984.

7) Arbitration Act 29(1)

8) Supreme Court 2003. 09. 05 sentenced 2002da17333; Supreme Court 2004. 03. 12 2003da16771; Supreme Court 2006. 03.10 sentenced 2005da31361; Seoul High Court 2007. 01. 12 Sentencing 2005Na45898; Supreme Court 2014.04.10. Sentencing 2011da22092; Supreme Court sentenced 2008.02.28 2007da52287; Daejeon District Court sentenced on 05. 20, 2008, 2006adan 91350; Seoul Eastern District Court 2011. 04. 06 Sentencing 2010 Gahap 16944; Supreme Court 2011. 10. 27 Sentencing 2010da72045; Seoul Eastern District Court 2012. 04. 20 Sentencing 2011 Gahap 20629; Supreme Court 2013. 07. 12 Sentence 2006da17546; Supreme Court 2014. 02. 13 sentenced 2011na38417; Seoul High Court sentenced on 06. 04. 2015, 2013na 2023677, Seoul Central District Court 2016.11.15. Sentencing 2014Gahap563032; Busan District Court 2019.02.03 Sentenced 2015 Gahap 27854; Seoul Central District Court 2016.11.16. Sentencing 2016AH538474,2016AH538481;

material damage caused to the buyer's other property by the goods. Therefore, the agreement and the product liability can be applied in the event of physical damage to the buyer due to the goods. In addition to defects in the goods themselves, even if there is no defect, the damage caused by the seller's packaging or negligence to notify can be applied to the agreement and legal principles. Between the agreement and the law, there is an opinion that the application of the Product Liability Act should be recognized even if damages are denied in CISG, such as a violation of the obligation to notify defects (Article 39 [1] of CISG), two-year exclusion period (Article 39 [2] of CISG), and burden of proof. For physical damage caused by goods, it seems fitting to allow overlapping as long as illegal activities are recognized.<sup>9)</sup>

Therefore, if the CISG looks at the property related to material damage as precedents and theories, it can establish the Product Liability Act as a governing law and hold it responsible for disputes arising from international commodity trading.

## 1. Defect

### (1) CISG

In the CISG, the problem of product defects is expressed as non-conformity of goods, and the scope of its application is considerably broadened. In addition to defects in the delivered goods themselves, cases of under-delivery, over-delivery, delivery of different types of goods, and even delivery of goods with incorrect packaging are included in the case of non-conformity (CISG Article 35(1)). After all, any goods delivered that differ from those specified in the contract are non-conforming.

### (2) Product liability

In the Product Liability Act, "defect" means that the product has manufacturing, design, or display defects that fall under any stipulations of Article 2, Subparagraph 2, or lacks other safety points that can be expected in general. In this act, the definition

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Seoul Central District Court 2017. 05.23 Sentencing 2016na64014; Seoul Western District Court 2017.11.28 Sentencing 2016Adan 241617.

9) Choi Heung Seob, "Conformity of Goods and Standards Established by Public Law in the CISG", 『International Trade Law』, MOJ, 2006, pp.152-156.

of defect is divided into three categories. Manufacturing defects refer to cases where a product is manufactured and processed differently from its original design, regardless of whether the manufacturer has fulfilled its manufacturing and processing obligations, such as poor safety design or poor safety devices.

Design defects refer to cases where the manufacturer did not adopt an alternative design even though it could have reduced or avoided damage or risk if it had adopted a reasonable alternative design. Poor quality control, safety devices' failure, and poor assembly condition inspection also fall under this category. Labeling defects refer to cases where the manufacturer did not perform proper labeling even though the damage or risk that the product could cause could have been reduced or avoided if the manufacturer had given a reasonable explanation, instruction, warning, or other indications.

## 2. Conformity of goods

### (1) CISG

The seller must deliver the goods specified in the contract to the buyer. These obligations for conformity of contract are divided into conformity of goods and conformity of rights, but in this paper, for proper comparison with the Product Liability Act, only the conformity of goods specified in Article 35 of the CISG will be described.

#### 1) Contractual agreement

Article 35 of the CISG explains the seller's obligations, such as quantity, quality, and type prescribed, and in Paragraph 1, the seller shall deliver goods contained or packaged in containers in a manner prescribed by the contract. However, the CISG does not impose particular requirements on contractual obligations related to the quantity, quality, or packaging of goods. Therefore, the process of imposition of contractual obligations governed by Article 35 (1) follows the general contracting process described in CISG Part II (Construction of a Contract) and Part I Regulations (Articles 8 and 9) of the CISG.<sup>10)</sup> In addition, this regulation recognizes the principle

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10) Harry M. Flechtner, "Funky Mussels, A Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice thereof under the United Nations Sales Convention("CISG")," Boston University

of freedom of contract between the parties and argues that the highest priority for the contract conformity criterion is an explicit agreement between the parties.<sup>11)</sup>

Although the seller may only interpret the contract requirements explicitly mentioned in this sentence that the seller must deliver the goods referred to in Article 35 (1) as determining the seller's obligation, different interpretations may be applied. Suppose the recipient of a statement or intention made by a party could not have known or could not have been aware of such intention. In that case, the statement should be construed according to that party's intention, and it is reasonable that the party's intention be interpreted consistent with the understanding that the recipient of the practical information has.<sup>12)</sup>

In the case of international sales involving long-distance transportation, weight loss may occur during transportation, and errors may occur in the case of large-scale contracts. In this case, although only the quantity, quality, and type are listed in Paragraph 1 of the same article, the implied agreement that the regulations under the public law of the importing country must be satisfied cannot be accepted.<sup>13)</sup> . Since the difference in the quantity and the non-conformity of some deliverables are treated the same, the buyer must declare the non-conformity.<sup>14)</sup>

## 2) Conformity of goods

Article 35 (2) shall be deemed to apply if there is no explicit or implied agreement between the contracting parties on the conformity of goods.<sup>15)</sup> This section presents the series of objective criteria used to determine the conformity of goods if the contract

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International Law Journal, Vol.26, 2008, p.5.

11) Won-Suk Oh, "Seller's Obligation for the Fitness of Goods in International Sales Contract", Korea Trade Review, Vol.3, 2002, pp.1-16.; Won-Suk Oh · Byung-Mun Lee, "A Comparative Study on the Seller's Duty to Deliver the Goods in Conformity with the Contract in the Sale of Goods", The Korean Reserch Institute Of International Commerce & Law, 37(1), 2008, pp.3-33.; Kang-Hun Ha, "A Study on the conformity of Goods in the Int'l Sale of Goods ", Korea Trade Review, 32(2), 2007, pp.399-420.

12) R.F. Henschel, "The Conformity of Goods in International Sales, Thomson, Cad Jura, 2005, p.148.; F.Enderlein and D. Maskow, International Sales Law; United Nations Convention on Contracts for the International Sales of Goods; Convention on the Limitation Period in the Internationa Sale of Goods, Oceana Publications, 1992, p.47.

13) S/M, Art. 35 Rn. 22.

14) S/M, Art. 35 Rn. 15.

15) Elderlein and Maskow, "International Sales Law, N.Y. Ocena, 1992.

does not specify the detailed requirements for the goods to meet or is insufficiently presented.<sup>16)</sup> Article 35, Paragraph 2 suggests four criteria for judging product conformity if there is no other agreement between the parties. First, the goods must be suitable for everyday use of the same type of goods. In this case, although the contract requires a certain quantity, quality, standard, or specific packaging for the goods, the decision must be made based on the agreement between the parties in their contract per the usual rules. It is a fact that being fit for a common purpose does not necessarily require an excellent article. Second, the goods must serve a particular purpose explicitly or implicitly known to the seller when signing the contract. Depending on the situation, if the buyer did not trust the seller's technical skills and judgment, or if it is unreasonable to trust them, the request of this section does not apply. Third, if the seller presents the quality of the goods to the buyer in a sample or model, the goods must have that quality. Unless otherwise agreed by the parties, this section applies when the seller provides the buyer with a model of a sample or article. Fourth, if there is no standard method, it must be contained or packaged in a container in the manner required by the contract to preserve and protect the goods.

### 3) Time to determine conformity violation

In the CISG, the timing of determining a contractual conformity violation of the goods applies from when the risk is transferred to the buyer. Even if the violation is revealed after the risk transfer, it is not a problem for the violation. Article 36 refers to the non-conformity of the contract before the risk (Article 36 [1]) and the non-conformity of the contract before and after the risk (Article 36 [2]). In Paragraph 1, the seller is, in principle, responsible for the non-conformity of the goods that existed before the transfer of the risks to the goods, and if there was a non-conformity before the transfer of the risks to the goods, the seller could not escape the responsibility. The important thing here is not the timing of determining contract non-conformity but whether there is a risk of contract non-conformity. On the other hand, in Paragraph 2, the seller is not responsible if nonconformities occur after the risk transfer, but first, in the case of violating the seller's obligations, the seller is

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16) Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods, Oxford University Press, 2005, p.1149.

responsible. Second, if the seller guarantees the goods, the seller cannot escape responsibility. Any non-conformity arising after the risk transfer shall make a party liable if it is attributable to a violation of the seller's obligations. Violations of obligations include violations of guarantee characteristics only if the goods are suitable for a certain period for a general or specific purpose.

As a limiting requirement, the buyer must notify the seller by specifying the contents within a reasonable time from when he/she has found or has to find an issue with the goods.<sup>17)</sup> In this case, the exclusion period of the notification is two years, based on the date the goods were delivered to the buyer.

## (2) Product liability

### 1) Concepts and types of defects

The concept of defects and tangible defects are defined in the Product Liability Act as manufacturing design, labeling defects, or other commonly expected stability deficiencies.<sup>18)</sup>

Defects and flaws can be distinguished. A defect means that the product does not perform as promised in terms of functionality, and a flaw means that the product lacks stability. The Product Liability Act classifies defects into three types. First is a manufacturing defect. A case in which the product was manufactured or processed differently from the original design by the manufacturer. Second is a defect in design. If the manufacturer had applied a reasonable alternative design, damage or risk could have been reduced or avoided, but the product became unsafe because the alternative design was not applied due to poor quality control, failure of safety devices, an inspection of assembly defects, etc. Third is a defect in labeling. It refers to a case where the manufacturer does not do this even though it could have reduced or avoided the damage or risk that the product could cause if the manufacturer had given a reasonable explanation, instruction, warning, or another label.

### 2) Criteria for judging defects

Some say that defects should be identified, but many individuals in Korea say that

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17) CISG Art39(1)

18) Product Liability Act 2(2)



defects in the product are divided into values of use or equivalence of the product and safety of the product, with the former defect meaning that the quality or quality of the product is below the standard. Therefore, although there is a lack of merchantability, the defect is a lack of safety, and the two are essentially different. Defects in quality are compensation for exchange or defects, so it is sufficient to resolve them with the seller. The purpose of product liability is to compensate the user of the product due to the instability of the product, so defects in the product will be understood separately from security defects. Therefore, the defect that is the criterion for determining product liability can be seen as a lack of safety for the product.<sup>19)</sup> Korea's Product Liability Act also defines defects as a lack of safety that is usually expected.

### 3) Period of responsibility

When the period elapses, the evidence necessary for litigation defense by manufacturers, such as records at the time of product development, the level of technology at the time of manufacture, etc., is extinguished, making it difficult for the seller to defend the dispute. In addition, if the inquiry into potential responsibility continues without limitation of the period, it will be difficult for the seller to establish a rational product development or management plan. Therefore, it is necessary to fix the victim's right to claim damages after a certain period to secure the manufacturer's legal stability, and for this purpose, there is a state of limitation and a state of exclusion.

In the extinctive prescription period, the buyer's right is extinguished if the buyer has the right to claim damages against the seller due to injury or damage but has not exercised the right for a specific time. <sup>20)</sup> Under the Product Liability Act, the right to claim damages is extinguished by prescription unless the consumer or legal representative is liable for damages under Article 3 for three years, and the right to claim damages under this Act shall be exercised within 10 years from the date of supply by the manufacturer. However, damage caused by substances that accumulate in the body and harm human health shall be added from the date the damage occurs

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19) Lee Eun Sup, 「International Trade Norm and Enviromnetnal Norms」, Pusan National Universtiy, 2001, p.899.

20) Yun-Jig Gwag, "General Rules of Civil Law", 1991, p.544.

for symptoms after a certain incubation period has elapsed.

The period of exclusion (legal policy tenure) is the period of existence scheduled by the law for certain rights, and the legal basis for deciding this period is determining legal relations centered on rights quickly.<sup>21)</sup> The extinctive prescription and exclusion periods are typical in that the manufacturer's responsibility, among others, is extinguished over time. The extinctive prescription period is when the victim can recognize damages and hold the manufacturer responsible. However, the exclusion period differs because it recognizes a relatively long period of 10 years without questioning whether the victim can hold the product responsible.

The Product Liability Act stipulates that one of the grounds attributable to product liability is "from the date of supply of the product" to clarify that defective products come from distribution.<sup>22)</sup>

### 3. Burden of proof

#### (1) CISG

Understanding the problem of the burden of proof as a procedure, the substantive corporation agreement does not regulate the problem of the burden of proof. Article 35 does not deal with the burden of proof for nonconforming goods so problems may arise. Most courts judge that the buyer must bear the burden of proof for the non-conformity of the goods.

#### 1) Subject of burden of proof

There is no explicit provision for the burden of proof in the CISG. The buyer is responsible for proving that the seller knew a product's special purpose at the time of signing the contract, and the seller is responsible for proving that the buyer did not trust the seller's skill and judgment or that it was unreasonable to trust it.<sup>23)</sup> The distribution of the burden of proof plays a vital role because the seller's liability is determined by whether the contract's non-conformity existed before the risk. In

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21) Yun-Jig Gwag, *ibid*, p.548.

22) Product Liability Law Art 7(2)

23) CISG Art.35(2)

particular, it is challenging to prove a late or hidden defect—a defect that could not be found even if the buyer inspected it.

In the case of Article 35 (1), there is an opinion that the buyer bears the burden of proof for the existence of non-conformity of the contract when the risk is transferred<sup>24)</sup>, but the view of sharing the burden of proof is persuasive.<sup>25)</sup>

In other words, if the buyer points out the non-conformity of the contract when receiving the goods or notifies the non-conformity according to Article 39, the seller must prove the suitability of the contract. In contrast, if the buyer receives the goods without objection, the buyer must prove the existence of the non-conformity.<sup>26)</sup>

If the buyer proves the objection, it is presumed that the previous risk was non-conformity, and the seller must prove that the contract was suitable at the time of risk transfer or that the contract involved non-conformity for other reasons. The reason is that the notification period and exclusion period for nonconformities are limited in the agreement, and exceptions are recognized only under strict requirements.<sup>27)</sup>

In addition, Article 36 (2) stipulates that even if a product is unsuitable after the time prescribed in Paragraph 1 (when the risk is transferred to the buyer), the seller is responsible for violating the seller's obligation. The seller's violation includes the violation of the guarantee obligation. Regarding this provision, it is interpreted that the buyer must bear the burden of proof for the seller's contract violation or guarantee violation.<sup>28)</sup> However, the discussions on the burden of proof related to the interpretation of Article 35 (1) and (2) of the CISG do not tackle the general principle of burden of proof. A discussion of the burden of proof limited in exceptional cases, such as CISG 36(2) for the existence of nonconformities in a contract "when a risk is transferred to the buyer" or CISG 36(1) for nonconformities in a contract "after the risk is transferred to the buyer."

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24) B/B?Bianca, Art.36 para 3.

25) Kwang-Huyn Suk, "Law of Contracts for the International Sale of Goods", Pakyongsa Publishing Co., 2010, p,146.

26) S/S/Schwenzer, Art.35 Rn.49.

27) S/M, Art.36 Rn.25.

28) S/M, Art.36 Rn.27.

## (2) Product liability

The burden of proof refers to the obligation to prove the facts that insist on submitting the matters at issue between the litigants as evidence.<sup>29)</sup>In order to claim compensation from the manufacturer for defects in the product due to defects in the instruction or warning, the cause and effect of defects in the product must be proven. However, in the case of mass-produced products due to advanced technology, there is little information about the production process from consumers, and only expert manufacturers know this, so the buyer cannot identify product defects. Due to this specificity, it is practically difficult for consumers to fully prove the causal relationship between the occurrence of defects and damages in the product, so the Product Liability Act has eased the consumers' burden of proof.<sup>30)</sup>In the revised law of the Product Liability Act, the transition of the burden of proof was clarified by introducing the contents of the Supreme Court's judgment in the legal regulations.<sup>31)</sup>

### 1) Legal Characteristics

The legal nature of the Product Liability Act consists of contractual legal principles, tort legal principles, and non-fault liability. The legal principle based on product liability initially sought contract liability. In this case, the victim buyer did not have to

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29) The burden of proof is divided into Burden of Production and Burden of Persuasion. The burden of proof is that unless evidence is presented that there is a defect in the product, the judge must decide that there is no defect. If the jury cannot determine whether a defect exists in the product after submission, it is determined that the defect does not exist.

30) In Article 3-2 (Act No. 14764) of the Amended Product Liability Act, ① that the damage occurred to the victim under normal use of the product ② that the damage was caused by a cause belonging to the real control area of the manufacturer ③ that the damage is applicable A causal relationship between the existence of the defect and the occurrence of damage from the defect is presumed if it can be demonstrated that the defect does not normally occur without a defect in the product, 2017.04.18.

31) The Supreme Court said, "If an accident occurs under normal use of the product, if the consumer proves that the accident occurred in an area under the exclusive control of the manufacturer and the circumstances that the accident does not normally occur without the fault of a certain person," the Supreme Court Unless the manufacturer can prove that the accident occurred due to a cause other than the defect in the product, it is assumed that the defect exists and that the accident has occurred and the burden of proof is relieved so that the liability for damages can be assumed for fairness and fairness of damage. It is in line with the ideal of a damage compensation system that assumes a reasonable burden as its guiding principle." Supreme Court, 2004.03.12, Sentencing, 2003da16771; Sentenced on 03. 10. 2006, judgment of 2005da31361 and Supreme Court, sentenced on 02. 25, 2000, judgment of 98da15964.

prove the seller's negligence, and there were various methods of compensation for damages, such as defect repair and product replacement, which was advantageous to the victim consumer. However, over time, in the complex distribution structure of modern society, there have been disadvantages, such as the absence of a contract party relationship between a manufacturer and a victim, with the direct contract relationship being cut off if the user or victim is a third party. If contract liability is applied, the manufacturer bears the burden of proof, but if a manufacturer in a superior position proves no negligence, the case is likely to be exempted, which can pose a problem in validating the exemption terms.<sup>32)</sup> According to the existing contract law, there is a limit to compensating the buyer for damages caused by defects in the seller's product. In order to overcome these limitations and protect the buyer, tort liability was applied to the seller who manufactured the defective product. According to this law, when a buyer claims damages against the seller due to illegal activities, the buyer must prove that the product is defective, that the defect has caused the damage, and that the buyer has not fulfilled his duty of care. However, it is incredibly taxing for the buyer to prove the causal relationship between the seller's negligence and the product's defects and incurred damages since the product's manufacturing process favors the seller. In addition, it is close to impossible to prove the causal relationship between defects and damages in products because there are many specificities that ordinary consumers cannot disclose. In order to reduce the damage to buyers, the court attempted to introduce the principle of estimating negligence, the principle of estimating facts, the duty of care, the possibility of causal relations, and the theory of epidemiological causal relations. However, the move was criticized as insufficient for consumers' protection.

The theoretical basis for acknowledging no-fault liability is risk liability, and the person who adjusts the defect in the product is responsible for compensation regardless of negligence. The introduction of no-fault liability in product liability confirms that the buyer's relief from damage is evident, and today's product liability law recognizes no-fault liability. In this law, consumers must prove the causal relationship between the occurrence of a product defect and the defect, but it does not

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32) Jong-Won Lee, "A study on the product liability in the pharmaceutical product", *Kyungshung University Law Research*, 23(1), 2014, p.3.

require proof of the reason as the defect is attributable to the seller.

## 2) Subject of burden of proof

The burden of proof is a matter of who bears the disadvantage if it is not proven. In particular, the core of the issue of distributing the burden of proof is based on who bears the disadvantages in the dispute in the absence of evidence.<sup>33)</sup>

If the legal nature of the Product Liability Act is applied without negligence, the victim, the buyer, is not responsible for proving the seller's intention or negligence. In order to impose liability for damages on the person who manufactures and sells the goods, the existence of defects, the occurrence of damages, and the existence of a causal relationship between defects and damages must be premised.

Depending on the specificity of the product, the causal relationship between defect and damage is virtually estimated. If an accident occurs while using the product, usually, the victim can claim that the accident occurred in an area controlled by the manufacturer and that the accident occurred without negligence. If the manufacturer fails to disprove that the accident was caused by an agent other than a product defect, the causal relationship is recognized, and the manufacturer is responsible for the defect.<sup>34)</sup>

The buyer must prove indirectly ① that the damage would not have been caused without someone's negligence in the distribution of the product, ② that the damage was caused by the act or material means of the person under the exclusive control of the defendant, and ③ that the damage was not due to the plaintiff's arbitrary action or contribution.

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33) Kye-Chan We, "Die Beweislast im deutschen Schadensersatzrecht", *Chungnam Law Review*, 19(1), 2008, p.44.

34) Supreme Court Judgment "In the case of an explosion or ignition while the TV is being received normally, if the consumer proves that the accident occurred in an area under the exclusive control of the manufacturer, the manufacturer will conclude that the accident is due to a cause other than a defect in the product. If the product is in the distribution stage unless it can be proved that it has occurred, it is assumed that there is a defect that does not have reasonable safety that is expected to have been naturally provided for the safety of the product at the time of use, and it is assumed that an accident occurred due to such defect, and liability for damages Reducing the burden of proof so that it can be erased is in line with the compensation system." Supreme Court 2000. 02.25. Sentence 98da15934 judgment.

### **III. Case study of the arbitration award on the subject of proof of non-conforming goods**

#### **1. Buyer's burden of proof**

In December 1997, the arbitration court decided that CISG was applicable because the parties had workplaces in different contracting countries at the time of signing the contract and explicitly chose CISG and Austrian law. In this case, the provisions corresponding to the lack of contractual suitability of the goods in Article 39 (1) of the CISG were applied. The arbitration court imposed a burden of proof on the buyer for lack of conformity, reviewed the evidence provided by the buyer, and acknowledged the buyer's claim that the certificate was defective, unlike the goods specified in the contract, and that the seller's expertise was lacking.<sup>35)</sup>

In October 2002, a long-term contract was signed between a seller, who participated in the exploration and production of a Dutch offshore gas field, and a buyer, a major international company in crude oil refining and petroleum product and gas distribution. Articles 35 and 39 of the CISG were applied in this case. After confirming that Rijn Blend's mercury level had increased in this contract, the buyer notified the seller that the contract would be discontinued until a solution to the defect was found. Since no remedy was taken, the buyer left the contract to expire. In response, the seller argued that the buyer had to resell the undelivered blend to another company at a considerably lower price than the contract, resulting in huge losses, and those specific quality requirements were not agreed upon when the delivered Rijn Blend was signed into a contract. As the parties agreed that the CISG applies to this dispute, the arbitral tribunal was required to demonstrate the suitability of the goods by reference to academic opinions and international case laws concerning the burden of proof.<sup>36)</sup> In this case, the tribunal was opposed to the view that the responsibility for proving the contract suitability of goods should be determined by domestic law and that the issue should be resolved by the general principles of the agreement (Article 7, Paragraph 2 of the CISG). In addition, the buyer must prove the non-conformity of the goods,

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35) Arbitral Award, 10/12/1997; unilex S2/97

36) Arbitral Award, 15/10/2002; inilex 2319

regardless of the opinion.

In October 2005, Japanese sellers and Chinese buyers signed a contract to sell sheet metal production units. When using the goods delivered by the contract, the buyer claimed that the seller committed fraud by maliciously concealing facts, such as the absence of advanced technology promised by the seller. In response, the arbitration court suggested that the CISG should be applied to disputes, and following Article 39 of the CISG, the buyer should prove the lack of contractual conformity of the product. According to the buyer's proof, the arbitration court ruled that the seller could not be proven to have committed fraud by hiding the defect and that the buyer should bear all expenses related to the arbitration application.<sup>37)</sup>

In April 2007, Brazilian sellers and Chinese buyers signed contracts on pressure sensors. At the beginning of the arbitration proceedings, the parties agreed on the applicability of the CISG and sought compensation from the arbitration laboratory of the Stockholm Chamber of Commerce with jurisdiction over the case. Based on Article 35 (1) of the CISG, the buyer did not prove that the goods delivered by the seller complied with the quality or description required by the contract, nor did the underlying breach of the contract. Therefore, it was judged that there was no right to terminate the contract and no right to claim damages. In addition, the arbitrator concluded that, based on the provisions outlined in Article 35(2), the defect was minimal and that the buyer, the end user, could have easily avoided the defect.<sup>38)</sup>

In December 2020, a Chinese seller and a U.S. buyer signed a briquette iron contract. According to the contract, the goods had to meet specific chemical and physical requirements. In addition, all disputes in this agreement were included as a legal choice clause to be resolved through arbitration by the American Arbitration Association. At the beginning of the arbitration process, the parties agreed to the application of the CISG, and all matters outside the scope of the agreement were subject to Venezuelan law. With the application of Article 39 of the CISG, the buyer must be responsible for defects in delivered goods, and the buyer has never demonstrated that he has the right to reduce the contractual suitability and the value and price of nonconforming goods at delivery.<sup>39)</sup>

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37) Arbitral Award, 21/10/2005 ; unilex 1202

38) Arbitral Award, 05/04/2007; unilex 1194

39) Arbitral Award, 11/12/2020, unilex 01-19-0003-0137



## 2. Seller's burden of proof

In October 1997, an Italian seller and a Belgian buyer had a dispute over whether to defect in the delivery of goods in their contract. In this case, it was judged that "the defect has not been confirmed, the seller is in principle responsible for proving that the goods are suitable, and an appraiser is designated to confirm the suitability of the goods."<sup>40)</sup>

In June 1998, an American seller and a Chinese buyer signed a press sales contract to be used for the production of frame rails for trucks. The buyer began an arbitration procedure claiming damages due to non-conformity with the contract. The parties applied Articles 35, 38, 39, and 40 of the CISG, and the seller had to bear the burden of proof of non-conformity because they had not taken any action to eliminate the risk of non-conformity and knew that proper installation of alternatives was necessary. Moreover, it was ruled that the buyer could suffer damages due to improper installation.<sup>41)</sup>

In April 2008, a Swedish seller and a Chinese buyer signed a contract to supply powder, and the color, moisture, and country of origin were described in the contract. After delivery, the goods were found to be defective by the buyer, who then informed the seller of the goods' lack of suitability. The buyer prepared to return the goods and requested cancellation of payment. As to the subject of the burden of proof, the arbitral tribunal stated that the goods provided by the seller did not comply with the contract requirements and were not suitable for import, so the seller was liable for proof of defects in the goods.<sup>42)</sup>

## 3. Comparative analysis

As seen above, the arbitration case judges that the seller or buyer is responsible for proving the contract suitability of the goods based on their agreement. When analyzing the cases, it can be seen that the buyer is often held responsible for proving the

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40) Arbitral Award, 06/10/1997, unilex 6610

41) Arbitral Award, 05/06/1998, unilex 338

42) Arbitral Award, 18/04/2008, unilex 1531

contract suitability of the goods. There is an opinion that it is reasonable to bear the burden of proof from a position where it is easy to secure evidence as the buyer exercises de facto control over the goods after receiving them.<sup>43)</sup> However, although the buyer exercised control over the goods after receiving them, the buyer was often outside the seller's jurisdiction and did not receive compensation even though the goods were damaged due to lack of proof and information asymmetry.

According to the arbitral award, there were many demands for the buyer to bear the burden of proof if they claim damages due to goods that were not suitable for the contract, which added to the burden on the buyer. In response, the CISG presented a theoretical background for the Product Liability Act to argue that there is no explicit provision for the burden of proof, so it should be judged by applying domestic law. If the Product Liability Act is applied, the burden of proof on the buyer due to defects in goods can be reduced, and discrimination from companies or countries can be reduced even if the buyer is the subject of the burden of proof.

## IV. Conclusions

In the interpretation and application of the CISG, each country's arbitration agency or judicial agency must apply the unified principle to the acquisition of the unified legal status of this convention. Although each country's domestic legislation is different, the movement of goods through international trade occurs more frequently and quickly. Significantly, the world trade market has rapidly shifted from offline to online due to the coronavirus, showing many changes.

Because of changes in the trade market, the proportion of individuals' overseas direct purchases increases due to the growth of the online common market. The form of trade transactions between companies and consumers is expected to grow, along with trade transactions between companies and consumers. Unlike companies that import goods in large quantities due to changes in trade transactions, it is not easy to prove defects when individual consumers become buyers and import goods.

In light of the unification and legal nature of this convention, it was necessary to

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43) <http://cisgw3.law.pace.edu/cisg/text/digest-art-35.html>

derive a cooperative principle through the actual application cases of each country for the subject of the burden of proof on the suitability of goods contracts, which is frequently a problem in the international sales of goods. Although CISG defines the subject of the burden of proof as the buyer, it is not a unified idea, and it can be seen that the subject of the burden of proof was not constant in the case analysis.

In the event of a dispute in the international sales of goods, arbitration procedures have a series of advantages that can be said to be much more attractive than litigation, so this paper analyzed the subject of proof through the arbitration case applied by the CISG as the governing law. According to the arbitration case analysis, buyers often suffered losses due to non-conformities; however, the subject of the burden of proof was more often designated as the seller, and many arbitration cases had a relatively short period of proof for non-conformities.

As the type of trade transaction changes, the need for revising the CISG is suggested to relieve buyers from damages from non-conformities in the international sales of goods under the CISG law. It is important to continuously seek unified global legal principles through case studies that continue to be accumulated in interpreting and applying the burden of proof of contract and the suitability of goods in this convention. For the continuity of research on this subject, future studies will analyze the 'reasonable period' mentioned in the defects in goods due to non-conformities in the contracts of the CISG through arbitral tribunal cases. In defining the buyer's obligation to notify of non-conformities in the CISG, this study will continue its research on "notifications within a reasonable period," which are essential treaties in trade practice and where many disputes occur.

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