

Additional Terms and Warranties under the  
U.N. Convention on Contracts for the  
International Sale of Goods (CISG)

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# Additional Terms and Warranties\* under the U.N. Convention on Contracts for the International Sale of Goods (CISG)

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\* 'Warranties' are used for the convenience of understanding the relevant issues. The CISG does not refer to 'warranties.' Its phrase is 'conformity with the contract.'

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## I . Implication from the South Korea's Accession to the CISG

South Korea has acceded to the CISG without any declarations or reservations.<sup>1)</sup> The CISG will be effective as of March 1, 2005 in South Korea. On and after the effective date, the CISG will apply to international contracts for sale of goods if international sales contracts satisfy the application requirements under the CISG. Thus in South Korea the CISG will apply to international contracts for sale of goods as a domestic law when either 1) the places of business of both parties are in different Contracting States<sup>2)</sup> or 2) a Contracting State's law applies as a governing law by the application of rules of private international law<sup>3)</sup>, except the express agreement to exclude the application of the CISG by the parties<sup>4)</sup>.

A South Korea's major trade counterpart, the U.S. has been a

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1) South Korea acceded to the CISG on Feb. 17, 2004. As of April 16, 2004, the number of contracting states is 63 (<http://www.uncitral.org/english/status/index.htm>). In contrast to South Korea, the United States and China filed Article 95 declarations which exclude the Article 1(b) of the CISG. Thus in the U.S. and China when a party's business place is located in a Non-Contracting State, the CISG does not apply to such an international sales case.

Furthermore, Germany has not filed any declaration. However, it has filed remarks on the CISG which state that "Germany has advised that it holds the view that parties to the CISG that have made a declaration under article 95 are not considered Contracting States within the meaning of subparagraph (1)(b) of article 1 of the CISG and that Germany assumes no obligation to apply this provision when the rules of private international law lead to the application of the law of a party that has made a declaration to the effect that it will not be bound by subparagraph (1)(b) of the CISG."

2) CISG Art. 1(1)(a)

3) CISG Art. 1(1)(b).

4) CISG Art. 6.

Contracting State of the CISG since January 1, 1988. However, the CISG has not been applied to international sales contracts between U.S. companies and South Korean companies up until now, since South Korea was not a Contracting State of the CISG. Even though the United States is a Contracting State of the CISG, the U.S. excluded the application of the CISG when conflicts of law decides a Contracting State's law as a governing law, since the U.S. exercised the declaration pursuant to Article 95 of the CISG.<sup>5)</sup> Thus when the laws of one of U.S. states are applied to sales contracts disputes between U.S. and South Korean companies, UCC of that state has been applied instead of the CISG. When the rules of private international law led to the application the law of South Korea, Civil Code or Commercial Code of South Korea has been applied since the CISG was not effective law in South Korea.

After the CISG is effective in South Korea, the CISG will apply to international sales contracts between U.S. and Korean companies, unless the parties exclude the application of the CISG.<sup>6)</sup> Thus UCC of a U.S. state or Civil Code or Commercial Code of South Korea will not apply any more after the effective date of the CISG, when the places of business of the parties are in the U.S. and South Korea, unless the parties exclude the application of the CISG.

Even though the CISG applies between any countries if the contracts for sale of goods satisfy the application requirements of the CISG, this article focuses on international sales contracts between U.S. and Korean companies considering relative importance based on

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5) The Article 95 Declaration filed by U.S. is "Pursuant to article 95, the United States will not be bound by subparagraph 1(b) of article 1."

6) Article 6 of the CISG provides "The parties may exclude the application of this Convention -"

trade volume between the two countries.

Considering the expected application of the CISG next year in South Korea, in this article I compare the major differences among the CISG, UCC, and South Korea Civil Code or Commercial Code when applied to international contracts for sale of goods between U.S. and Korean companies. Since South Korea is a civil law country, some major issues can be applied differently from UCC and/or the CISG. Among such issues under the CISG, this article focuses on additional terms and warranties, since such issues can lead to different results from current South Korean law.

## II. Additional Terms under the CISG

Additional terms are one of the issues on the formation of the contract. Additional terms are the terms additional to or different from those offered or agreed upon. Since additional terms modify the terms of the offer, two issues arise. First, when an acceptance modifies the terms of the offer using additional or different terms, whether the contract is formed or not? If an acceptance with additional terms is valid as acceptance even though it contains additional terms, the contract is formed. If not, the contract is not formed. Second, if the contract is formed even though additional terms are used with acceptance, whether the additional terms become part of the contract terms or not? The comparison between UCC, South Korea Civil Code, and the CISG will reveal the differences of the approaches to the two issues above and implications to Korean companies regarding battle of forms under the CISG.

## A. Comparison of Additional Terms under UCC and South Korea Civil Code

### 1. Additional Terms under UCC

UCC 2-207 provides whether contract is formed and whether or not additional or different terms will become part of the contract, when additional terms are used in acceptance or confirmation. UCC 2-207(1) provides that an acceptance with additional or different terms operates as an acceptance, unless acceptance is expressly made conditional on assent to the additional or different terms. Thus even though the terms additional to or different from the offer are used, such an acceptance is not a counter offer, but is a valid acceptance. Under the mirror image rule of common law, an acceptance which varies the terms of an offer is not an acceptance, but a counter offer.<sup>7)</sup> The 'mirror image rule' of general contract law was changed under UCC.

Whether or not additional or different terms will become part of the contract depends on whether the contracts are between non-merchants or between merchants. Between non-merchants the additional terms are construed as proposals for addition to the contract. Without acceptance by the offeror, additional terms do not become part of the contract between non-merchants.<sup>8)</sup> Between merchants such additional terms become part of the contract, unless they materially alter the contract, the offer expressly limits acceptance to the terms of the offer, or the notice of objection is given.<sup>9)</sup> UCC does not provide what kinds of terms are the terms

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7) Richard E. Speidel et al, *Sales*, West Group (2002), p. 508

8) UCC § 2-207(2) (2001)

9) *Id.*

that 'materially alter' the contract. However, in the official comment of UCC, the typical clauses that materially alter the contract include a clause negating standard warranties, a clause requiring a guaranty of 90% or 100% delivery, a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due, and a clause requiring that complaints be made in a time materially shorter than customary or reasonable.<sup>10)</sup>

## 2. Additional Terms under South Korea Civil Code

South Korea is a civil law country and the Civil Code is one of the major codes. In South Korea, the issues on additional or different terms are not provided in Commercial Code, but in Civil Code. Under the Civil Code, an acceptance with additional or different terms from the offer is a rejection of the offer and become a counter offer.<sup>11)</sup> Thus when additional or different terms are used with the acceptance, the contract is not formed since the offer was rejected under the Civil Code. Unless the offeror accept the additional or different terms as a counter offer, no contract is formed. While under UCC the contract is formed even though additional or different terms are used in an acceptance, under South Korea Civil Code contract is not formed in such a case. Furthermore, South Korea Civil Code makes no distinction between merchants and non-merchants on whether the additional terms are included in the contract terms, since the contract is not formed whenever additional or different terms are used in an acceptance unless the additional terms are accepted by the offeror.

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10) UCC § 2-207, comment 4 (2001).

11) South Korea Civil Code Art. 534.

## B. Application of Additional Terms under the CISG

Under the CISG, an acceptance that contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.<sup>12)</sup> However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.<sup>13)</sup> Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.<sup>14)</sup>

Thus the CISG differentiates the legal effects of additional or different terms between terms which materially alter terms of the offer and the terms which do not materially alter the terms of the offer. If an acceptance materially alters the terms of the offer, it becomes a rejection of the offer and constitutes a counter-offer. Thus contract is not formed. The CISG explicitly mentions that the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other, and the settlement of disputes materially alter the terms of the offer, in order to make it clear for the interpretation of additional or different terms. When an acceptance does not materially alter the terms of

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12) CISG Art. 19(1).

13) CISG Art. 19(2).

14) CISG Art. 19(3).

the offer, the contract is validly formed and the terms of the contract includes such additional or different terms. However, the CISG makes no distinction between merchants and non-merchants. Under the CISG, additional terms that do not materially alter the terms of the offer become part of the contract regardless whether the contract is between merchants or not.

### C. Implication to Korean Companies

South Korea Civil Code's provisions are strict on the additional or different terms. It is like mirror image rule of common law, since any acceptance with additional or different terms becomes a rejection and counter-offer. It does not differentiate additional or different terms which materially alter the terms of the offer and those which do not materially alter. Thus the contract is not formed, unless such additional or different terms are accepted by the offeror.

However, under the CISG, effective March 1, 2005 in South Korea, an acceptance with additional or different terms which does not materially alter the terms of the offer is a valid acceptance and constitutes the terms of the contract. When an acceptance materially alters the term of the offer, such an acceptance becomes a rejection and counter-offer. Thus the difference of the application of law between GISG and South Korean law occurs when additional or different terms do not materially alter the terms of the offer.

Since the CISG recognizes an acceptance with additional or different terms which do not materially alter the terms of the offer as a valid acceptance, when international contracts for sale of goods between U.S. and Korean companies are entered into by forms such as printed purchase order and acknowledgment, much more caution

is required than before the effective date of the CISG for Korean companies. Since the applicable law will be the CISG unless the parties exclude the application of the CISG, when battle of forms occurs the result is similar to the consequence in which UCC is the governing law. This means that in international sales contracts between U.S. and South Korean companies, when the parties do not provide on any other governing law, the CISG will govern the additional or different terms issues and that South Korea Civil Code contract principle or UCC will be no longer a governing law on the issue. When a Korean company is a buyer and uses a printed purchase order, such a buyer must check the contents of acknowledgement whether it has additional or different clauses that alter the terms of the offer. When such an alteration of the terms related to other than material issues, the terms altered by the seller constitute the terms of the contract. When a Korean company is a seller of goods to a U.S. company, it can use an acknowledgement with additional or different terms which do not alter materially the terms of offer by a buyer with an expectation to be included in the contract terms when disputes between the buyer and the seller occur.<sup>15)</sup>

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15) South Korea's accession to the CISG will also impact the applicable law between other major trading countries and South Korea. For example, China is also a Contracting State of the CISG. Since China is one of South Korea's major trading countries, South Korea's accession to the CISG will affect the application of the governing law between China and South Korea trading of goods. Before the South Korea's effective date of the CISG, China did not apply the CISG to the disputes on sale of goods between Korean companies and Chinese companies. Even though China is a Contracting State, it filed an Article 95 declaration. Thus when Chinese law was the governing law, China didn't apply the CISG because only a party's business place is in a Contracting State. However, Japan has not acceded to the CISG.

### III. Warranties under the CISG

Regarding warranties, four major issues are very important under the each legal system. First, what kinds of warranties are imposed under the contract? Second, what kinds of remedies are available for the breach of warranties? Third, whether the warranties can be limited or excluded or not? If a disclaimer of warranties is allowed, what is the limitation on the disclaimer or the method of disclaimer? Fourth, whether a statute of limitations is imposed on the remedies of warranties? The comparison of warranties under UCC, South Korea Civil Code and Commercial Code, and CISG shows the differences of the approach under each legal system.

#### A. Comparison of Warranties under UCC and South Korea Civil Code/Commercial Code

##### 1. Warranties under UCC

UCC takes a tripartite approach which yields to three kinds of warranties.<sup>16)</sup> Those warranties are express warranties, UCC 2-313, implied warranties of merchantability, UCC 2-314, and implied warranties of fitness for particular purpose, UCC 2-315. Express warranties can be created by any affirmation of fact or promise made by the seller<sup>17)</sup>, any description of the goods<sup>18)</sup>, or any sample or model<sup>19)</sup>, which is made part of the basis of the bargain. Express warranties are related to the essence of the bargain.<sup>20)</sup> Thus when

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16) Richard E. Speidel et al., *supra* note 7, at 841

17) UCC § 2-313 (1)(a) (2001).

18) UCC § 2-313 (1)(b) (2001).

19) UCC § 2-313 (1)(c) (2001).

20) UCC § 2-313, comment 1 (2001)

disclaimer is inconsistent with the language of express warranties, it is construed as unreasonable. Such disclaimer of express warranties is inoperative.<sup>21)</sup> Implied warranty of merchantability is a warranty that the goods shall be merchantable if the seller is a merchant of goods of that kind.<sup>22)</sup> The implied warranty of merchantability is imposed only when the seller is a merchant with respect to goods of the kind which is sold.<sup>23)</sup> UCC provides the requirements to be merchantable in UCC 2-314(2). Among the requirements, that goods are "fit for the ordinary purpose for which such goods are used"<sup>24)</sup> is a fundamental concept<sup>25)</sup> of this warranty. Disclaimer of the implied warranty of merchantability is permitted under UCC 2-316 (2). However, such disclaimer "must mention merchantability and in case of writing must be conspicuous."<sup>26)</sup> An implied warranty of fitness for particular purpose is a warranty that the goods shall be fit for the particular purpose for which the goods are required.<sup>27)</sup> Such an implied warranty arises when the seller at the time of contracting has reason to know the particular purpose for which the goods are intended and buyer's reliance on the seller's skill and judgment to select or furnish suitable goods.<sup>28)</sup> Furthermore, the buyer must actually be relying on the seller.<sup>29)</sup> Implied warranties of

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21) UCC § 2-316 (1) (2001)

22) Implied warranties of merchantability are drawn in view of the steadily developing case law on the subject (Purposes of Change to UCC 2-314, *Selected Commercial Statutes*, West Group (2002), p. 73.)

23) UCC § 2-314(1) (2001).

24) UCC § 2-314(2)(c) (2001).

25) UCC § 2-314, comment 8 (2001).

26) UCC § 2-316, comment 3 (2001)

27) UCC § 2-315 (2001)

28) UCC § 2-315, comment 1 (2001).

29) *Id.*

fitness for a particular purpose may be excluded only if the disclaimer is in writing and conspicuous.<sup>30)</sup>

A variety of remedies for the breach of implied warranties are available to buyers. The buyer may: (a) reject the goods within a reasonable time after their delivery or tender; (b) revoke his acceptance of non-conforming goods; (c) recover damages for breach with regard to the non-conforming goods; or (d) cover and have damages.<sup>31)</sup>

A statute of limitations is imposed on an action for breach of warranties. An action for breach of warranties must be commenced within 4 years after the cause of action has accrued.<sup>32)</sup> A breach of warranty occurs when tender of delivery is made, except that a warranty is explicitly extended to future performance.<sup>33)</sup>

## 2. Warranties under South Korea Civil Code and Commercial Code

In the Civil Code, warranties of sale of goods are provided in Article 580 and 581. Under the Article 580 of Civil Code, warranties for sale of goods arise when the goods have a 'defect' and the buyer did not know or did not have any negligence for not knowing such a defect. In such a case, as remedies for breach of the warranty, the buyer may rescind the contract and claim damages, if the purpose of the contract is frustrated.<sup>34)</sup> However, if the purpose

30) UCC § 2-316, comment 4 (2001).

31) Vivica Pierre, *What Do Farmers Impliedly Warrant When They Sell Their Livestock: A Comparison of the Uniform Commercial Code, the Louisiana Civil Code, and the Vienna Convention on Contracts for the International Sale of Goods*, 19 S.U L Rev 365 (1992).

32) UCC § 2-725(1)(2001); By the original the parties may reduce the period of limitation to not less than one year but may not extend it

33) UCC § 2-725(2) (2001).

of the contract is not frustrated, the buyer may not rescind the contract, but claim only damages.<sup>35)</sup> These remedies for warranties are similar to the warranties against redhibitory defects under Louisiana Civil Code<sup>36)</sup>, a code that has a civil law origin.<sup>37)</sup>

Article 581 of Civil Code provides on the warranty of goods designated in kind. In such a case, the liability of warranties arises if the goods have a defect when the specific goods are allocated for the sale and the buyer did not know or did not have any negligence for not knowing such a defect. As remedies for breach of warranties, the buyer may either require providing substitute goods without any defect or rescind the contract and claim damages subject to Article 580 of Civil Code.<sup>38)</sup>

Even though the defect is very important concept for warranties,

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34) South Korea Civil Code Art. 580 (1) and Art. 575 (1).

35) *Id.*

36) Louisiana Civil Code Article 2520 'Warranty against redhibitory defects' provides:

"The seller warrants the buyer against redhibitory defects, or vices, in the thing sold.

A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.

A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price."

For redhibition, see George L. Bilbe, *Redhibition and Implied Warranties under the 1993 Revision of the Louisiana Law of Sales*, 54 *La. L. Rev.* 125 (1993).

37) Vivica Pierre, *supra* note 31, at 369

38) South Korea Civil Code Art. 581 (2).

the defect is not defined in the Civil Code. However, it is interpreted that the defect required for the warranty liability means that the goods have any physical flaws. Whether the goods have a flaw depends on the quality and function generally required for the goods of the kind. When sample or advertising was used to represent a certain quality or function, the defect must be decided based on such standard.<sup>39)</sup>

The warranties under Article 580 and 581 of Civil Code can be limited or excluded by the parties. However, when the seller knows the defect and does not declare such a defect to the buyer, the warranties are not excluded by the parties.<sup>40)</sup> Furthermore, the warranties under Article 580 and 581 have 6 month statute of limitations from the date of the finding of the defect by the buyer.<sup>41)</sup>

Between merchants, Commercial Code Article 69 also applies to warranties as well as Civil Code provisions. Under the Commercial Code, the buyer must inspect the goods without delay when the buyer received the goods and if the buyer finds any defect or deficiency, he must dispatch a notice of such defect or deficiency promptly.<sup>42)</sup> If the goods have a hidden defect, the buyer may notice the defect to the seller if the buyer finds the defect within 6 months from receiving the goods.<sup>43)</sup> When the buyer does not satisfy the inspection and notice required under Article 69 (1) of the Commercial Code, he may not claim the remedies for the breach

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39) Yoonchick Kwack, *Chae-Kwon-Kak-Non* (Special Theory of Contracts and Torts), Pakyoungsa (2003), p. 148.

40) South Korea Civil Code Art. 584.

41) South Korea Civil Code Art. 582.

42) South Korea Commercial Code Art. 69 (1).

43) South Korea Commercial Code Art. 69 (1).

of warranties. However, if the seller knew the defect when he delivered the goods, Article 69(1) does not apply.<sup>44)</sup> Thus when the seller knew the defect when he delivered the goods, even though the buyer did not inspect the goods and send a notice of the defect, he still retains the remedies for the breach of warranties.

#### B. Application of Warranties under the CISG

Under the CISG, warranties are provided in Article 35. Under the CISG, "[t]he seller must deliver goods which are of the quantity, quality and description required by the contract..."<sup>45)</sup> The CISG has the provisions similar to implied warranties of merchantability and implied warranties of fitness for particular purpose under UCC. Article 35(2) defines the conformity that "...the goods do not conform with the contract unless they ... are fit for the purposes for which goods of the same description would ordinarily be used, ... [they] are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract ..." <sup>46)</sup> The CISG further provides that "[t]he seller is liable in accordance with the contract and this Convention for any lack of conformity..."<sup>47)</sup> Since the CISG applies to commercial sale of goods and excludes the consumer sales from its coverage<sup>48)</sup>, warranties under CISG applies only to commercial sale of goods.<sup>49)</sup>

For the buyers obligations, "[t]he buyer must examine the goods,

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44) South Korea Commercial Code Art. 69 (2).

45) CISG Art. 35 (1).

46) CISG Art. 35(2) (a),(b).

47) CISG Art. 36 (1).

48) CISG Art. 2(a); Vivica Pierre, *supra* note 31, at 387.

49) However, the CISG applies when the seller neither knew nor ought to have known the purchase of goods was for consumer use.

or cause them to be examined, within as short a period as is practicable in the circumstances."<sup>50)</sup> Furthermore, Article 39 provides: "(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee." However, the buyer may reduce the price or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the notice required by article 39.<sup>51)</sup>

"The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."<sup>52)</sup> Moreover, the seller has right to cure any non-confirming goods up to the date of delivery, when the seller delivered the goods before the date of delivery.<sup>53)</sup> The seller can exercise such right to cure only if the exercise of his right "does not cause the buyer unreasonable inconvenience or unreasonable expense."<sup>54)</sup>

The CISG provides several remedies for the breach of warranties.

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50) CISG Art 38(1).

51) CISG Art 44.

52) CISG Art. 40.

53) CISG Art 37.

54) CISG Art 37.

“When a seller breaches an implied warranty under the CISG, the buyer may either: (a) require performance by the seller of his obligations pursuant to Article 46(1); (b) require delivery of substitute goods pursuant to Article 46(2); (c) require the seller to remedy the lack of conformity by repair pursuant to Article 46(3); (d) avoid the contract for a fundamental breach of contract by the seller pursuant to Articles 49 and 51; (e) reduce the price pursuant to Article 50; or (f) claim damages.”<sup>55)</sup> The buyer is not deprived of any right to claim damages by exercising his remedies above other than damages.<sup>56)</sup>

### C. Comparison of Warranties under UCC, South Korea Civil Code and Commercial Code, and the CISG

South Korea Civil Code does not provide for the kinds of warranties as UCC provisions<sup>57)</sup> and just states on the warranty against defects. However, it is interpreted that the goods sold required to have the quality and function generally required for the goods of the kind by the interpretation of the Civil Code provisions.<sup>58)</sup> Thus even though the CISG and the South Korea Civil Code do not use the term ‘merchantability’, in practice there should be no difference, since goods must be fit for the ordinary purposes under the UCC, South Korea Civil Code, and the CISG.

However, while the UCC’s implied warranty of merchantability is limited to sales by merchants<sup>59)</sup>, under the South Korea Civil Code

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55) Vivica Pierre, *supra* note 31, at 389

56) CISG Art. 45(2).

57) South Korea Civil Code Art. 580 and 581

58) Yoonchick Kwack, *supra* note 39, at 148.

59) UCC § 2-313(1) (2001)

and the CISG such an implied warranty applies to sales by any seller. The South Korea Civil Code and the CISG do not make a distinction between sales by merchants and non-merchants. Thus, the CISG and South Korea Civil Code provisions related to the applicability of the implied warranty of merchantability give the buyer broader protection than the UCC provision.

UCC provides specific degree of quality of the goods to be merchantable.<sup>60)</sup> Such provisions on the meaning of 'merchantable' are not exhaustive and open to other possible attributes of merchantability.<sup>61)</sup> However, neither the South Korea Civil Code nor the CISG has provisions which specify the degree of quality of goods to which the buyer is entitled. Thus under South Korea Civil Code and the CISG, the specific quality of the goods to be merchantable must be decided in each case in order to decide whether implied warranty of merchantability is breached or not.

The UCC's warranty of fitness is embodied in the CISG.<sup>62)</sup> Under both the UCC and the CISG the buyer must prove that (a) the seller knew or should have known that the buyer purchased the goods for a particular purpose, (b) the buyer relied on the seller to furnish such goods, and (c) the seller knew that buyer relied on the seller to furnish such goods.<sup>63)</sup> Under the South Korea Civil Code, it is not clear whether the warranty similar to an implied warranty of fitness under UCC is imposed on the seller. However, some cases show the possibility that similar warranties could be recognized

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60) UCC § 2-313(2) (2001)

61) UCC § 2-314, comment 6 (2001)

62) CISG Art. 35(2)(b).

63) Vivica Pierre, *supra* note 31, at 396; Van Wyk v Norden Laboratories, Inc., 345 N.W.2d 81(Iowa, 1984).

under South Korea Civil Code.<sup>64)</sup> In a district court case for the warranty of fitness, for the proof of breach of warranty it is required that (a) the buyer requested specific function for the particular purpose to the seller and (b) the seller expressly or impliedly guaranteed such quality or function for the goods.<sup>65)</sup>

The remedies available to buyers for breach of warranties vary depending on whether the UCC, South Korea Civil Code, or the CISG applies. Under the CISG, a buyer has a right to specific performance unless the buyer has resorted to a remedy which is inconsistent with specific performance.<sup>66)</sup> However, under UCC the buyer can use specific performance only when the goods are unique or in other proper circumstances.<sup>67)</sup> Under the CISG the right to specific performance is not conditioned on the uniqueness of the goods. Under the South Korea Civil Code, the buyer may request for substitute performance when the breach of warranty is for the fungible goods.<sup>68)</sup> In other cases, rescission and/or damages are the available remedies for the breach of warranties under South Korea Civil Code.<sup>69)</sup>

While under the CISG the buyer may require the seller to cure the defect with respect to non-conforming goods<sup>70)</sup>, there is no such provision on the right to cure under South Korea Civil Code.

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64) Judgment of the Supreme Court, June 30, 1995, 95 Da 2616; Judgment of the Suwon District Court, Aug. 7, 1996, 95 Na 7526.

65) Judgment of the Suwon District Court, Aug. 7, 1996, 95 Na 7526.

66) CISG Art. 46(1).

67) UCC § 2-716(1) (2001).

68) South Korea Civil Code Art. 581.

69) South Korea Civil Code Art. 580.

70) CISG Art. 46(3).

Under the CISG, the buyer has a right to reduce the price with respect to the delivery of defective goods.<sup>71)</sup> Under the UCC, the buyer may deduct all or part of this damages from the purchase price still due.<sup>72)</sup> The CISG's remedy to reduce the price is much broader because this remedy is available even when the buyer has already paid the price. South Korea Civil Code has no such equivalent remedies.

Warranties can be excluded or limited under the UCC, South Korea Civil Code, and the CISG. However, the method or scope of the disclaimer is different by each law. Under UCC, negation or limitation of an express warranty is valid if it is consistent with the express warranty and reasonable.<sup>73)</sup> To exclude or limit an implied warranty of merchantability under UCC, 'merchantability' must be mentioned and in case of writing must be conspicuous.<sup>74)</sup> For the exclusion or limitation of an implied warranty of fitness, the exclusion must be in writing and conspicuous.<sup>75)</sup> Under South Korea Civil Code, warranty against the defect may be excluded by the agreement of the parties.<sup>76)</sup> However, if the seller knew the defect and did not declare it to the buyer, such exclusion is not operative. No other specific method for the exclusion of the warranty is mentioned under the South Korea Civil Code. Under the CISG implied warranties can be excluded if the parties have agreed otherwise,<sup>77)</sup> and no specific method of exclusion or limitation is

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71) CISG Art. 50.

72) UCC § 2-717 (2001).

73) UCC § 361(1) (2001).

74) UCC § 361(2) (2001)

75) Id

76) South Korea Civil Code Art. 584.

77) CISG Art. 35 (2)

provided. Thus under the CISG and South Korea Civil Code exclusion or limitation of implied warranties can be made without any method restriction. While under the CISG implied warranties can be excluded by the agreement even though the seller knows the defect, under the South Korea Civil Code if the seller knows the defect warranties can not be excluded by the agreement of the parties.<sup>78)</sup>

For the inspection and notice of the defect or lack of conformity, South Korea Commercial Code and the CISG provide on required inspection and notice of the defect, and the legal effects if the buyer does not inspect the goods or send a notice of the defect.<sup>79)</sup> While the inspection for the defect in South Korea Commercial Code applies only between merchants, the CISG makes no distinction between merchants and non-merchants.<sup>80)</sup> However, UCC does not state on the buyer's duty to inspect the goods to find out defects or non-conformity similar to South Korea Commercial Code, but only provides on the buyer's right to inspection of goods.<sup>81)</sup>

While South Korea Civil Code and UCC provide on statute of limitations for the claim of breach of warranties<sup>82)</sup>, the CISG does not provide such statute of limitations.

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78) However, it is interpreted that when the buyer also knows the defect, the exclusion of warranties by the agreement is valid, even though the seller knows the defect and does not declare it. (Yoonchick Kwack, *supra* note 39, p. 154).

79) South Korea Commercial Code Art. 69; CISG Art. 38 and 39.

80) CISG Art. 38 and 39.

81) UCC § 2-513 (2001).

82) South Korea Civil Code Art. 582; UCC 2-725(1)(2) (2001)

#### D. Implication to Korean Companies

Unless the parties have agreed to exclude CISG warranties, the CISG will be the governing law on warranties arising from the contracts for the international sale of goods between U.S. and South Korean companies. The Korean companies must understand the change of the legal environment after the effective date of CISG in South Korea, since the kinds of implied warranties and available remedies are different. The provisions on the implied warranties under the CISG are more similar to the U.S. UCC than South Korea Civil Code. While South Korea Civil Code has no provisions on implied warranties of fitness for particular purpose, the CISG provides the implied warranty that is similar to implied warranty of the fitness under UCC. Under the CISG, the goods must be "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract."<sup>83)</sup> Since whether implied a warranty of fitness is imposed to the seller is not clear under the South Korea Civil Code provision on warranty against the defect and the requirement for the warranty of fitness is not defined, the CISG has a more favorable provision for the buyer on the warranty of fitness. While some provisions of the CISG are similar to South Korea Commercial Code, the scope of application may be different. Such provisions are that the buyer is required to inspect the goods<sup>84)</sup> and to give notice to seller any lack of conformity founded<sup>85)</sup> between any vendors under the CISG, while South Korea Commercial Code requires such inspection and notice between merchants. Furthermore, the available remedies for the

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83) CISG Art. 35(2)(b).

84) CISG Art. 38.

85) CISG Art. 39 (1).

breach of warranties differ under the CISG, UCC, and South Korea Civil Code. The remedies for the breach of warranties available under the CISG are more diverse than those under the South Korea Civil Code. Considering implied warranties and available remedies for the breach of warranties, the CISG is more favorable to the buyer than South Korea Civil Code.

If a Korean seller wants to exclude or limit implied warranties under the CISG because it is unfavorable to him, he can exclude or limit the warranties by agreeing on that point with the other party. If the agreement to exclude the implied warranties is difficult to be agreed by the parties, another option for the seller could be to explicitly exclude the application of the CISG as a whole by the agreement, even though the law of a contracting state is designated as a governing law.

#### IV. Conclusion

The provisions of the CISG on additional terms and implied warranties are similar to the related provisions of UCC. Thus when applying the CISG, cases interpreting relevant UCC provisions might be useful as a reference to similar cases governed by the CISG. However, while UCC case law can be used as a reference, even in the U.S. the similarity of the provisions between UCC and the CISG does not require the courts to apply UCC case law to the CISG cases *per se*.<sup>86)</sup>

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86) *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1028 (2d Cir. 1995); *Orbisphere Corp. v. United States*, 726 F.Supp 1355 (Ct. Int'l Trade 1989).

For the additional terms under the CISG, some terms are specifically mentioned as the terms that materially alter the terms of the offer. However, for other terms which are not mentioned in that provision, whether such terms materially alter the terms of the offer must be decided by the court or arbitration tribunal. In that case, the interpretation of the CISG is required.

Furthermore, the CISG does not deal with all the aspects of the sales transaction. Other aspects of the sales transaction are ruled by the governing law. Thus in some cases the interpretation of the laws in the governing law state together with the CISG will be expected. In the interpretation of the CISG, one of the fundamental rules is to take into account "its international character and ... the need to promote uniformity in its application."<sup>87)</sup> Moreover, other countries which adopted the CISG are also producing cases applying and interpreting the CISG. Those cases are also useful as references for interpreting the CISG. Thus continuing comparative legal studies on the application of the CISG by other Contracting States are desired to understand the meaning of the relevant provisions of the CISG clearly and reasonably and to harmonize the application of the CISG with other Contracting States. In addition to the additional terms and warranties, there can be other differences in substance between the CISG and the contract law of South Korea.<sup>88)</sup> Thus further studies are necessary for such areas in the future.

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87) CISG Art. 7(1)

88) For the differences in substance between the CISG and UCC Article 2, see Richard E. Speidel, *The Revision of UCC Article 2, Sales in light of the United Nations Convention on Contract for the International Sale of Goods*, 16 Nw. J. Int'l L. & Bus. 174 (1995)