The 1980 UN Convention on Contracts for the International Sale of Goods: A Comparative Analysis of Consequences of Accession by the Republic of Korea†

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† *The publication of this Article is dedicated to the memory of James M. West, 1955 to 1998.* The titles of all Korean laws have been transliterated according to the McCune-Reischauer System.

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I. INTRODUCTION

The 1980 United Nations Convention on Contracts for the International Sale of Goods[1] entered into force January 1, 1988.[2] Among the fifty-two states which have ratified or acceded to the treaty to date are Australia, Canada, China,[3] France, Germany,[4] Italy, Russia and the United States.[5] Several important trading nations

1. U.N. Convention on Contracts for the International Sale of Goods, Final Act, April 11, 1980, U.N. Doc. A/Conf. 97/18, Annex 1 (1980), *reprinted in* S. Treaty Doc. No. 98-9, 98th Cong., 1st Sess. and 19 I.L.M. 668, 671-668 (1980) [hereinafter CISG]. CISG was opened for signature April 11, 1980, and remained open for signature until September 30, 1981.

2. Entry into force is governed by CISG art. 99(1). Nineteen nations signed CISG during the signature period, and another thirty-three nations have acceded as of September, 1998, for a total of fifty-two parties. Current information on participation in CISG, including the texts of declarations and reservations, is available from the UN at (212) 963-5047, or from the U.N. World Wide Web site <http://www.un.org>.

3. China was actively involved in the creation of CISG, and was an early signatory. Professor Jianming Shen has written extensively on the relationship between CISG and Chinese law. *See, e.g.*, Jianming Shen, *Declaring the Contract Avoided: The U.N. Sales Convention in the Chinese Context*, 10 N.Y. INT'L L. REV. 7 (Winter 1997); Jianming Shen, *The Remedy of Requiring Performance Under the CISG and the Relevance of Domestic Rules*, 13 ARIZ. J. INT'L & COMP. LAW 253 (Fall 1996); *see also* Tim N. Logan, *The People's Republic of China and the United Nations Convention on Contracts for the International Sale of Goods: Formation Questions*, CHINA LAW REP. 53-74 (1989).

4. *See* Gerhard Manz & Susan Padmann-Reich, *Introduction of the UN Convention on International Sale of Goods in Germany*, INT'L BUS. LAWYER 300-05 (1991). On the application of CISG by German courts, *see* Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany* 1988-1994, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1995 at 51 (CORNELL INT'L L.J. ed., 1996).

5. CISG, ratified by the Senate in 1986, is a self-executing treaty with the force of federal law. CISG was enacted into U.S. law with no accompanying legislation to clarify or harmonize its relationship to the Uniform Commercial Code [hereinafter "UCC"] or to State common law of contracts, but the official English version of CISG was published in the Federal Register (52 Federal Register 6262, 6264-6280), which seems to have smoothed over potential problems raised by the fact of CISG existing in six languages, Arabic, Chinese, English, French, Russian and Spanish, all being equally valid. English is at least one of the official languages, however, whereas Korea's situation will be similar to Germany's, in which the standard German text is "merely an aid to comprehension and interpretation and not determinative before a court of law." Manz & Padmann-Reich, *supra* note 4, at 301. An "official" German version was agreed in 1983 among Germany, Switzerland, and Austria. Peter Schlechtriem, Uniform Sales Law 20 (1986). It seems clear, however, that a disputing party could always argue that the language of this German version is inconsistent with one or more of the official versions, and it is at least arguable that even a tribunal deciding a case under one of the official languages must consider other official versions if one of the parties so demands. For discussion of this "Tower of Babel" aspect of CISG, *see* Michael J. Bonell, *Interpretation of Convention*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW 65, 90 (C. Bianca and M. Bonell eds. 1987); *see also* Arthur Rosett, *CISG Laid Bare: A Lucid Guide to a Muddy Code*, 21 CORNELL INT'L L.J. 575, 587 (1988), reviewing Commentary on the International Sales Law, *Id.*

such as Japan and the United Kingdom[6] were not original signatories, however they are expected eventually to join the convention by accession.

Korea has not yet become a party to the CISG, however the international sales regime established under the CISG already applies to Korea-related transactions in several circumstances. First, CISG is increasingly being incorporated by reference in private sales contracts between Korean and foreign parties as the governing law. Thus, any tribunal that respects the parties' choice of law, whether Korean or foreign, and if foreign, whether or not located in a CISG jurisdiction, will apply CISG to such an agreement. Such contracts may also include a choice of a Korean judicial forum or of arbitration in Korea, entailing that these tribunals will be called upon to apply CISG rules in settling disputes. Second, Korean companies and individuals sometimes become involved in contract litigation or arbitration outside of Korea in which the tribunal may apply CISG rules as part of the domestic law of the forum (or as part of the national law of a third country selected under the foreign forum's choice of law rules). Third, the Korean courts themselves may decide to apply the CISG in circumstances where Korean choice of law rules direct application of the contract law of another jurisdiction which is a party to CISG.[7] In the not too distant future, Korea seems likely to take the step of acceding to CISG, particularly given the broad participation in the treaty by Korea's major trading partners. Unification of the law governing private trade arguably makes international sales transactions more predictable and secure and reduces the complexity of dispute resolution, although commentators disagree about the extent to which CISG actually furthers these goals in practice.[8]

The limited aim of this article is to review salient features of CISG, highlighting areas where CISG differs from or is more detailed than the legal norms set forth in the Korean Civil and Commercial Codes, the primary sources of Korean law governing commercial sales.[9] France and other European and Latin American countries with civil tradition legal systems similar to Korea's contributed greatly to the multilateral negotiations which created the CISG text, accordingly many parts

6. *See* Robert G. Lee, *The United Nations Convention on Contracts for the International Sale of Goods: OK for the UK?*, 1993 J. BUS. L. 131 (stating Britain is expected to join the CISG by accession); *see also* Barry Nicholas, *The Vienna Convention on International Sales Law*, 105 LAW Q. REV. 201 (1989).

7. Decisions whether to apply the CISG as an integral part of the contract law of a foreign jurisdiction may be more complicated when that country in question has made a declaration under Article 95 not to be bound by Article 1(1)(b). *See infra* note 18 and accompanying text.

8. *See* Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265-305 (1984) (setting forth a skeptical assessment of the CISG's amelioration of legal complexity).

9. The Civil Code (*Minpop*), Law No. 471 of Feb. 22, 1958 and the Commercial Code (*Sangpop*), Law No. 1000 of Jan. 20, 1962, as amended, are available in unofficial English translations in Korea Legal Center, Laws of the Republic of Korea (1983 & Supp. 1984-91); *see also* Jae Yeol Kwon, *An Isolation in Systems of Law: Differences Between the Commercial Codes of the United States and Korea*, 29 LOY. L.A. L. REV. 1095 (1996) (comparing the Commercial Code and the UCC); RUDOLF B. SCHLESINGER, COMPARATIVE LAW at 590-96 (1988) (discussing the relationship between Civil and Commercial codes in civilian jurisdictions).

of the CISG will appear immediately familiar to Korean jurists.[10] At the same time, because CISG was drafted after deliberation on the unique characteristics of international sales of goods and required accommodation of legal principles derived from dissimilar legal systems, there are a number of significant divergences from existing Korean law.[11] Comparative reference will also be made to the UCC of the United States, to the laws of other civil law countries, and to court and arbitral decisions interpreting CISG[12] where such reference helps clarify the approach of CISG or Korean law to particular issues.

The CISG is divided into three substantive parts plus final clauses.[13] Part I concerns scope of application and general principles, while Part II contains rules on formation of contracts. Part III, the main body of the treaty, governs obligations of performance, passage of risk, remedies for breach, and excuses for nonperformance. This paper is organized in accordance with the structure of CISG, rather than following the structure of Korean law. The final clauses in Part IV are self-explanatory and will not be examined here except to note possibilities for reservations.

10. *See generally*, HORACIO A. GRIGERA NAON, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 89-124 (N. Horn & C. Schmitthof eds., 1982). Korea was represented on the Drafting Committee at the 1980 Vienna Conference that finalized the text. *See* Henry Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods*, 18 INT'L LAW. 29, 35 (1984).

11. We proceed on the assumption that Korea, upon joining CISG, will not necessarily amend its domestic contract law to mirror CISG, and therefore CISG and ordinary Korean sales law will continue to exist as distinct, parallel regimes within Korean law. Korea might, on the other hand, amend its domestic sales law to reduce inconsistencies with CISG. *See* Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43 (1991) (providing a discussion of possible amendment of the U.S. U.C.C. to comply more closely with CISG); *see generally*, Richard E. Speidel, *Symposium: The Impact of Internationalization of Transnational Commercial Law: The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS.165 (Winter 1995).

12. Given the relatively open-textured nature of the CISG text, and the fact that CISG does not exist within an authoritative interpretative system or against the backdrop of a single body of law, uniformity in CISG interpretation will depend upon the willingness of judges and arbitrators to consider how their counterparts around the world interpret particular CISG provisions. To facilitate this, the UNCITRAL Secretariat collects abstracts of decisions interpreting CISG from reporting bodies within CISG states, which it then publishes in the series, "Case Law on UNCITRAL Texts," or "CLOUT." U.N. DOC. A/CN.9/SER.C/ABSTRACTS/1-18. The CLOUT abstracts are also available on the UNCITRAL World Wide Web site (www.un.or.at/uncitral). Unfortunately, as Korea has not acceded to CISG no Korean court or arbitral decisions interpreting CISG appear in the CLOUT abstracts. Other English language sources of national jurisprudence and/or arbitral decisions interpreting CISG are the loose-leaf service UNILEX: International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods, Michael J. Bonell, et al., eds., the Journal of Law and Commerce, based at the University of Pittsburgh School of Law (since 1993), the Uniform Law Review (*Revue de Droit Uniforme*), published by the International Institute for the Unification of Private Law (UNIDROIT), and the International Court of Arbitration Bulletin, from the International Chamber of Commerce (ICC).

13. *See generally*, JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982) (providing a very helpful overview of the Vienna Convention, and has been relied upon for guidance throughout this piece).

II. SCOPE AND GENERAL PROVISIONS OF CISG: PART I, CHAPTERS I AND II

Articles 1 through 6 constitute Part I, Chapter 1 of CISG, "Sphere of Application." These articles seek to define the role of the CISG by indicating to which types of agreements CISG should be applied. These articles also attempt to define certain issues which are in no case governed by CISG, and will continue to be governed by domestic law. Articles 7 through 13, which make up Part I, Chapter II, "General Provisions," provide rules and guidance concerning issues of language, meaning and interpretation, both of law (CISG) and of the verbal and non-verbal conduct of the parties.

A. Scope: Part I, Chapter I (Articles 1 through 6)

Article 1(1)(a) provides that CISG applies to contracts for the sale of goods between parties whose places of business are in different states and that both are parties to the treaty. The "place of business" criterion is adopted rather than nationality or any other basis for categorizing a contract as "international" because it was considered the simplest and most appropriate criterion for directing the application of CISG to sales across national borders.[14] Had nationality been used, the prevalence of multinational enterprises and of corporations incorporated for tax and other purposes in jurisdictions other than those of their bases of operations would have created recurrent difficulties. Although Article 10, discussed below, is intended to clarify the application of the term "place of business," some scholars believe the fact that no precise definition is provided is a defect in the treaty.[15]

An alternative and more complex basis for application of CISG is contained in Article 1(1)(b): when the rules of private international law employed by a body[16] called upon to enforce or interpret an international sales contract lead to the application of the law of a contracting state. The United States and certain other countries consistently opposed the inclusion of Article 1(1)(b). The United States and the People's Republic of China (China), two of Korea's most important trading partners, by reservation expressly permitted by Article 95, have excluded the application of Article 1(1)(b).[17] Consequently, American or Chinese courts hearing disputes arising out of sales transactions between domestic and Korea-based parties

14. *See* Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS 1-1, 1-20 (Nina M. Galston & Hans Smit eds. 1984) [hereinafter "Parker School Essays"].

15. *See, e.g.*, GRIGERA NAON, *supra* note 10, at 95-96.

16. CISG will be interpreted and applied in private arbitration, as well as by courts of signatory nations. The implications of this for uniformity and consistency in CISG interpretation may be important, but it is beyond the scope of this article.

17. The declarations that accompany states' ratifications of CISG are available on the UN World Wide Web site (www.un.org).

may defer application of CISG in such cases, until such time as Korea accedes to the convention, even though CISG is, for some purposes, part of the forum law applied under applicable conflict of laws rules.[18] By the same token, as long as Korea is not a party to CISG, Korean courts adjudicating disputes arising out of similar transactions, if led by private international law rules to apply U.S. or Chinese law, may decide to apply not the CISG, but the same body of domestic contracts law that the U.S. or Chinese courts would themselves have applied had the cases been tried there.

Germany applied a different but related reservation when it acceded to CISG: it declared that the rule in Article 1(1)(b) will be applied by German tribunals only if the contracting state selected under rules of private international law did not make a reservation under Article 95.[19] As a result, German courts, led by rules of private international law to apply U.S. or Chinese law, should apply U.S. or Chinese domestic sales law, not CISG, even though the United States and China are contracting states.[20] Korea, like other countries considering accession to CISG, will thus have to weigh domestic concerns, as well as possible reactions of other nations, when deciding whether to accept or to exclude application of Article 1(1)(b).[21]

The third and final basis for CISG applicability is that parties to a contract generally are free to incorporate CISG as the governing law, and Article 6 recognizes that parties may also exclude, derogate from or modify its provisions. The exception to this rule of party autonomy is the case noted in Article 12, where a state requires that sales contracts must be in writing.[22] States may declare pursuant to Articles 12 and 96 that they will require all sales contracts to be in writing, but because Korean law recognizes the enforceability of oral agreements, it is unlikely that Korea would qualify its accession with such a declaration.

The provisions of CISG are concerned solely with the formation of international sales contracts and the rights and remedies of the parties thereunder. Article 4 expressly states that CISG is not intended to govern issues of the validity of the underlying contract or of its effect on title to property, which will continue to be controlled by applicable municipal law. Article 5 states that CISG does not apply to liability of sellers for death or injury claims, even though Part III does cover warranty obligations in some detail regarding compensation for economic loss. In sum, CISG is not concerned with capacity of the parties, legality of the transaction, effect of a sale on property rights of third parties, tort liability for sale of defective goods, procedural prerequisites for enforcement of contractual liabilities or any

18. The exceptions are whether the parties had designated CISG as the governing law, and whether the Chinese or U.S. court respected such choice.

19. *See* Manz & Padmann-Reich, *supra* note 4, at 302.

20. *See* Karollus, *supra* note 4, at 51-52, 56-57.

21. *See* Michael Joachim Bonell and Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law (part 1)*, NS 1 UNIFORM L. REV. 147, 153-54 (1996) (discussing case law on Article 1(1)(b)).

22. *See infra* note 42 and accompanying text.

other subject-matter not explicitly addressed in the CISG rules on formation, obligations and remedies.[23]

CISG does not itself govern periods for prescription of commercial claims arising out of international sales. However, simultaneously with its finalization in 1980 a Protocol to the 1974 UNCITRAL Convention on the Limitation Period in the International Sale of Goods was drawn up.[24] The 1974 UNCITRAL Convention on this important topic has not received wide acceptance, but because the Protocol makes adjustments in the 1974 UNCITRAL Convention to make it fully consistent with CISG, it is hoped the countries adhering to CISG will also join in the Protocol.[25]

From a Korean law perspective, a contract for sale of goods falls within the definition of "commercial transaction" in Article 46(1) of the Commercial Code, although Article 1(3) of CISG makes clear that the civil or commercial nature of the parties or the contract under domestic law is irrelevant to the convention's applicability. The scope of "sales of goods" governed by the treaty depends on the provisions already discussed, and on Articles 2 and 3 which exclude the following classes of transactions from the sphere of application of CISG:

art. 2(a)	Consumer purchases (unless the Seller had no reason to know the goods were destined for personal or family use);
2(b)	Auctions;
2(c)	Execution or other sales under legal process;
2(d)	Sales of commercial paper, securities or currency;
2(e)	Sales of vessels, hovercraft or aircraft; and
2(f)	Sales of electricity.
art. 3(1)	Sales of specially fabricated goods for which a substantial part of the input materials are supplied by the buyer.
art. 3(2)	Contracts under which the preponderant part of the obligations of the supplier of goods consists in the supply of labor or other services.

Potential difficulties are immediately apparent in applying Article 3(1) and 3(2) to "mixed" contracts such as contracts for turnkey plant erection or other design/build/erect facilities contracts, where sources of material are often in fact dictated by the buyer. The terms "substantial part"of the input and "preponderant part of the obligations" are imprecise and may give rise to disagreements on

23. *See* HONNOLD, *supra* note 13, at 94-104; E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 17, 19-20 (1984).

24. U.N. Doc. A/CONF. 97/18, Annex II (1980), amending U.N. Doc. A/CONF. 63/15 (1974).

25. Current participation information is available on the U.N. website (www.un.org). The United States has signed both, but Korea and most other major trading nations have joined neither. *See* Kazuaki Sono, *UNCITRAL and the Vienna Sales Convention*, 18 INT'L LAW. 7, 8-9 (1984).

whether CISG should govern. Potentially problematical "mixed" contracts often are for high values, and careful drafting and review of the documentation normally would include precise contractual stipulations on applicable law. One of the advantages of the CISG text is that documentation of international sales can be considerably simplified and shortened by a clear reference to the CISG rules. Nevertheless, special project contracts will continue to require close attention to ensure that unanticipated application of the CISG rules does not frustrate their planning.

Finally, CISG Article 4(1), providing that CISG, "is not concerned with ... the validity of the contract or of any of its provisions or of any usage," will require traders to investigate carefully the contours of Korean law governing contract validity, including such issues as mistake, duress, unconscionability, etc. There has been extensive scholarly discussion of how CISG Article 4(1) should be interpreted,[26] and domestic law doctrines of capacity, fraud, duress, mistake, undue influence or unconscionability often need to be resolved in settling the scope of the validity exception. The validity of contracts under Korean law does not depend on certain formal requirements familiar to common lawyers, such as consideration or a writing, but it remains to be seen how far rules that can invalidate domestic contracts on public policy grounds will apply to international sales contracts as well. In addition, public law norms such as the rules of the Monopoly Regulation and Fair Trade Act[27] or the Regulation of Standardized Contracts Act[28] may in some circumstances affect the validity and enforceability of international sales contracts between merchants.

B. General Provisions: Part I, Chapter II (Articles 7 through 13)

The general provisions in Articles 7 through 13 serve as important guides for the interpretation of CISG, and for its application in concrete cases. These articles provide rules for determining the intent of parties to a contract, and address the often crucial issue of the extent to which customs and usages of a particular trade are binding. Articles 11 and 12 offer an approach for reconciling inconsistent domestic approaches to the formal requirement that a sales contract be evidenced in writing.

Article 7 concerns interpretation of CISG, and directs that it should be construed to promote uniform application in international commerce and "the observance of good faith in international trade." The "good faith" standard, which is important in civil law systems, also appears as a general imperative in Article 2(1) & (2) of the Korean Civil Code and in numerous particular provisions of

26. *See, e.g.*, Helen E. Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1 (1993).

27. (Romanization) Korean Monopoly Regulation and Fair Trade Act, Law No. 3320 (Dec. 31, 1980).

28. (Romanization) Korean Regulation of Standardized Contracts Act, Law No. 3922 (Dec. 31, 1986).

Korean law.[29] The location of a "good faith" provision in Article 7 was controversial, and commentators have expressed the opinion that the "good faith" requirement is out of place in a provision concerning interpretation of CISG, and that it belongs instead among general obligations of parties.[30] Placement of the "good faith" principle in Article 7 reflects a negotiated compromise with states such as the United Kingdom, which strongly opposed any inclusion of a principle they considered ill-defined and moralistic.[31] Nevertheless, the principle is given general force in the location adopted and may prove of great significance when the CISG is applied in municipal courts. Additionally, there is some danger that disuniformity, and thus occasions for forum-shopping, will be created by dissimilar treatment of the good faith obligation in civil and common-law jurisdictions.[32]

The problem of "gaps" in CISG is addressed in Article 7(2), which directs courts applying CISG to refer to "the general principles on which it is based" and, where such principles are insufficient, to the domestic law applicable under the rules of private international law.[33] One likely source for "general principles" is the 1994 UNIDROIT Principles of International Commercial Contracts, a transnational "restatement" of law intended to "establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied."[34]

The Korean Act on Private International Law[35] provides in Article 28 that matters not clearly covered by specific provisions of the portion of that Act concerning commercial affairs are to be governed by commercial custom, and only if no commercial custom is proved, by the rules of civil law selected under general conflict rules such as those respecting juristic acts between different jurisdictions. Thus, it appears that Article 7(2) of CISG could be interpreted to authorize Korean courts to apply local commercial customs, although CISG itself in Articles 8(3) and 9 restricts the application of the treaty to avoid the unfairness of applying customary rules unfamiliar to one party.

29. In the United States, UCC art. 1-203 imposes a non-derogable duty of good faith in the performance or enforcement of contracts, although good faith is not often invoked by the courts in deciding formation issues.

30. *See* Schlechtriem, *supra* note 5, at 38-39.

31. Gyula Eörsi, *General Provisions*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS 2-1, 2-6 - 2-8 (Nina M. Galston & Hans Smit eds. 1984).

32. In it's index of CISG decisions released 3 June 1997, UN Doc. A/CN.9/SER.C/INDEX/2/REV.1, UNCITRAL's CLOUT reporting system reports only five decisions interpreting the "good faith" provision of Article 7, all from courts or arbitral bodies in civil law jurisdictions.

33. A Korean lawyer will compare this to Article 1 of the Korean Commercial Code, which establishes "commercial customary law" as a supplementary source, followed in priority by the Civil Code. Under the CISG, usages of trade are addressed separately in Article 9.

34. Introduction of the Governing Council of UNIDROIT (Rome 1994). The text of the 1994 UNIDROIT Principles and related documentation is available on the World Wide Web at <http://itl.irv.uit.no/trade_law/>. *See generally*, MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1997).

35. (*Sopuisapop*), Korean Act of Private International Law, Law No. 966 (Jan. 15, 1962) (also translated as the "Conflict of Laws Act").

Article 8 of CISG is concerned with interpretation not of the legal rules of the convention, but of manifestations of the intentions of the parties, both linguistic and by conduct. The purpose of this Article is to require courts of all contracting states to use a consistent objective standard for evaluating statements and conduct of parties in the course of formation and performance of international sales contracts.[36] Of particular note is that Article 8(3) directs a broad inquiry into "all relevant circumstances," including the parties' prior course of dealing, if any, their negotiations, trade usages and subsequent conduct.

The applicability of customary trade usages and of practices implied from a prior course of dealing is addressed in Article 9. Some developing countries participating in the drafting of CISG argued against a clause which would bind parties to commercial customs of which unsophisticated parties lacked prior notice, and this concern with avoiding unfair surprise is reflected in the wording of Article 9.[37] Thus, Article 9(1) binds parties to usages to which they have agreed and to practices they have "established between themselves." The tacit implication that parties should not normally be bound to usages to which they have not agreed (or at least established between themselves through conduct) is clarified by Article 9(2). A usage of trade not explicitly agreed between the parties is binding under Article 9(2) only if both parties "knew or ought to have known" of such usage, and such usage is "widely known and regularly observed" by parties similarly situated in the relevant line of international trade. This provision appears to deny any binding force to local customs which are not internationally known unless the parties have expressly adopted such local usages. As discussed above, however, Articles 7(2) and 8(3) may permit reference to local usages or to less than universal international customs, at least for purposes of interpretation.

Article 9 of CISG substantially alters the priority of custom under Korean domestic law. Korean Commercial Code Article 1 and Civil Code Articles 1 and 106 give custom a prominent force, and custom often is invoked to fill in gaps in contractual provisions as long as the custom is consistent with public policy. Under CISG, the burden of proof for reliance on customary usages as binding sources of rights and duties supplementary to the contract is rather stringent, and the several different ways by which trade usages may be invoked under Article 7(2), Article 8(3) and Article 9 may complicate litigation in which customary standards are outcome-determinative.

Article 10 of CISG concerns the proper construction of the term "place of business," which appears in Article 1 on the scope of effectiveness of the treaty and in other provisions.[38] Article 10(1) concerns the common situation in which a party to a sales contract has multiple branches or offices in various countries (which may

36. *See* HONNOLD, *supra* note 13, at 138.

37. *See* Schlechtriem, *supra* note 5, at 41.

38. *See* HONNOLD, *supra* note 13, at 150 (reporting that "place of business" also appears in CISG arts. 12, 20 (2), 24, 31 (c), 42 (1) (b), 57 (1) (a), 69 (2) and 96).

not all have adopted CISG), and focuses attention on the place on business which has "the closest relationship to the contract and its performance" based on facts known to both parties prior to formation.

This criterion is in many respects unsatisfactory, and it would have been preferable to include a series of definitions. However the difficulty in drafting suitable definitions for an international instrument which must cover multinational enterprises, natural persons, partnerships, state trading entities, and all other varieties of parties resulted in residual vagueness and ambiguity on this and other points. Among other problems which are likely to arise is the question of how "permanent" or "transitory" a place of business is.[39] In many circumstances more than one place of business may be substantially involved on the side of a party, so the determination which has the "closest relationship to the contract and its performance" may be somewhat arbitrary.

Article 10(2) was inserted to cover the extremely rare case where a party to an international sales contract has no place of business. A potential problem with 10(2) is that it assumes that if a party does not have a place of business, it will still be possible to determine "his habitual residence." This will be useful where there is indeed a single party, albeit one with no place of business in the traditional sense. It is unclear, however, how well 10(2) could be applied to an unincorporated association composed of several natural persons, or to an association of corporate entities without a joint place of business.

Articles 11 through 13 deal with the issues of whether a contract must be evidenced in writing, and confirm the now universal custom that telex and telegram may suffice as writings for purposes of contract law. The proliferation in the 1980s of facsimile use, and in the 1990s of Internet and Electronic Data Interchange (EDI) networks using telecommunications lines to link far flung computers, occurred after CISG was drafted, hence issues raised by these modes of communication are not covered. The many legal issues arising out of the use of new information technology for electronic commerce are gradually being addressed both through international initiatives and in new national legislation.[40]

One problem faced by the UNCITRAL diplomatic conference was that some countries, typically those with a common law tradition such as the United States, impose strict formal requirements that certain classes of contracts be in writing.[41]

39. Tax considerations have resulted in a highly developed jurisprudence of "permanent establishments," which is probably immaterial to the CISG's sphere of applicability.

40. *See* UNCITRAL Model Law on Electronic Commerce (UN World Wide Web site www.un.org). The Korean Ministry of Information and Communications in July 1998 issued a draft "Act on Digital Signatures" and in August 1998 the Ministry of Commerce, Industry and Energy released a draft "Act on Electronic Commerce." *See generally*, Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship between International and Domestic Law Reform*, 72 TUL. L. REV. 1931 (1998).

41. The UCC "statute of frauds" rule (UCC 2-201) provides that all contracts for the sale of goods for a price of US$500 or more are unenforceable if not evidenced by a writing signed by the party against whom enforcement is sought. Efforts are underway to revise Article 2 of the UCC, and the May 1, 1998 draft of an amended Article

Many civil law countries, including Korea, on the other hand, make no formal requirements regarding writings, and an oral agreement is fully enforceable provided the terms and conditions can be proved. CISG Article 11 adopts the civilian approach by stipulating that contracts need not be evidenced in writing, but provides in Articles 12 and 96 that any contracting state may by declaration impose a requirement that offers, acceptances, contracts, amendments or terminations of contracts, and any other indications of intention, must be evidenced in writing if either party has its place of business in that state.[42]

In practice, virtually all international sales contracts are evidenced in writing, and although the writings may not satisfy the formal requirements of Part II of CISG so as to constitute a binding contract, it is important to keep in mind that CISG recognizes that contracts may become binding by mutual conduct as well as by written offer and acceptance.[43] A writing or a series of writings which fail to satisfy the formal requirements of Part II of CISG thus could be supplemented by the conduct of the parties to become a binding contract.

2-201 raises the threshold amount to US$5,000, but retains the basic writing requirement. *See* STEVEN J. BURTON and MELVIN A. EISENBERG, CONTRACT LAW: SELECTED SOURCE MATERIALS 137-95 (1998) (providing information on the UCC revision process and the May 1998 draft revisions).

42. The United States made no declaration under Articles 12 and 96 to extend UCC 2-201 to the CISG context, and interestingly, this reservation has not been invoked by other common law CISG participants, but instead by socialist or former socialist participants such as Belarus, Estonia, Hungary, Latvia, Lithuania, Ukraine, and the USSR (succeeded by the Russian Federation), as well as two civil law countries, Argentina and Chile. China chose to opt out of Article 11 alone, and did so directly, rather than through the Article 12–Article 96 procedure; see Logan, *supra* note 3, at 63-74 (providing a discussion of how this may reduce the writing formalities required under Chinese law). China's reservation arguably violates CISG Article 98, which states that, "No reservations are permitted except those expressly authorized in this Convention." *See* Schlechtriem, *supra* note 5, at 111-12 (Professor Schlechtriem sees Article 98 as creating a public international law obligation, grounded in Article 19(2) of the Vienna Convention on the Law of Treaties, which a state would violate if it made any reservation not explicitly provided for in the Final Provisions (Articles 89-101)). Professor Schlechtriem does not discuss whether a tribunal applying CISG in conjunction with such a reservation should consider the reservation effective nonetheless, or whether such a reservation should be ignored in favor of a straight application of CISG. *Id.* In the Chinese context, the latter approach could introduce an unwelcome element of uncertainty since private parties that are informed about CISG probably assume that China's reservation is effective and plan accordingly, and since other tribunals, in particular Chinese courts, might well continue to treat China's reservation as effective.

43. CISG art. 18.

III. FORMATION OF THE CONTRACT: PART II OF CISG (ARTICLES 14 THROUGH 24)

The rules in Part II, which govern the formation of a binding international sales contract, are intended to reconcile varying civil and common-law requirements and precedents on the following issues:

a. The distinction between offers to sell and invitations for offers to purchase
b. Time of effectiveness, duration and revocability of offers
c. "Open-price" offers
d. Consequences of acceptances which vary the terms of offers
e. Effect of delayed acceptance
f. Time of formation of the contract

The opening provision of Part II, Article 14(1), defines an offer as a proposal which is "sufficiently definite" about the essential terms of the contract, which manifests the intention of the offeror to be bound in case of acceptance, and which is "addressed to one or more specific persons." The expression "sufficiently definite" is further defined to mean that, at a minimum, the offer must describe the goods and "expressly or implicitly" fix, or furnish a means for fixing, the quantity and price.

The Korean Civil and Commercial Codes treat the definition of an offer as largely self-evident, and reference to the definition of "sale" in Article 563 of the Civil Code confirms that identification of the property sold and determination of its price are fundamental prerequisites to an effective contract of sale.[44]

The language of CISG Article 14(2), which attempts to distinguish an offer "addressed to" particular offerees from a mere invitation for purchase orders subject to acceptance by the seller, has no counterpart in Korean statutory law, and is not entirely satisfactory. For example, an offeror's lack of intent to be bound by a widely circulated list of quotations often is not expressly stated, and the inclusion in such materials of limitations on the validity of the prices, such as "subject to change after Jan. 1, 1993" might be read as manifesting an intention to be bound until that date. A catalogue of goods and prices, even though mailed directly to a multitude of specific individuals, would normally be considered only an invitation to make offers of purchase,[45] however under a literal reading of CISG Article 14,

44. "A sale shall become effective when one of the parties agrees to transfer a property right to the other party and the other party agrees to pay the purchase price to the former." KOREAN CIVIL CODE, art. 563 ("Definition of Sale").

45. *See* HONNOLD, *supra* note 13, at 161; *see generally* MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 37 (1998).

its status would not be beyond doubt where there is a "natural quantity" for purchase.

Various complexities can also arise from submission of firm quotations containing prices which vary depending on quantities ordered by the buyer. In such a transaction the would-be seller manifests an intention to be bound to the prices stated, but the quantity is determined by the buyer. Which is the offeror and which the offeree? An "option" of this sort normally is not binding under the common law if no consideration is paid by the prospective buyer,[46] although such bases of contract formation are quite common in many branches of trade. It is to be anticipated that trade usages will be important and often controlling sources of standards in this area.

The CISG Article 14 requirement that an offer state the price of the goods or a definite means for determining their price is consistent with Korean law,[47] although a departure from the American rule under the UCC.[48] Some critics contend that CISG Article 55 creates confusion by contemplating, in apparent contradiction to Article 14, that a contract may be "validly concluded" without a definite price.[49] Commentators disagree on whether Article 55, which directs an unstated price to be ascertained by reference "to the price generally charged at the time of conclusion of the contract for such goods sold under comparable circumstances in the trade concerned" can only apply where a forum state has adopted Part III but not Part II of CISG,[50] or whether it means that trade usage may be an "implicit" means of fixing price under Article 14.[51] Because by its terms Article 55 applies only if the contract has been validly concluded, and under Article 14 a contract could not be validly formed to which Article 55 would apply, the inconsistency is bothersome indeed and indicates an unsatisfactory compromise between dissimilar domestic approaches to open-price contracts. CISG Article 4(a), which excludes questions of validity from the scope of CISG,[52] may also come into play where price terms are missing if the relevant national law makes agreement on price a condition of validity.[53]

The next area of conflict which the CISG endeavors to resolve concerns the revocability of offers. Under Anglo-American law offers are generally revocable,

46. ARTHUR T. VON MEHREN, LAW IN THE UNITED STATES 83-84 (1989).

47. *See supra* note 44 and accompanying text.

48. UCC art. 2-305 ("Open Price Term") recognizes that parties may agree to be bound without agreeing on price, in which case the price is "a reasonable price at the time for delivery."

49. *See, e.g.*, Schlechtriem, *supra* note 5, at 50-52, 80-81.

50. This was the view of the Commentary on the draft CISG prepared by the Secretariat of the United Nations Conference on Contracts for the International Sale of Goods, at which CISG was adopted. *See* Gyula Eörsi, *Open Price Contracts*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW 401, 407 (C. Bianca and M. Bonnell eds. 1987).

51. *See* HONNOLD, *supra* note 13, at 162-64 (taking the latter view that trade usage may be an implicit means of fixing price under Article 14).

52. *See supra* note 26 and accompanying text.

53. *See* FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 211 (1992).

unless expressly stated to be "firm" in exchange for some consideration or reliance by the offeree.[54] In contrast, civil law systems, including Korea, generally treat offers as irrevocable "for a reasonable time" if a period of validity of the offer is not expressly stated.[55]

Article 15 of CISG states that an offer becomes effective upon reaching the offeree, and that prior to receipt by the offeree the offer can be "withdrawn" by a notice of withdrawal which reaches the offeree simultaneously with or prior to the arrival of the offer. A "withdrawal" pursuant to Article 15 is not a revocation because the offer never became effective.

Article 16 states the CISG compromise between common law revocability and civil law irrevocability: offers may be revoked only if the offer does not provide a fixed time for acceptance (or otherwise indicate it is "firm") and the offeree has not yet dispatched an acceptance or otherwise acted in reliance on the offer. This solution is reasonable, and somewhat closer to the civil law approach than to the Anglo-American approach. Note that under CISG an offer which states an expiry date will probably be considered irrevocable until that date even though American critics are quick to point out that a revocable offer may lapse at a given time just as easily as an irrevocable offer.

This limited revocability of an offer under CISG differs from the typically civil law approach taken by Korean Civil Code Articles 527 and 52. However, Article 16(2) of CISG will in most cases render offers irrevocable for their stated duration of validity. The CISG provisions on timely acceptance of offers also are largely consistent with Korean law.

CISG Article 17 states the nearly universally accepted rule that a rejection terminates an offer at the time the rejection is received by the offeror. Under Article 18(2) of CISG, an acceptance is effective if it reaches the offeror prior to the time fixed for acceptance in the offer, or if no time if fixed, within a reasonable time. These rules are identical with Articles 528(1) and 529 of the Korean Civil Code and Article 52 of the Commercial Code. Further, both CISG Article 18(2) and Korean Commercial Code Article 51 require that an oral offer must be accepted immediately or else it will lapse, though CISG 18(2) qualifies this rule if the "circumstances indicate otherwise." Under both CISG Article 21(2) and Civil Code Article 528(2), if the acceptance was dispatched at a time when it could reasonably have been expected to reach the offeror prior to expiration of the offer, the late receipt is still effective unless the offeror immediately notifies the offeree that the acceptance was untimely and ineffective.

One area where the CISG deviates significantly from Korean law concerns the treatment of acceptance by silence or conduct. Under Korean Commercial Code Article 53 an offer received by a merchant concerning his ordinary line of trade is

54. VON MEHREN, *supra* note 46, at 83.

55. KOREAN CIVIL CODE, arts. 527 and 529; *see generally*, RUDOLF SCHLESINGER, ed., FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 755-80 (1968).

deemed to be accepted unless the offeree promptly dispatches a rejection. Under CISG Article 18(1) silence or inaction is not in itself a sufficient manifestation of an intent to be bound, however CISG Article 18(3) recognizes that trade usages or the prior course of dealing between the parties may recognize acceptance by conduct, such as shipment or payment of the price within the time fixed in the offer.

These CISG provisions are believed to protect parties against becoming bound to material obligations through negligence, and as noted above, the burden of proof for showing the sufficiency of a given act as an acceptance under trade usages will be relatively stringent. The general approach of CISG Article 18(3) is the same as that of Korean Civil Code Article 532, however CISG will place limits on the ability of the offeror unilaterally to impose a duty on the offeree to respond to the offer under threat of a binding contract being formed by inaction.

Article 19 of CISG addresses situations where an offeree seeks to accept an offer, but does so using an "acceptance" that varies the terms of the original offer. Within the realm of contracts to which CISG is relevant, this problem often arises in situations known in American legal parlance as "the Battle of the Forms." The traditional "meeting of the minds" theory of contract led to a requirement that the acceptance must perfectly mirror the offer, and that if it did not, the attempted acceptance would not only be ineffective, but would also constitute a rejection of the original offer. Based on this theory, most countries established rules similar to that of Korean Civil Code Article 534, namely that an acceptance subject to condition or other modification is not effective as an acceptance, but rather constitutes a rejection and counter-offer which must be accepted by the original offeror for a contract to result.[56] Strict application of this rule in cases where parties exchange form purchase orders and invoice/sales confirmation documents would result in a large proportion of sales not being based on valid contracts.

Given the obvious drawbacks of a strict "mirror image" rule in modern commerce, UCC Article 2-207(1) sought to conform to commercial reality by adjusting the "mirror image" rule to one providing that an acceptance containing additional or different terms is effective as an acceptance of the terms of the original offer unless the acceptance expressly indicates it is conditional on the original offeror's agreement to the modifications proposed in the acceptance. Under UCC 2-207(2) the modifications contained in the "acceptance"/counter-offer are to be treated as proposals to be added to the contract, and, between merchants, they automatically become part of the contract unless certain conditions are met. Even if the additional terms do not become part of the contract, however, the main contract has been formed, on the terms contained in the original offer. UCC 2-207(3) provides that the parties' conduct is sufficient to establish that a contract has

56. The "mirror image" rule still generally holds in American common law, and is reflected in §39 and §59 of the RESTATEMENT OF CONTRACTS; CHIRELSTEIN, *supra* note 45, at 53-58; *see* Peter H. Schlechtriem, *The Battle of the Forms Under German Law*, 23 BUS. LAW. 655 (1968) (discussing Germany as representative of the civilian tradition).

been formed even if the offer and acceptance are materially inconsistent. Where conduct demonstrates an agreement to be bound, the contract consists of terms shared by the offer and acceptance, together with terms implied from customs and usages under the circumstances.

Faced with this basic divergence between the widely held "mirror image" rule and the practical approach of the UCC (which is a kind of validation presumption), the compromise adopted by the CISG conference in Article 19 was to provide that an acceptance containing modifications of the offer is effective only if the modifications proposed are not material, that is, they do not affect significant rights and duties defined broadly in Article 19(3), such as price, payment, quality, delivery time and place, warranty disclaimers or dispute resolution. Terms in an "acceptance"/counter-offer that differ materially from the offer prevent a contract from being formed under CISG, while under the UCC such terms will not automatically become part of the contract if not rejected by the original offeror, but neither will they prevent formation of the contract. In practice, CISG rejects the UCC approach in favor of a slight qualification of the "mirror image" rule, for most cases of crossed forms are likely to result in discrepancies on material terms as defined in CISG Article 19(3). The potential thus remains for discrepancies between conditions of offers and acceptances to be used as pretexts for repudiation of contracts where market movements have rendered the bargain unattractive to one of the parties.

Article 20 of CISG contains rules for standardizing the interpretation of time periods for acceptance expressed in an offer. The Korean law on this subject, such as Article 157 of the Civil Code, is not specific, stating only that the initial day is generally excluded in computing time periods. Under CISG Article 20(1) time limits expressed in a telex or other instantaneous communication run from receipt, while those expressed in a letter run from the date shown on the letter, or if the letter is undated, from its postmark date. Article 20(2) is in accord with Civil Code Article 261 to the extent that a period of acceptance which lapses on a holiday is automatically extended to the following business day.

The treatment of a late acceptance is addressed in CISG Article 21. Although employing different theories, both CISG Article 21(1) and Civil Code Article 530 grant that an offeror who receives a delayed acceptance has the option of treating the contract as formed. Under CISG Article 21(1) the offeror must immediately, orally or through written notice, inform the offeree that the acceptance was effective. Under Korean Civil Code Article 530 the delayed acceptance may be treated as an offer (on the original terms) which the original offeror may then accept by dispatching a notice to the original offeree without undue delay.

The foregoing provisions concern untimely notices of acceptance which were dispatched too late to reach the offeror prior to expiration of the offer, assuming normal effectiveness of the means of communication employed. Where the acceptance is delayed due to unforeseen difficulties in transmission, the different rules of CISG Article 21(2) and Civil Code Article 528(2)-(3) apply. In these

circumstances both CISG and current Korean law provide that delayed acceptance is deemed to have been timely and effective unless the offeror immediately notifies the offeree, orally or in writing, that the acceptance was delayed. Under Civil Code Article 528(2), the offeror is obliged to dispatch a notice of the delay whether or not the acceptance is treated as effective. The practical effect is the same as under CISG Article 21(2) however, because in the absence of such notice, the acceptance is effective pursuant to Civil Code Article 528(3).

Article 22 of CISG, corresponding to Article 15(2) on withdrawal of offers, provides that an acceptance may be withdrawn if notice of the withdrawal reaches the offeror prior to or simultaneously with the acceptance becoming effective. This again is consistent with the basic principle of Civil Code Article 111 that a manifestation of intention is effective upon receipt of notice, thus a notice withdrawing an acceptance may preempt a later arriving notice of acceptance.

Articles 23 and 24 of CISG specify the time of formation of a binding contract to be the moment when an acceptance "reaches" the offeror. These rules, which adopt the same approach as Korean Civil Code Article 111, reject the "mailbox rule" of American common law in the context of contract formation. Thus, the risk that a notice of acceptance may be lost or seriously delayed en route is placed on the offeree rather than the offeror.

IV. Sale of Goods under CISG: Part III, Chapters I through V

Part III of the Convention governs the correlative rights and duties of the buyer and seller once they have concluded a binding contract for the international sale of goods. The organization of Part III is as follows: Chapter 1 briefly states some general principles concerning "avoidance" of contracts, modification and termination by consent, and the relation between domestic law and the Convention regarding the remedy of specific performance. Chapter II sets forth the obligations of the Seller, subdivided into delivery obligations, warranty obligations and obligations to compensate the buyer for defaults. Chapter III sets forth the buyer's obligations, again subdivided to cover payment, taking delivery, and compensating the seller for breaches by the buyer. Chapter IV addresses passage of risk, while Chapter V deals with obligations common to the seller and buyer, such as responses to anticipatory repudiation, measure of damages, entitlement to interest, excuses for nonperformance, consequences of avoidance and preservation of goods subject to dispute.

Because Korean contract law, like the national laws of most other countries, was not created with international sales specifically in mind, it is not surprising that the CISG provisions in Part III are more detailed and explicit than Korean municipal law on some topics. Certain of the CISG rules reflect longstanding commercial custom which the Convention codifies as part of *lex mercatoria*. Other of the rules appear so obvious that one has difficulty in imagining any underlying

inconsistency among national laws, but nevertheless, the Convention as a whole represents a compromise between divergent theories of contract law.

A. *General Provisions: Part III, Chapter I (Articles 25 through 29)*

Interestingly, the opening article of Part III, Article 25, states a definition of "fundamental breach" of a contract. As will appear, this distinction between "fundamental" and other lesser breaches is of central significance within CISG for determining which remedies are available to the parties. Any breach by a party gives the other party the right to claim damages, but generally only a "fundamental breach" permits a party to avoid the contract,[57] allows a buyer to reject non-conforming goods and require substitute goods,[58] or allows a seller to withhold delivery.[59]

Article 25 defines as fundamental any breach of contract which "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect ..." unless the result was both unforseen and not reasonably foreseeable by the party in default.[60] Article 25 directs attention to the consequences of the breach under all the circumstances, and even where a breach is serious, if the adverse consequences are promptly removed by voluntary action of the breaching party (offer to cure), the detriment often would not be "substantial" enough to treat the breach as fundamental. Thus, there is an element of good faith presumed which will affect the characterization of the breach. The second necessary characteristic of a "fundamental" breach under CISG Article 25, concerning forseeability, has nothing to do with the magnitude of the detriment suffered by the non-breaching party. Rather, regardless of the actual detriment suffered, if the breaching party can prove that he did not foresee the extent of the detriment that came about as a result of the breach, and that a "reasonable person of the same kind in the same circumstances" would not have foreseen the detriment, then the remedies available to the injured party will be limited considerably.

This distinction between "fundamental" and other breaches has no express counterpart in Korean domestic law.[61] However the general good faith principle of the Korean Civil Code is generally interpreted to require that the right of rescission

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57. CISG arts. 49(1)(a) and 51(2) ("seller's default"); CISG art. 64(1)(a) ("buyer's default"); CISG art. 72(1) ("anticipatory avoidance by either party"); CISG art. 73(1) & (2) ("installment sales").

58. CISG art. 46(2).

59. *See* Honnold, *supra* note 13, at 362 (explaining refusal to deliver is a basic right of the seller under CISG Article 64).

60. Article 25 is more objective than its counterpart in the 1964 Convention on a Uniform Law for International Sales, which focused on whether the breach, if foreseen by the other party at the time of contracting, would have caused a reasonable person in the position of such other party not to enter into the contract. *See* Michael Will, *Fundamental Breach, in* Commentary on the International Sales Law 205, 215-20 (C. Bianca and M. Bonell eds. 1987).

61. CISG Article 25 appears to be a relatively pure product of the drafting process of CISG and its predecessors, not closely related to any national legal system. *Id.* at 205-09.

be exercised in good faith, with the result that a similar theory is applied. The "fundamental breach" approach rejects the common law doctrine of "perfect tender", under which even an immaterial breach may be grounds for rejection of goods or termination of a contract.[62] Another way of looking at CISG Article 25 is that it calls upon the adjudicator to examine what the non-breaching party was reasonably entitled to expect at the time the contract was made, and to decide whether the breach is so serious that damages alone would be an inadequate remedy.

Article 26 of CISG states that avoidance of a contract is effective only if the declaration is notified to the other party. This requirement makes sense in international transactions because it avoids aggravation of damages due to confusion. The former 1964 treaty, as well as some domestic laws, including Korean Commercial Code Article 68, recognize a kind of "automatic" or "*ipso facto*" avoidance in certain circumstances, however those rules were believed too complex and thus were not adopted in CISG.[63] It is sound policy to require immediate notice when one party intends to invoke radical remedies such as rejection, revocation of acceptance, claim for refund, resale to third parties prior to delivery and so on. The requirement of a manifestation of intention to rescind the contract is expressly required by Article 543(1) of the Korean Civil Code, so CISG Article 26 is consistent with the general Korean rule even though it overrides the *ipso facto* rescission rule under Commercial Code Article 68.

Article 27 of CISG deals with an issue previously mentioned in connection with contract formation,[64] namely allocation of the risk that a notice will be lost or delayed during transmission. Article 27 provides that the party who dispatched a notice using "means appropriate in the circumstances" is entitled to rely on the communication, even if delayed, garbled or interrupted.

While transmission risks during the formation phase were placed on the sender, during the performance phase they are placed on the recipient. The theory of the common law "mail box" rule was adopted for Part III because it was considered inequitable to have transmission problems prejudice those remedies of a party which depend on timely notice.[65] Aside from specific exceptions in CISG Articles 47(2), 48(4), 63(2) and 65(1)-(2), which mostly involve notices from a party in default, Article 27 thus represents a change from Korean Civil Code Article 111, under which notices are effective upon receipt.

Article 28 of CISG clarifies that the availability of the remedy of specific performance in any particular situation is ultimately governed by the national law of the forum where the case is brought. This accords with the general principle that

62. *See generally*, CHIRELSTEIN, *supra* note 45, at 118-21 (discussing the common law "perfect tender" rule and its modification under the UCC).

63. HONNOLD, *supra* note 13, at 217.

64. CISG art. 21(2) and Civ. Code art. 528(2)-(3).

65. HONNOLD, *supra* note 13, at 219-20.

local law governs remedies and procedures, and in any case as national laws vary widely on the availability of specific performance it would have been extremely difficult for the Diplomatic Conference to have agreed on a provision concerning specific performance without obstructing broad adherence to the Convention.

CISG does contemplate specific performance in Articles 46(1) (seller) and 62 (buyer), however Article 28 clarifies that such remedy need not be decreed unless it is available under local law for comparable contracts of sale not governed by the convention. Thus, there is no change of existing Korean law, which follows the predominant civilian approach of treating specific performance as an ordinary remedy.[66]

Issues relating to modification are addressed in Article 29 of CISG. Contrary to the common-law doctrine of "consideration," Article 29(1) provides that the mere agreement of the parties is sufficient to amend or to terminate a contract. The amendment need be in writing only if the original contract so required, however even in such cases, a party waives its right to require a written amendment or release if its conduct is inconsistent with the original bargain and has been relied upon the other party. This approach to consensual modification and termination of contractual obligations contains no material divergence from Korean domestic law, which does not require consideration in contract formation, and does not require that contracts, or modifications thereof, be in writing.

B. Obligations of the Seller: Part III, Chapter II (Articles 30 through 52)

Part III, Chapter II of CISG, which governs the obligations of the Seller, begins with a general statement in Article 30, and is then divided into sections dealing with delivery of goods and presentation of documents (Section I), conformity of the goods and third party claims (Section II), and remedies for breach by the seller (Section III).

The Seller's obligations are stated generally in Article 30: to deliver the goods, to transfer relevant documents, and to convey title in the goods to the buyer, as required by the contract and CISG. This corresponds to Article 568 of the Korean Civil Code, which states the effect of a contract of sale.

As noted previously, most of the rules contained in CISG are for use when the parties' contract does not address an issue, either through oversight or by intentional contracting against the background of CISG. Korean domestic law does not contain many specific provisions regarding evaluation of the conformity of the seller's performance to the contract, thus CISG will represent an addition to the existing law on some of the topics addressed.

66. *See* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 505, 509 (Tony Weir, trans., 2nd rev. ed., 1992).

Before reviewing the CISG provisions, it should be noted that many international sales contracts incorporate trade terms by reference. For example reference is often made to the International Chamber of Commerce (ICC) International Rules for the Interpretation of Trade Terms (INCOTERMS)[67] which are used to incorporate agreed-upon shipment terms. INCOTERMS and CISG are complementary and not conflicting; CISG does not address many details which INCOTERMS covers, and INCOTERMS is not directly concerned with legal remedies.[68]

CISG and INCOTERMS are both sufficiently comprehensive to cover several varieties of documentary sales, as well as simple sales with delivery of goods against payment. As one would expect, documentary sales are prevalent in international trade, however we should remark that CISG does not deal with such important topics as modes of trade finance, security for collection, contracts of carriage, forwarding arrangements, and other collateral arrangements. CISG focuses on the buyer and seller and allocates their rights and duties. The CISG drafters were mindful of the need to avoid inconsistencies with related laws and customs, such as the Hamburg Rules, the Uniform Customs and Practice for Documentary Credits, INCOTERMS, etc. CISG covers limited terrain, leaving the broadest flexibility for special arrangements by agreement from case to case.

Articles 31 through 34 of CISG concern time and place of delivery, issues that ordinarily are specifically addressed in the contract, often by reference to FOB, CIF or some other established trade term. Article 31(a) provides that, where the sale involves transportation of goods, the seller must hand the goods over to the first carrier for shipment to the buyer. This discharges the seller's obligation to deliver, subject to risk of transit loss rules in Chapter IV discussed below. Article 31(b)-(c) governs the situation where carriage is not agreed, presumably the rare case where the buyer will pick up the goods ex-factory, and provides that the seller must place the goods at the buyer's disposal either at the place where the parties contemplated they would be tendered or else at the seller's place of business as of the formation of the contract.

Article 32 provides that, where carriage is agreed, the seller must see to the identification of the consignment of goods to the contract, must arrange for carriage in an appropriate manner under the circumstances, and must cooperate with the buyer in furnishing information required for the buyer to take out insurance. These provisions, again, are likely to be superseded by incorporated INCOTERMS or specific terms of the contract. In any case they impose no unexpected burdens on the seller and conformity to custom with respect to arranging contracts of carriage would normally suffice.

67. The current version of INCOTERMS appears in ICC Publication No. 460 (1990).

68. *See generally* John Honnold, *Uniform Law and Uniform Trade Terms—Two Approaches to a Common Goal, in* 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 89 (1983).

The important question of due date for delivery is almost always fixed by agreement, however Article 33 of CISG may sometimes be significant. Article 33 provides that, unless otherwise agreed, the seller may deliver at any time within the period fixed for delivery, or if no period is fixed, within "a reasonable time." Accordingly, where the contract fixes a "latest delivery" date, the seller may ship immediately upon conclusion of the contract and the buyer may have to bear storage costs attributable to early arrival of the goods. Moreover, under Article 58, in the absence of any specific provision, the buyer must pay the price when the seller places the goods (or title documents) at the buyer's disposal. In the Korean context, where documentary letters of credit (L/C) are employed in most trade to or from Korea, the time for shipment is explicitly regulated by the conditions of the L/C whether or not the written contract confirmation states a precise time for delivery.

Under CISG Article 34 a seller who is obliged to tender documents rather than goods to the buyer may cure any defects in the documents up to the deadline for tender. This provision is independent of the ICC's Uniform Customs and Practice for Documentary Credits (UCP),[69] which banks use to resolve questions of compliance with the conditions of a letter of credit when documents are presented for payment. Article 34 concerns only rights between the buyer and seller and puts no obligations on any financial intermediary for settlement of the transaction.

A party tendering documents under an L/C would, in any case, have an opportunity to cure defects until the expiration date of the L/C, unless the discrepancy were so clearly inconsistent with the L/C terms as to be presumptively incurable without an amendment. Thus, this Article, may in some cases, impose an obligation on a buyer to amend a payment facility such as an L/C if the seller has essentially cured defects in documents in relation to the requirements of the contract of sale, where the L/C requirements are somehow more stringent without justification.

Articles 35 through 44 cover the important area of the conformity of the goods to the contract and various issues relating to express and implied warranties. This is an area which is not treated in detail under the Korean Civil and Commercial Codes. As this is perhaps the most common subject matter of disputes in international trade, the adoption of these provisions (and the relevant rules on scope of damages) will be of immediate practical concern to Korean traders if and when accession is made to CISG.

The basic obligation of the seller in a contract for the sale of goods is to deliver goods in accordance with the description, quantity and quality expressed in the contract. Article 35(1) states this general rule of warranty by express description (which may include reference to a sample or incorporation by reference of institutional standards or specifications). The warranty also extends to any explicit contractual requirements concerning containers or packaging.

69. The current version of the UCP, the 1993 Revision, appears in ICC Publication No. 500 (1993).

In the absence of valid disclaimers, the seller warrants that the goods are merchantable, in the sense of being "fit for the purposes which goods of the same description would ordinarily be used" (either by the buyer or an indirect purchaser).[70] In addition, Article 35(2)(b) stipulates that the goods must be fit for any particular purpose known to the seller when the contract was made, except where the buyer was not in a reasonable position to rely on the seller's judgment about the fitness of the goods.

These and the other provisions of Article 35 make the seller liable to satisfy the reasonable expectations of the buyer that the goods will be free from defects or other deformity which would impair the utility of the goods. Korean law, in Civil Code Articles 580 and 581, does not state affirmative obligations regarding the fitness of goods for intended use, rather it implements the principle that a defect in the goods creates a right in the buyer, pursuant to Civil Code Article 575(1), to rescind the contract or claim damages, depending on whether the defect is so serious as to defeat the buyer's object in entering into the contract.

Both CISG Article 35(3) and Korean Civil Code Article 580(1) provide that the seller is not liable for lack of conformity of the goods if the buyer knew or should have known of the non-conformity at the time the contract was formed. Regarding the emergence or pre-existence of defects, which Korean law does not specifically address, CISG Article 36 states that the seller is liable for all defects (whether patent or latent) existing at the time risk passes to the buyer, and also for defects arising thereafter due to any breach by the seller (such as defective packaging).

The seller is also liable for breach of any express guarantee of continuing conditions or qualities in the goods. Absent valid disclaimers, the general implied warranty of fitness in Article 35 normally would extend to an undertaking by the seller that the goods would not deteriorate after delivery within a reasonable interval in which a prudent buyer could be expected to use the goods. Article 581 of the Korean Civil Code states a similar rule that the warranty extends to defects emerging subsequent to sale if the non-negligent buyer was unaware that such defects would emerge.

Article 37 of CISG allows a seller who has made an early delivery to avoid or mitigate liability for defects by curing any defect, shortage or deficiency (whether by replacement or remedial work) prior to the contractual delivery date, provided that such action does not unreasonably inconvenience or impose expense upon the buyer. This principle is not explicit in existing Korean law, but it follows from the general principles of good faith and of mutual duties to mitigate damages.

One of the most important provisions of CISG is Article 38, which governs the buyer's duty to inspect and notify defect claims to the seller. Korean Commercial Code Article 69 provides that, between merchants, the buyer must examine the goods without delay after delivery and immediately notify the seller of defects or

70. CISG art. 35(2)(a).

deficiencies in quantity. Failure to do so is a waiver of the buyer's rights to rescind the contract, demand a reduction of price or claim damages where the defect was discoverable by a reasonable inspection. Where the defect in non-obvious or "latent", the buyer must notify the seller within six months after delivery or forfeit the claim.

This Korean law provision is generally in accordance with international practice, however it is not sufficiently specific to resolve problems common in international trade, such as inspection obligations where goods are resold and transshipped to third parties. There is no clear definition of when "taking delivery" occurs, and sellers may claim that failure to inspect immediately constitutes a waiver or that pre-shipment inspection and approval (in some form) bars subsequent warranty claims.

CISG Articles 38 and 39 are basically consistent with Korean Commercial Code Article 69, but the treaty provisions solve some problems common in international trade by specifically addressing the problems of transshipment and resale. The basic principle is retained that the buyer "must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances,"[71] and must notify the seller of defects or shortages within a reasonable time after the non-conformity was or ought to have been discovered.[72] Where goods are transported by international carriage, examination may be deferred until the goods arrive at their destination.[73] If the seller was aware at the time of contracting that the goods would possibly be redirected or transshipped without a reasonable opportunity for inspection by the buyer, the inspection may be deferred until arrival at the ultimate destination.[74]

These rules must be interpreted with due regard to the factual circumstances of each case, and whether a "reasonable opportunity" for inspection exists at any given point during transport would depend on the cost of unpacking and repacking, the need for special facilities or personnel to perform the inspection, and other relevant facts. Generally, the CISG terms seem to be somewhat more favorable to the buyer than the Korean Commercial Code, particularly as regards CISG Article 39(2), which extends the absolute time limit for notifying defects to two years in place of the six month period under Commercial Code Article 69.

The above provisions on waiver for failure by the Buyer to inspect and notify the Seller of non-conformity are subject to provisos, under both CISG Article 40 and Commercial Code Article 69(2), that the seller cannot rely on such implied waivers of warranty claims where the seller has acted in bad faith, such as by failing to disclose or by actively concealing defects or shortages in the goods about which the seller was clearly in a position to know. Additionally, it should be noted that

71. CISG art. 38(1).
72. CISG art. 39(1).
73. CISG art. 38(2).
74. CISG art. 38(3).

Article 44 of CISG provides that waiver arising by reason of a buyer's failure to notify the seller as required under Article 39(1) will not preclude the buyer from claiming a price reduction or damages where the buyer has "a reasonable excuse for his failure to give the required notice."

It is by no means clear what scope will be given to "reasonable excuse", however it has been suggested that this may cover situations where a defect was discovered but its full significance not realized until some later time.[75] Where an excuse can be established, the buyer can claim damages or reduction in price, however the waiver of the right to rescind or to recover for lost profits is still binding. This principle is similar to the Korean law provisions, which do not penalize the buyer for failure to discover defects if such failure is not negligent.

Articles 41 through 43 cover warranties not in respect to the quality or quantity of the goods, but warranties that the seller is entitled to pass ownership rights free and clear of third party claims. This basic presupposition in contracts of sale is expressed in detail in Korean Civil Code Articles 569 through 579 for obligations in general. CISG Article 41 is consistent in stating the general rule that the seller must deliver goods free from any right of third parties, however CISG Article 42 will be a modification of existing Korean domestic law because it introduces detailed rules on the seller's liability for industrial or other intellectual property right claims by third parties.

Keeping in mind that the parties retain autonomy to vary or supersede CISG provisions by express contract terms, Article 42 makes the seller responsible for any patent, trademark or similar infringement claims if the seller "knew or could not have been unaware of such claim," and provided such claim was foreseeable in light of the seller's knowledge of the jurisdiction where the goods were destined to be used or resold.[76] The seller is not responsible when the buyer knew or should have known of the problem at the time of contacting, or where the infringement arose from the seller's compliance with designs or technical specifications furnished by the buyer.

As in the case of a quality defect, the buyer's right of indemnity under Articles 41 or 42 is subject to an obligation, found in Article 43(1), of notice to the seller within a reasonable time after the infringement claim arises. Article 43(2) further provides that prompt notice by the buyer is not a condition to the seller's liability where the seller actually is aware of the third party claim. Again paralleling the case of quality defects, Article 44 allows a buyer subject to the waiver clause of Article 43(1) to still claim a price reduction or damages where the buyer has a "reasonable excuse for his failure to give the required notice."

Prior to discussing the CISG provisions on the buyer's remedies for breaches by the seller, it will be useful to briefly review the effect of CISG on existing

75. HONNOLD, *supra* note 13, at 284.

76. Won-Mo Ahn, The Seller's Liability for Third Party Claims Based on Intellectual Property (1989) (LL.M. Thesis, University of Pennsylvania Law School).

Korean legal doctrines concerning warranties against defects. Although the CISG provisions covering patent defects are somewhat more detailed, there is no fundamental difference from the Korean Codes as respects express warranties by description and sample. Even the implied warranties of fitness for a purpose (which are subject to disclaimer under CISG Article 6) are in practice already existent under judicial interpretations of domestic Korean law. Warranties against latent defects constitute a rather complex subject in Korean domestic law, being based primarily on adoption of the Japanese theory of *kashi tanpo* liability, which can be considered either as a form of implied warranty or as a statutory obligation independent of contract, in either case however claims are subject to privity .[77]

Under Article 584 of the Korean Civil Code, a seller's disclaimer of warranties is limited by a correlate of "good faith." Although there is no doctrine of "unconscionability" such as is adopted in the UCC 2-302 for contracts of adhesion, any attempt to disclaim *kashi tanpo* type liability will normally be ineffective. Most contracts subject to CISG may be assumed to be between merchants with at least a semblance of bargaining power on both sides, such that abusive warranty disclaimers will be the exception rather than the rule.

It is not yet clear, however, whether the general principle of party autonomy under CISG will put sellers in a position to disclaim *kashi tanpo* type liability for latent defects, or whether courts (in Korea or elsewhere) will apply "good faith" provisions such as Article 40 to restrict the ability of sellers to contract out of warranty liability. These issues will be further clarified under the rules of the treaty in interaction with international "public policy" as the jurisprudence of CISG interpretation develops.

The buyer's remedies in the event of breach by the seller are dealt with in Section III of Part III, Chapter II, Articles 45 through 52. In addition, CISG contains in Part III, Chapter V general provisions on remedies and the scope of damages which apply both to buyers and sellers, and Article 45(b) incorporates some of those provisions, Articles 74 through 77, by reference.

CISG Article 45, besides referring to other specific remedial provisions, clarifies two principles which may be of importance in particular cases. First, Article 45(2) states that the exercise by the buyer of any particular remedy does not bar a claim for damages in respect of the same breach. Thus, the general principle is established that the right to claim damages is cumulative to other remedial options, and is not waived by resorting to any other authorized remedy. Secondly, Article 45(3) provides that a court or arbitral tribunal enforcing a contract subject to CISG may not grant a "period of grace" for performance by the seller. This provision is simply a reinforcement of the general principle favoring validation of the terms of international transactions as actually agreed, and is of no special

77. *See generally* ASIAN CONTRACT LAW: A SURVEY OF CURRENT PROBLEMS 109-111 (David E. Allan ed., 1969).

concern in Korea, where courts are not in the habit of granting discretionary dispensations to defaulting sellers.

The buyer's remedies under CISG include specific performance (Article 46(1)), substituted performance (Article 46(2)), repair or cure of default by the buyer at the seller's expense (Articles 46(3), 48(1)), avoidance for fundamental breach (Articles 49, 51(2)), and reduction in price (Article 50). The right to damages as described in Articles 74 through 77 encompasses some of the above remedies as well as some incidental claims, as discussed below.

Under Article 46, the buyer may require the seller to perform in accordance with the contract unless the buyer has by his own conduct made such performance impossible or has, by avoiding the contract, waived his right to require performance.[78] Article 46(1) adopts the civil law perspective that specific performance is an ordinary remedy, rather than the Anglo-American view that damages are the ordinary remedy and specific performance an extraordinary remedy requiring special justification. Notwithstanding this rule, Article 28 of CISG, as noted previously, makes availability of specific performance dependant upon the practices of the forum as regards that remedy. The comparable Korean domestic law provision is Civil Code Article 389, which allows the obligee to apply for specific performance except where the circumstances do not so permit.

Article 46(2) of CISG entitles the buyer to demand substitute goods, consistent with the principle of restoring the buyer to the position the buyer would have been in if no breach had occurred. This remedy is costly for the seller and can be exercised only in case of fundamental breach, otherwise, the buyer can only demand under Article 46(3) that the seller cure the defects in the goods by repair, unless that would be unreasonable considering the totality of the circumstances.

In many situations only a portion of the goods are defective or missing. Article 51 of CISG attempts to clarify that the buyer's remedies under Articles 46 through 50 apply only to such portion of the consignment not in compliance with the contract, unless the default amounts to a fundamental breach within the definition in Article 25. For example, the remedy of requiring substituted goods, found in Article 46(2), which depends on a fundamental breach, may be available only as to a portion of the goods which are missing or defective, unless the default is so serious as to constitute a fundamental breach of the entire contract. The contract cannot be avoided if the contract has been materially performed, even if the buyer is entitled under Article 46(2) to delivery of substitute goods for some portion of the consignment.

Article 47 of CISG, like Korean Civil Code Articles 544 and 395, provides that where a seller has failed to perform in accordance with the contract, the buyer may notify the seller that the required performance will not be accepted if the seller fails to perform within a reasonable fixed period. This notice, known as a *Nachfrist*

78. CISG art. 81 (discussing the effects of avoidance as governed by the article).

notice, is a kind of grace period or last chance, pursuant to which the buyer undertakes to defer exercising any inconsistent remedies until the notified period expires.[79] Where the situation is one of default in delivery, CISG Article 49(1)(b) provides that the buyer may avoid (rescind) the contract and claim damages if delivery is not accomplished within the time fixed. Non-delivery is thus presumptively a fundamental breach.

In cases where the non-performance is less fundamental (such as failure to repair certain defective goods), the expiration of the *Nachfrist* notice would not allow avoidance of the entire contract, however it would justify the buyer in refusing any subsequent tender of performance by the seller, and in resorting to other remedies. This provision regarding the *Nachfrist* notice is similar to present Korean domestic law (and the law of most civil law jurisdictions) and should occasion little need for adjustment of current practice, except that rescission (avoidance) is not permitted under CISG upon expiration of the *Nachfrist* period where the default is not fundamental. This approach adopted by CISG avoids numerous problems arising under Anglo-American law with respect to the question of whether time is "of the essence."[80]

The rights of the seller to cure a default after the date for delivery has passed are addressed in CISG Article 48. If the buyer has previously avoided the contract in accordance with Article 49, the seller has no rights under Article 48(1). If no avoidance has been declared, and the default is subject to cure by repair or replacement, the seller has a limited right under Article 48(1) to remedy the breach. This would not prejudice the buyer's right to damages and is generally consistent with the principle, stated in Article 77, that damages must be mitigated.

Article 48 addresses the situation where the seller is willing to make a remedial performance but the buyer could refuse to accept the performance on the basis of intervening avoidance or expiration of a period fixed in a *Nachfrist* notice. Article 552 of the Korean Civil Code, which gives a party the right to demand that the other party declare his intentions regarding rescission, is similar. Under CISG Article 48(2), if the buyer fails to respond to an offer by the seller to perform, then the buyer is obliged to accept such performance provided it is made within a reasonable time, and the buyer cannot resort to any alternative remedy which would frustrate the seller's ability to cure. Any offer to perform by the seller stating a fixed time is effective, provided it is actually received by the buyer, to limit the buyer's ability to reject the cure, unless the buyer promptly responds to the seller stating an intention to exercise an inconsistent remedy which is justified under Article 49 or other provisions of CISG.

79. *See* Will, *Additional Period for Performance*, *supra* note 60, at 342, 342-46.

80. *See generally* E. ALLAN FARNSWORTH, CONTRACTS §8.18, at 644-46 (2nd ed., 1990), and cases cited therein.

Avoidance of the contract by the buyer (also known as rescission, cancellation, etc.) is addressed in Article 49 of CISG, and subsequently in Articles 81 through 84 (effects of avoidance). The buyer's rights to rescind or avoid the contract under CISG are narrower in scope than are such rights under Korean domestic law. Under Article 49(1), avoidance by the buyer is permitted in case of fundamental breach by the seller, or in case of non-delivery within an extended period validly fixed in a *Nachfrist* notice given pursuant to Article 47. Article 49(2), however, places time limits on the exercise of the right of avoidance, to preserve equity in circumstances where care of rejected goods or goods in transit may become a serious problem. The limitation is that the buyer must declare avoidance within a reasonable time after becoming aware of a late delivery, after becoming aware of a fundamental breach other than a late delivery, or after expiration of the time fixed in a *Nachfrist* notice, as the case may be. Once avoidance has been declared, the buyer will be entitled to pursue damages within the scope described in Articles 74 *et seq.*

Reduction of price as a remedy of the buyer under Article 50 of CISG normally would be pursued where the seller is not liable for "damages", such as where the default or breach of warranty is attributable to force majeure, defined in Article 79 as an "impediment beyond the control" of the party. This remedy, which derives from the traditional Roman law *actio quanti minoris*, is necessitated in part by the CISG adoption of a modified version of the civil tradition rule basing contractual liability on fault or fraud.[81]

Korean Civil Code Article 390 exempts a party from liability for damages where performance has become impossible without the obligor's "intent or negligence," and accordingly the adoption of a price reduction remedy in CISG Article 50 will give aggrieved parties important new rights in a few rare cases. Imprecise doctrines of restitution (unjust enrichment) are sometimes used in similar cases, but the price reduction remedy under CISG is especially tailored to allocate risk where the buyer accepts and retains the goods notwithstanding a non-conformity for which the seller is not liable. Price reduction is not the same thing as a set-off of damages, and use of the remedy as an alternative to damages would be advantageous only where the market price of the goods had greatly fallen between contracting and delivery.

Article 52 of CISG, like Article 50, would be applied rarely, as it concerns the situations of early delivery and excess quantity. In either case, the buyer has an option to require strict conformity to the specific contractual terms, but may, of course, also display flexibility.

81. *See* HONNOLD, *supra* note 13, at 326.

C. *Obligations of the Buyer: Part III, Chapter III (Articles 53 through 65)*

Paralleling Part III, Chapter II, containing the obligations of the seller, Part III, Chapter III is divided into sections describing the various obligations of the buyer. Chapter III begins with a general statement of the buyers obligations in Article 58, which is followed by sections containing obligations concerning payment of the purchase price (Section I), taking delivery (Section II), and remedies for breach by the buyer (Section III).

Under CISG Article 53, as under Korean Civil Code Article 568, the buyer's basic obligations to pay and take delivery of the subject-matter of the sale are stated. Articles 54 through 60 spell out rules regarding the nature and time and place of payment, basically to fill any gaps in the documentation of the transaction. These issues will generally be expressly resolved in the documentation, either *ad hoc* or by incorporating trade terms such as INCOTERMS.

Article 54 clarifies that the buyer is responsible to facilitate payment by satisfying any formalities such as foreign exchange control approvals. Normally, no problems would arise in the documentary letter of credit sales. However, this burden could be significant where deferred settlement is used and an unwary seller unexpectedly confronts obstructions to remittance after the goods have been delivered.

Article 55 of CISG provides that market price should be relied upon to provide a missing price term where an otherwise validly concluded contract doesn't expressly or implicitly provide for price. This provision is curious in that it appears to conflict with Article 14(1), which provides that a binding contract is not formed unless the offer expressly or implicitly makes provision for determining the price.[82] Commentators have suggested that Article 55 will apply in those very rare cases where the parties have clearly manifested an intent to be bound by a contract of sale, but have agreed to defer finalization of pricing.[83] In such cases, Article 55 requires the price to be fixed by reference to prevailing market prices at the time the contract was made, however if no such market exists or can be proved, the CISG provision is of little assistance. The provision would seem to be founded on principles of equity and avoidance of unjust enrichment. Article 56 of CISG provides that, in case of doubt, a price based on weight is based on net weight. This provision is unlikely to be of great significance as international contracts are almost always explicit on this topic.

Article 57 of CISG, corresponding in part to Korean Civil Code Article 586, provides for payment, unless otherwise agreed, at the seller's place of business, or, if payment is against transfer of documents or the goods, at the place of transfer. As documentary credits are in widespread use for transactions to and from Korea, this

82. *See supra* notes 54-58 and accompanying text.
83. For one such scenario, *see* HONNOLD, *supra* note 13, at 338-39.

provision is of negligible importance for most traders. Time of payment is fixed, absent specific contractual terms, by CISG Articles 58 and 59. Consistent with Korean Civil Code Article 585, payment is presupposed to be subject to the same time limit as transfer of title, and additionally it is clarified that the buyer, unless otherwise agreed, may have an opportunity to inspect before payment. Article 59 of CISG states that the contract alone obliges rendition of payment, without any further request or formalities required from the seller. Article 60 of CISG, defining the buyer's obligation to take delivery, is of little consequence except in setting forth a general duty of cooperation on the part of the buyer in facilitating delivery which is an extension of the universal private law principle of good faith.

Remedies of the seller, set forth in Articles 61 through 65 of CISG, are simpler than the buyer's remedies, and for the most part they are reciprocal to the relevant rights of the buyer to cumulate the damage remedy, to demand specific performance, to dispatch a *Nachfrist* notice, and to avoid the contract for any fundamental breach.

Article 61 is the mirror image of Article 45, previously discussed.[84] Article 62 creates a right of specific performance in the seller, providing that the seller may, unless he has already avoided the contract or resorted to another inconsistent remedy, compel the buyer to accept delivery and pay the price. Article 63 corresponds to Article 47, and enables the seller to deliver a *Nachfrist* notice to the buyer, demanding payment and acceptance of delivery before a reasonably fixed date. Here, as in the case of the buyer's remedies, avoidance is not automatic following expiration of the *Nachfrist* extension, it depends on Article 64, which recognizes non-payment or unjustified refusal to take delivery as, in effect, presumptive fundamental breaches. In Article 64, as Article 49, the right of avoidance is waived if it is not exercised within a "reasonable time," though damages claims are preserved.

Article 65 of CISG adopts a somewhat innovative approach to a particular problem of abuse of rights. Often a contract is concluded which provides that the buyer will subsequently furnish certain specifications or other technical requirements to the seller. If, after formation of the contract, the buyer for any reason wishes to abort the transaction without resorting to an open repudiation, the buyer may refuse to furnish such technical details and attempt to treat the contract as voidable due to vagueness or incompleteness of description. Article 65, which has no specific counterpart in domestic Korean law, addresses this form of abuse by allowing the seller to propose detailed specifications to the buyer. Such a proposal would be deemed binding if the buyer fails to furnish suitable alternatives to the seller within a reasonable period fixed by the seller. This provision may be highly significant where the seller's proof of damages would be difficult without a

84. CISG art. 45.

resale, however the seller's specifications must also be reasonable and not in conflict with the duty to mitigate damages.

D. Passing of Risk: Part III, Chapter IV (Articles 66 through 70)

The CISG provisions in Articles 66 through 70 addressing passage of risk of loss are in most respects similar to the provisions of UCC 2-509 and 2-510. As most international sales are documentary, and the burden of cargo insurance during transit is ordinarily allocated by contract (often by trade terms such as "C.I.F." or "C.& F."), passage of risk problems usually do not arise in dispute resolution between the buyer and seller, however sometimes uncertainties exist and these CISG provisions would fill any gaps.

Article 66 of CISG states the familiar principle of "passage of risk," that loss or damage to the goods after risk has passed to the buyer does not affect the obligation of the buyer to pay the price, unless the loss or damage is attributable to a prior default by the seller. This provision follows necessarily from Article 36(1), which establishes that conformity of the goods to the contract is determined at the time risk passes, which time is fixed in accordance with Articles 67 through 69.

Having due regard to the practicalities of transport insurance in international trade, Article 67 of CISG establishes the rule that where the sale involves carriage of goods, as it will in most cases, the risk passes when the goods are physically "handed over" to the first carrier in accordance with the contract. If the contract names a particular place for commencement of carriage, risk would not pass upon handing over to a carrier for pre-carriage to the named place, rather only upon transfer of the goods at that place. Article 67(1) clarifies that the possession of title documents does not control passage of risk. The underlying policy reason apparently is that a rule predicating passage of risk upon transfer of documents would be difficult to administer, since the time of occurrence of cargo damage during transport often cannot be fixed with any exactness. CISG Article 67(2) clarifies that risk cannot pass until goods (especially fungible goods) have been identified to the contract, which in case of bulk commodities would normally occur upon issuance by the carrier of a bill of lading naming the buyer or his financial intermediary as consignee. This rule rarely will be of significance, however in case of casualty occurring during loading by the carrier it might relieve the buyer from certain losses (which normally would be insured in any case).

Article 68 deals with the problem of passage of risk where goods in transit are sold, often by transfer of negotiable title documents. Because such transactions generally include the transfer of an insurance policy or certificate covering transit risks, the rule contemplates that the circumstances may imply that risk is deemed to have passed retroactively from the time of receipt by the carrier. This is because the buyer will be in a better position efficiently to press claims against the carrier or insurance underwriter. The final sentence of Article 68 expressly makes the bad

faith seller liable for any concealed pre-existing loss or damage of which the seller knew or should have known at the time the title passed.

Most international sales will fall under Article 67, but in the occasional cases of delivery by alternative means, such as a pick-up by the buyer ex-seller's factory, Article 69 would govern, providing that risk passes when the buyer takes over or is obliged to take over the goods. Notwithstanding Article 69, the rules in Articles 85 *et seq.* concerning duties to preserve goods in case of defaults would also apply and affect the allocation of liabilities where damage or loss could have been avoided by reasonable action of the seller. As under Article 67, identification of the goods to the particular contract is a condition for any passage of risk.

Article 70 serves to clarify the priority of the provisions on fundamental breach over the provisions on risk of loss. The idea is that a seller who has committed a fundamental breach cannot, by shipping the goods, limit the ability of the buyer to avoid the contract and in addition protect himself against liability for transit loss or damage.

The above-described CISG provisions on risk of loss are different from existing Korean domestic law, which focuses on the time of transfer of ownership rights (such as by delivery of title documents). It is believed that the CISG rules, focusing as they do on physical transfer of the goods to the carrier, are simpler, and in any event the prevalence of insurance for carriage of goods means that these provisions will occasion no fundamental change in commercial practice. Large-value international sales should specifically address the passage of risk when the documentation is made, and, as elsewhere, the CISG provisions may be freely varied by the parties.

E. Provisions Common to Obligations of Both Parties: Part III, Chapter V

The final chapter of Part III of CISG covers some of the most important issues likely to arise in an international sales transaction: anticipatory repudiation, scope of damages, force majeure, effects of avoidance, and duties to preserve goods under dispute. The CISG provisions on these issues include some taken from civil law jurisprudence (e.g., *compensatio culpae* in CISG Article 77) and some derived from Anglo-American precedents (e.g., the Hadley v. Baxendale approach to consequential damages in Article 74.)

1. Anticipatory Repudiation: Chapter V, Section I (Articles 71 through 73)

Korean jurists will recognize Article 71 of CISG as being identical to the general rule stated in Korean Civil Code Article 536, under which either party may suspend performance until the other party demonstrates an intention and ability to perform the reciprocal obligation. However, Article 71 of CISG is more specific, in that it recognizes some common problematical situations, such as where one

party becomes insolvent - Article 71(1)(a) refers to "a serious deficiency in ... credit worthiness."

If a seller is entitled to suspend performance, whether or not a fundamental breach has been ascertained, he may stop the goods in transit under Article 71(2), however no resale is possible until the contract has been avoided. Article 71(3) requires the party suspending performance immediately to give notice of the basis of suspension, and if adequate assurances of counter performance are made, then the suspension must be terminated and performance resumed.

Article 72 of CISG deals with the situation where one party, prior to commencement of performance, has reason to conclude that a fundamental breach by the other party is not merely possible, but virtually certain to occur. However, this situation will be relatively rare, and the right of avoidance under Article 72 also covers the situation where the other party announces in advance its intention not to perform. In accordance with commercial custom, Article 72(2) requires that any declaration of avoidance be communicated by prompt notice allowing an opportunity for the other party to demonstrate adequate assurance of performance prior to effectiveness of the avoidance, unless extraordinary circumstances justify immediate avoidance.

Article 73 of CISG, dealing with installment contracts involving a series of partial deliveries, is an adaptation of the principles of Article 51 (partial breach) to the special circumstances of installment sales. No particular provisions of domestic Korean law currently address the treatment of installment sales, however the results under general Korean contract law would be similar to the specific CISG rules.

Article 73(1), like Article 51, establishes that a fundamental breach with respect to one installment entitles the buyer to exercise the relevant remedies, including avoidance, with respect only to that installment. Article73 (2) provides that a fundamental breach with respect to one installment may entitle the buyer to avoid the contract as to all future installments, by reasonably prompt notice, if the breach gives the party "good grounds to conclude" that similar breaches will occur. Article 73(3) addresses the situation where installment deliveries are all mutually related, such that a fundamental breach with respect to one installment renders the delivery of the other installments (including previous deliveries accepted by the buyer) essentially unusable by the buyer. It must be recalled, however, that the buyer's right of avoidance in such a situation depends on the other CISG provisions defining a fundamental breach as one which the seller could not be expected to cure within a reasonable time, notwithstanding some inconvenience and delay. Also, the rules on mitigation of damages will apply to an exercise of the radical avoidance remedy in this situation.

2. Damages: Chapter V, Section II (Articles 74 through 77)

Rules on the scope of damages for breach of an international sales contract vary substantially from jurisdiction to jurisdiction. The Korean measure, in Article 393

of the Civil Code, is relatively restrictive as regards "special" or "consequential" or "incidental" damages, which must have been foreseeable in detail by the party in default. It is difficult, for this reason, for a buyer-reseller to recover lost profits on a "lost volume" theory, since it may be impossible to prove that the supplier was aware of any intended resale.

Article 74 of CISG states simply that damages amount to the monetary loss including loss of profit, however damages may not exceed the loss the breaching party could have foreseen at the time that contract was formed as "a possible consequence" of the breach which subsequently occurred. This approach of CISG to the scope of damages is consistent with the 1845 English decision in *Hadley v. Baxendale*, and with UCC 2-714(1), which speaks of losses resulting "in the ordinary course of events . . . ." The flexible "foreseeability" criterion may be applied somewhat differently in different countries' courts called upon to apply CISG, however. Because the CISG approach is based on an objective, rather than subjective, concept of foreseeability, the actual knowledge of the defaulting party should not be as significant as it sometimes has been in cases litigated under Korean domestic law.

Articles 75 and 76 are concerned with the scope of damages where the contract rightfully has been avoided by one party. Article 75 states the familiar rule that, where a seller has resold to liquidate damages or a buyer has "covered" by purchasing from a third party, the difference in price between the original contract and the substituted transaction is recoverable, provided the resale or cover purchase was done "in a reasonable manner and within a reasonable time after avoidance." Additionally, Article 75 makes it clear that additional consequential damages (such as costs of the substitute disposition and lost volume profit) may be recoverable. The only difference from Korean domestic law would be the range of additional damages which could be claimed.

Article 76 of CISG covers the situation where damages have not been liquidated by resale or cover purchase following avoidance of the contract, so that it becomes necessary to refer to market prices. The reference time and place are fixed by Article 76 as either (1) the time of avoidance and place where delivery should have been made or (2) if the goods were accepted and retained, the time the goods were taken over and the place of delivery (or such other place as may be reasonable, allowing an appropriate differential for the portion of the price allocable to transportation). These principles, once again, are mostly consistent with the remedial principles applied in the Korean courts, despite the fact that no such specific rules are set forth in the Korean Civil Code.

Article 77 of CISG states the civil law rule of *compensatio culpae*, corresponding to Article 396 of the Korean Civil Code. This principle, protecting the reliance interest, dictates reduction in damages where the party claiming damage fails to take reasonable actions to mitigate the loss. The same principle is implied by the "duty to mitigate damages" under common law systems, and in CISG this

duty is spelled out in further specific provisions as well, such as Articles 85 through 88.

3. *Interest: Chapter V, Section III (Article 78)*

Article 78 merely affirms that a party entitled to payment of any sum from the other party is entitled to interest. This provision is an example of a topic upon which no agreement on details was possible in the Diplomatic Conference, thus the resulting language is really almost empty of content.[85] No reference to a particular rate of interest or to "commercial rates" has been made, so the question is left to resolution by contract or by local law. Article 84(1) also refers to an obligation to pay interest when the seller is bound to refund the price, however there the rate is left unregulated. In Korea, Commercial Code Article 54 fixes the legal rate of interest at six percent per annum, unless otherwise agreed.

4. *Exemptions (Force Majeure): Chapter V, Section IV (Articles 79 and 80)*

The CISG provisions in Articles 79 and 80 on force majeure are of great significance because interruptions of international commerce due to extrinsic causes are not infrequent and commonly result in legal disputes. Under Korean law, Civil Code Article 537 addresses the situation where performance is "impossible due to any cause for which neither party is responsible" and provides an excuse for non-performance in such case. CISG Article 79(1) is similar in excusing a party from liability where his performance is obstructed by "an impediment beyond his control" provided that such party could not have been expected to foresee the intervention of such impediment at the time of contracting. This proviso is similar to the *culpae in contrahendo* principle appearing in Korean Civil Code Article 535, under which a party who induces the other party to conclude a contract notwithstanding his awareness of a supervening impossibility of performance will be liable to compensate the innocent party who relied on an implied representation that performance would be possible.

Article 79(2) deals with force majeure affecting one party's subcontractor or agent, and provides that the exemption from liability arises only where both the principal and agent are obstructed by an uncontrollable impediment. This Article may be compared with Korean Civil Code Article 391, where a default of an agent to whom performance is delegated is imputed to the principal. In either case, the burden of proof is on the party claiming the excuse from liability, and the remainder of Article 79 states the customary provisions that the occurrence of force majeure must be promptly notified and that the exemption terminates upon removal of the

85. *See generally*, Karin L. Kizer, Comment, *Minding the Gap: Determining Interest Rates Under the U.N. Convention for the International Sale of Goods*, 65 U. CHI. L. REV. 1279 (1998).

impediment. The relatively broad definition of "impediment beyond his control" found in CISG 79(1) does not go so far as to adopt the civil law principle, set forth in Korean Civil Code Article 390, that a party is liable for damages only if an intentional or negligent act or omission is shown to have caused the loss.

Article 80 of CISG, corresponding to Korean Civil Code Articles 538 and 546, contains the proposition that a party whose act or omission has obstructed the other party's ability to perform cannot rely on such failure of the other party. This proposition is in part a corollary of the doctrines of good faith and prohibition of abuse of rights. This Article was considered so obvious that many delegates to the Diplomatic Conference believed it did not need to be stated,[86] however it was finally included, perhaps to clarify situations where one party is related to governmental agencies capable of obstructing performance for illegitimate reasons

5. Effects of Avoidance: Chapter V, Section V (Articles 81 through 84)

Articles 81 through 84 are concerned with the rights and duties of the parties following a valid declaration of avoidance or rescission. Article 81 of CISG is almost identical with Korean Civil Code Articles 548 and 551, providing that rescission is without prejudice to any claims for damages, and that the parties should restore one another (by restitution as necessary) to their pre-contracting positions. CISG Article 81 further clarifies that dispute resolution, governing law and other contract terms concerned with disputes will survive notwithstanding a declaration of avoidance. Parties in dispute have been known to assert that arbitration clauses are invalid following a rescission, and this provision is intended to defeat such dilatory defenses.

Article 82 of CISG closely resembles Korean Civil Code Article 553, under which a party who is unable to restore the subject goods to the other party loses the right of avoidance, except where such inability is due to enumerated excused causes. Korean domestic law provides for a waiver of rights through intentional or negligent conduct, whereas CISG Article 82 states a general rule subject to slightly broader exceptions, however in the vast majority of cases the results will be identical. Article 83 clarifies that loss of the right of avoidance does not affect any other remedies.

Article 84 of CISG contains miscellaneous equity-preserving rules applicable in the event of avoidance. Article 84(1), like Korean Civil Code Article 548(2), entitles the buyer to interest if the purchase price must be refunded. Article 84(2) obliges the buyer to account for all benefits or fruits gained from the goods during the buyer's temporary possession of them prior to restitution to the seller, or prior to another permitted disposition of the goods. This provision follows from the

86. *See* HONNOLD, *supra* note 13, at 444.

general principle that avoidance has the effect of obliging the parties to restore each other to the same condition as if the contract had never been made.

6. Preservation of the Goods: Chapter V, Section VI (Articles 85 through 88)

In order to minimize economic waste in situations where responsibilities for the care and custody of goods are in dispute, CISG closes with Articles 85 through 88, which allocate duties of the buyer and seller to take reasonable steps to preserve the goods. A similar duty is imposed on the buyer by Article 70 of the Korean Commercial Code in situations where the buyer rejects goods in connection with a rescission.

Under CISG Article 85, a seller who tenders delivery is not allowed to abandon the goods at the buyer's risk if the buyer defaults in taking delivery or paying the price, rather the seller must use reasonable discretion to retain or store them at the buyer's expense. This corresponds in part to Korean Commercial Code Article 67, which also deals with the seller's right to resell, a subject addressed by CISG Article 88. Similarly, under Article 86, goods tendered to a buyer must be dealt with reasonably, irrespective of the buyer's entitlement to reject them, provided that no agent of the seller is available to take custody and that the buyer does not have to incur unreasonable expense or inconvenience. Article 87 allows a party with a temporary duty to preserve the goods to deposit them with a third party warehouseman, provided the expense thereby incurred by the other party is not unreasonable. Corresponding rights to deposit goods are created for the seller under Korean Commercial Code Article 67(1), and for the buyer under Commercial Code Article 70(1).

CISG Article 88, the final Article of Part III, provides that a party holding goods pursuant to a duty of preservation may sell them upon prior notice to the other party if the other party fails to take charge of the goods in a reasonable time. Thus, CISG authorizes private sale, whereas Korean Commercial Code Articles 67 and 70 require sale by an auction procedure under court supervision. Article 88(2) of CISG goes further, imposing an obligation on the party with custody to sell perishable goods if they are subject to rapid deterioration, or if preservation would involve commercially unreasonable expenditures. Notice to the other party is required only to the extent practicable. Following avoidance, Article 88(3) allows a party selling goods to retain out of the proceeds his reasonable costs of disposition, but requires an accounting to the other party for any residue.

V. CONCLUSION

The Republic of Korea over the past twenty years has become one of the world's major trading nations, particularly in the realm of manufactured goods. The Vienna Convention, as CISG is also known, was designed to systematize and rationalize international contracts in that realm. Trade in primary products and bulk

commodities, on the other hand, has its own historically developed customary documentation, standard forms for which tend to exclude the application of CISG. The volume of trade in manufactured goods moving in and out of Korea is large, thus the universal acceptance of CISG will be significantly enhanced if and when Korea decides to accede.

The foregoing comparative analysis shows that future accession by Korea to the Vienna Convention will occasion changes that, although significant in places, would not be radical. The treaty has been depicted as a compromise between interests of sellers in the developed world and buyers in the developing world. At present, South Korea has moved one foot into the industrialized core of the global economy while the other foot remains in the developing periphery.

A good portion of Korea's commerce is with the United States, the United Kingdom, Canada, Australia and other Anglo-American jurisdictions, and in the past these sales usually have been governed by American or British law. Another large segment of Korea's mercantile activity is with Japan and Continental Europe. The Korean legal system is structured quite similarly to Japan's, and the fact that Japan has not yet become a party to the CISG may have been a factor leading some Korean jurists to believe that the time for accession is not yet ripe.

Korea's trade with China has been expanding rapidly since diplomatic relations were normalized in 1992, however, and China is a party to the Vienna Convention. It may be that this growth in trade with China, coupled with an accession by Japan to the Vienna Convention within the next several years, will occasion increased support in Korea for accession. Until now there seems to have been little advocacy of the Vienna Convention in Seoul, although leading academic experts in commercial law have been studying its implications and are familiar with its perceived pros and cons.

The major Korean trading companies, and the related state-supported trade associations, perhaps lack a clear appreciation of the potential long-term benefits of a unification of international private law rules governing contracts for the sale of goods. Their approach to trade disputes has tended to be reactive instead of proactive and preventative, however this attitude is undergoing a process of gradual change.

With improved awareness and input from the Korean Bar and the law faculties of the universities on these issues, it is only natural that Korea will play a growing role in UNCITRAL and in the other international forums in which unification of international sales law is advocated. The comparative analysis contained in this piece is intended to contribute to such an improved awareness of what is at stake, and to showing that unfamiliarity with the details of the Vienna Convention rules need not unduly impede evaluation of the benefits for Korea of participating in legal rationalization on the transnational plane.