A Comparative Study of Negotiable Instrument Law Between the USA and Korea

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I. Introduction

In this paper, I study the differences between the Uniform Commercial Code Article 3 and the Korean Negotiable Instrument Law. The laws are basically similar, with a few minor differences.

1. Background
(1) Korea

The Korean Negotiable Instrument Law\(^1\) is based on the 1930 and 1931 Geneva conventions providing a uniform law for bills of exchange, promissory notes, and checks which is a compromise of French and German law. The basic purpose of the Korean law is to secure negotiability. The statute is construed not as permissive but compulsory.

In the Korean Negotiable Instrument law, there are important rules that are devised to support the negotiability: (i) The underlying obligation of the issuing instruments does not affect the validity of the instruments, and the legal relationship arising from the instruments.\(^2\) (ii) The concept of "a bona

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\(^1\) For convenience's sake, I use this terminology. The Korean Negotiable Instrument Law is composed of "Bill (of exchange) & Note Code" and "Check Code".

\(^2\) A traditional example is that A buys a car from B without knowledge the car does not run for $20,000, and signs a promissory note. The fact that the car has fatal defects is not important for legal relationship — obligation of payment, warranty, remedies and so on — that is the cause of making the note. And where a negotiable instrument is accepted for the underlying obligation, the underlying
fide holder" is firmly established to support negotiability. 3) (iii) Personal defenses cannot be asserted against the rights of a bona fide holder. Personal claims and defenses against the instrument may be cut off in the case which a bona fide holder is involved.

(2) The United States

While England refined its commercial laws with the Bill of Exchange Act of 1878, the United States sought to overcome the confusion of its early rules on negotiable instruments through a state–by–state adoption of the Uniform Negotiable Instrument Law. The Law was drafted and promulgated by the National Conference of Commissioners on Uniform Laws in 1895. Its terms were modeled on the English Bill of the Exchange Act, and the Law was adopted by every state.

In 1942, the National Conference of Commissioners on Uniform State Laws and the American Law Institute began drafting the Uniform Commercial Code. Articles 3 and 4 of the Uniform Commercial Code were rewritten and the revised versions were available for state adoption by the end of 1990. The U.C.C. was designed to replace many of the existing uniform acts governing commercial transactions. Because these changes clear up many of the problems in the original versions, and because they permit banks to move from a paper–based system to electronic banking, the Revision was adopted in every state.

2. Types of Negotiable Instruments

U.C.C. Article 3 and 4 regulates notes, drafts, checks, and certificates of deposit. Similar to Article 3 and 4, the Korean law has a "Note and Bill (of Exchange) Code", and a "Check Code". "Bill of Lading" and "Dock Warranty" are included as negotiable instruments in the both countries.

Under the U.C.C., a check is a kind of draft: if a draft names a bank as the drawee and is payable on demand, it is called a "check". 4) In the Korean instrument law, however, "draft" and "check" are treated differently. 5)

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3) This concept could be compared to the concept "a holder in due course" in the U.C.C.

4) U.C.C. § 3–104(b).
II. Unauthorized or forged signature

1. Forgery of a name necessary to the title

Under the U.C.C., if the name of the payee or any special indorsee is unauthorized (forged or signed by a nonagent), no subsequent taker can be a holder in due course because no one can obtain the good title necessary to qualify as a "holder."\(^{6}\)

The rule in the Korean law is different from that in the U.C.C.. Even if the name of the payee or any special indorsee is unauthorized (forged or signed by a nonagent), a subsequent taker can be a bona fide holder. A substantial defect of instrument does not have any influence on the other actions which are indorsements, acceptances, payments, and etc.. Therefore a subsequent taker may obtain a good title on the condition that he is a bona fide holder. Thus, while the U.C.C. has exceptions\(^{7}\) regarding the holder, the Korean law does not have similar exceptions.\(^{8}\)

2. Liability

According to the U.C.C., the person whose name is signed under the above mentioned circumstances is not liable for the instrument unless he or she ratifies the signature or is estopped from denying it.\(^{9}\) However, the unauthorized signer is personally liable just as if he or she had signed his or her own name.\(^{10}\)

The Korean law treats a forgery differently from a pretense of agency. In the case of a pretense of agency, the resolution is the same as the U.C.C..

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5) In order to avoid the confusion of terminology, I use "bill" instead of "draft" when referring to a Korean draft.
6) U.C.C. § 3-401(a); Steve H. Nickles, Modern Commercial Paper, West publishing, at 85
7) Under the U.C.C., if the person whose name was forged ratifies the unauthorized signature or is estopped from denying it, subsequent takers can qualify as holders in due course, provided that they meet the other requirements of the U.C.C. § 3-302 for due course holding.
8) Seung Kyu Yang, Negotiable Instrument Law, Samyoung-Sa, at 170; Kcc-Won Choi, Negotiable Instrument Law, Parkyoung-Sa, at 432.
9) U.C.C. § 3-403(a).
However forged signature results are different from the U.C.C.. The person whose name is signed by a forgery and the forger are not liable on the instrument itself. The forger has liability not of the instrument itself but of criminal and tort liability.\(^{11}\) If some one gets damages due to a forgery, the forger has to compensate him or her according to tort law.

### 3. Burden of Proof

Under the U.C.C., if the defendant-obligator raises an issue in the pleading as to the validity of signature, the burden is on the plaintiff. However, since the plaintiff is aided by a rebuttable presumption\(^{12}\), so the defendant must produce the evidence of forgery.

In Korea, there is no explicit statutory provision. According to the Supreme Court, the plaintiff-holder must prove the validity of signature.\(^{13}\)

### 4. Example

A steals a check from B and forges as the drawer. While under the U.C.C. A is viewed as having signed his own name as drawer, under the Korean law A is not liable as drawer but as tortfeasor. Another issue is whether a subsequent purchaser of the forged instrument may take a good title to the instrument. Under the Korean law, the forged instrument does not become void due to the forgery. It can be negotiated duly, and the subsequent purchasers may take a good title on the condition that they are bona fide holders.\(^{14}\)

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\(^{11}\) This is a majority opinion in Korea. The basic argument is that the appearance of an instrument must prevail over the underlying obligation of the instrument (Joo-Chan Son, *Commercial Law*, Parkyoung-Sa, at 95). One of the minority opinions is that the rule of pretense of agency must be applied to the case of forgery (Seung-Kyu Yang, *supra note* 8, at 148).

\(^{12}\) U.C.C. § 3-308(a). In First Nat' l Bank v. Blackhurst, 176 W. Va. 472, 345 S.E.2d 567 (W. Va. 1986), if the plaintiff can establish the effectiveness of the obligator's signature, produce the instrument, and prove that he is the holder in due course, he has established a prima facie case for recovery. The signature is presumed to be genuine. Also refer to Bowers v. Winitzki, 730 R.2d 1253, 1986.

\(^{13}\) Korean Supreme Court, 1993. 8.24 (93 da 4151)

\(^{14}\) See III. 2. (2)
III. Negotiability

1. Requirements for Negotiation

To be "negotiable", under the terms of U.C.C. §3-104(a), an instrument must be in writing, be signed by the maker or drawer, contain an unconditional promise or order to pay a certain sum of money on demand or by a given time, contain "words of negotiability", and be free of other promises and the like.

These requirements for negotiability are very similar to the Korean law, but the Korean law requires more and is stricter. The instrument must contain the place of payment, the place of issue, and the date of issue for negotiability in Korea. If one of them is omitted, the instrument is void.15) As to adding interest, in contrast to U.C.C. §3-112, the Korean law admits only note and bill "payable at sight on demand" or "payable at a fixed price period after sight".16)

2. Negotiation Process

Both laws provide that a bearer instrument is negotiated simply by delivering the instrument. An order instrument is negotiated by delivery of the instrument. Any further negotiation requires that the payee indorse the instrument and deliver it to the transferee.17)

(1) Whether payee’s indorsement must be valid

While, under the U.C.C., a title to an order instrument will not pass unless the payee’s indorsement is authorized and valid, the Korean law does not require its formal validity. A bona fide indorsee who gets the instrument from a forger may take a title to the order instrument. If an indorsee get a forged instrument without gross negligence and without previous notification, he may take a valid title to the instrument if the formal requirements are satisfied. The law tries to maintain negotiability, so forging the payee’s name does not break the chain of title. A bona fide subsequent possessor of the instrument

15) This is called as "the principle of strict formality" (Seung-Kyu Yang, supra note 8, at 52).

16) Korean Bill & Note Code. §5: Kee-Won Choi, supra note 8, at 290

17) U.C.C. § §1-201(20), 3-205: Seung-Kyu Yang, supra note 8, at 285
can take a good title.

Here is an example. A writes a draft payable to the order of B. Before indorsement by B, the draft is stolen from her by C, who signs "B" on the back and indorses to D. By the U.C.C., title to this check stops with B, and the draft is still her property. No one taking the draft after the forgery has the title; therefore, no one can qualify as a holder. The draft drawn by A is payable to whomever B orders payment; only B has the title to the instrument. C's pretense that he has ordered payment to bearer has no effect. Technically, C's forgery of B's name is treated as if he had signed his own name.\(^{18}\)

The effect of the Korean law is contrary to that of the U.C.C.. If D gets the instrument in good faith, without knowledge of the forgery, and without previous notice, he is a bona fide holder and can take a valid title. Therefore, on the due date, D can present A the draft in order to receive payment. If A pays money at the request of D, A has no liability on the condition that he does his minimum duty by inspecting D's identification.\(^{19}\) Even though, the payee's indorsement is not valid, negotiation may be processed successfully. Related to this issue, Korea has a legal device to protect B, whose instrument was stolen and whose signature was forged. Those who lose their negotiable instruments should do a public summons, give reports to the relevant parties (in this case A), and have the court declare that the lost instrument become void.\(^{20}\)

(2) Lost, Destroyed, or Stolen instruments

Under the U.C.C., if an instrument is lost, destroyed, or stolen, its true owner (the payee or the payee's transferee) may still sue upon it, but must first prove ownership and explain the reasons for not producing the instrument. To protect the defendant from double liability, in case the instrument should turn up in the hands of a holder in due course, the court may require the owner to post bond or give the defendants security against loss by reason of future claims.\(^{21}\)

\(^{18}\) U.C.C. § 3-404(1), First Safety Fund Nat'l Bank v. Friel, 504 N.E.2d 664.

\(^{19}\) See V. 3, (2)

\(^{20}\) Seung-Kyu Yang, supra note 8, at 200; Kee-Won Choi, supra note 8, at 41.

Under the Korean law, compared with this provision of the U.C.C., if an instrument is lost, destroyed, or stolen, its true owner (the payee or the payee's transferee) must undertake a procedure to make the lost, destroyed, or stolen instrument void.22) Therefore, contrary to the U.C.C., there is no possibility that a bona fide holder might happen after finishing this procedure. I think this is the reason why, in Korea, the court does not require the owner to post bond or give the defendant security against loss by reason of future claims.23)

3. Alteration of Instrument

(1) Definition of Alteration

Under the U.C.C., "alterations" means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other changes to an incomplete instrument relating to the obligation of a party.24) Changing the names or relations of the parties, changing the amount, or filling in blanks in an unauthorized fashion are examples of such alterations.

The definition of alteration under the Korean law differs from the U.C.C. It does not include "an unauthorized addition to an incomplete instrument.25) Thus filling in a blank space in an unauthorized fashion is not included in the concept of "alteration".26)

Juergens, 965 F.2d 149, 1992.

22) At first, through an official telegram or news paper, the true owner has to do public notification including this information that "the instrument will be void in a definite time (usually 2 weeks) and the holder who takes the possession of the instrument should report within this time or the holder will lose his title to the instrument", and the true owner should submit to the court the proof that he did the relevant public announcements; after reviewing, the court declares that the instrument is void (Korean Civil Procedure Code. § § 453-457). Whether the bona fide holder who takes the possession of the instrument but does not report or executes his right to the instrument can take the title to the instrument has been argued (Seung-Kyu Yang, supra note 8, at 171; Kee-Won Choi, supra note 8, at 47).

23) See U.C.C. § 3-309.

24) U.C.C. § 3-407(a)

25) The effect of unauthorized completion of an incomplete instrument is divided by whether the completion is made by holder or made by non-holder. See Kee-Won Choi, supra note 8, at 318.
(2) Effect

Under the U.C.C., an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is estopped from asserting an alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.\(^{27}\)

Under the Korean law, the parties that sign on the instrument before an alteration are liable according to the original terms; the parties that sign after an alteration are liable according to the altered terms.\(^{28}\) For example, A steals a draft from B, alters the amount of the draft from $1,000 to $10,000, indorses the altered draft to C (bona fide holder), and C indorses the draft to D. In this case, B is liable according to the original terms ($1,000), C is liable according to the altered terms ($10,000).

4. Restrictive Indorsement

Under the U.C.C., there are conditional indorsements, indorsements prohibiting further negotiation, indorsements for deposit or collection, and indorsements for the benefits of the indorser or another.

(1) Conditional Indorsements

A restrictive indorsement can be created by conditional languages added to an indorsement. By the U.C.C., a conditional indorsement does not prevent further transfer or negotiation of the instrument; it is enforced to the extent that any transferee under a conditional indorsement must pay or apply any value given by the transferee for the indorsement consistently with the indorsement.\(^{29}\) Conditions accompanying indorsements are effective only between the original parties thereof and do not bind later parties. Thus, a payee who indorses "Pay A only if A goes to his mother's funeral" has no binding effect on parties taking the instrument after A. Later parties may ignore the condition and need not investigate A's attendance at the funeral.\(^{30}\)

Under the Korean law, a conditional languages added to an indorsement is

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26) Kee-Won Choi, *supra note* 8, at 189
27) U.C.C. § 3-407(b).
28) Korean Bill & Note Code. § § 69, 77(1).
29) U.C.C. § 3-206(a).
30) U.C.C. § 3-206(b).
not valid, but does not prevent the instrument from negotiation. Only the added conditions are nullified.\textsuperscript{31)}

(2) Indorsement for Deposit or Collection

Under the U.C.C., indorsement "for collection", or "for deposit" in effect makes the indorsee the agent of the indorser for collecting the funds due on the instrument. If the payee adds "For Deposit Only" to an indorsement, this restriction means that the very next indorsement should be the depositary bank. The U.C.C. rule is that the first bank that sees the check after the "For Deposit Only" indorsement is placed thereon is liable in conversion. Later banks such as the drawee bank, assuming it is not the first bank to handle the check, are excused from convertibility. However, nonbank entities, no matter how innocent or far down the transfer chain, have no such exemption and are liable in conversion when taking a check bearing such a restriction that did not make it into the appropriate bank account. Such an indorsement does not terminate negotiability.\textsuperscript{32)}

Under the Korean law, the indorsee who takes an instrument by an indorsement "for collection", or "for deposit" may do only an indorsement "for collection", or "for deposit" again, and may not be a bona fide holder.\textsuperscript{33)}

(3) Indorsement for the Benefit of Indorser or Another

An indorsement "Pay A in trust for B" is a trust indorsement and vests legal title in the indorsee, subject to the beneficial interest on the indorser or third party.\textsuperscript{34)} Under the U.C.C., as long as the original indorsee pays or applies the value given by him or her in accordance with the indorsement, the original indorsee becomes a holder and may qualify as a holder in due course. Any subsequent holder takes free of the restriction, unless the holder had actual knowledge that the instrument had been negotiated in breach of the original indorsee’s fiduciary duty.

The Korean law does not have this kind of indorsement. Therefore, this indorsement might be construed as a conditional indorsement, and the

\textsuperscript{31)} Korean Bill & Note Code. § 12 (1). However, the additional conditions could be a personal defense between the concerned parties.

\textsuperscript{32)} U.C.C. § 3-206(c); Intermediary banks and drawee banks in the collection process are not affected, though depositary banks must comply.

\textsuperscript{33)} Seung-Kyu Yang, supra note 8, at 306; Kee-Won Choi, supra note 8, at 405

\textsuperscript{34)} U.C.C. § 3-206(d).
condition would be void.

(4) Indorsements “without recourse”, and “prohibition of further negotiation” will be discussed below.

IV. "Holder in Due Course” verse “Bona Fide Holder”

Whether a transferee of a negotiable instrument qualifies as a holder in due course will obviously effect the transferee’s liability on the instrument and the claims or defenses that may be asserted against him or her. According to article 3-302(a) of the U.C.C., a holder in due course is: (i) a holder who takes the instrument, (ii) for value, (iii) in good faith, (iv) without notice that is overdue or has been dishonored, or of any defense against or claim to it on the part of any similar party.

The Korean law has a similar concept of "a bona fide holder". I will compare the requirements between the two concepts.

1. Holder

Both countries require that the transferee must have possession of a instrument.\(^{35}\) However, the requirements for a good title free of forgery are different. By the Korean law, if the instrument is payable to order, consecutive indorsements are enough to presume that the instrument is valid. A transferee with the possession of the instrument is presumed to be a bona fide holder.

Were there an interruption in indorsements, the transferee should prove that valid transfer of the instruments happened despite the interruption.\(^{36}\)

2. For Value\(^ {37}\)

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35) According to the U.C.C. § 1-201 (20), holder means “the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession”

36) For example, A indorses B, B indorses C, C indorses D a check. If the check contains all of the indorsements A→B, B→C, C→D, D is presumed to be a bona fide holder regardless of substantive defect such as forgery. In another case, suppose that B forget to sign on the check when he indorsed to C: the check contains A→B, C→D. An interruption of indorsements exists on this check, and D shall not be presumed to be a bona fide holder. In order to get good title, he has to prove that B indorsed C successfully.
Under the U.C.C., to the extent that the agreed consideration has been performed, or that the holder acquires a security interest in or a lien on the instrument otherwise than by legal process; or when the holder takes the instrument of or as security for an antecedent claim against any person, whether or not the claim is due; or when the holder gives a negotiable instrument for it or makes an irrevocable commitment to a third person, a holder takes an instrument for value.38)

Under the Korean law, even though value is not required for a bona fide holder by the statutory law, it is considered one of requirements for a bona fide holder without objection.39) This requirement sometimes plays a role in deciding whether a holder takes an instrument "in good faith".40) There is a similar doctrine which is accepted: the transferee who takes a check by inheritance shall not be a bona fide holder.41) The problems arising from the requirement 'for value' of the U.C.C. are resolved differently by other provisions and principles in Korea.

3. Purchase in Good Faith

The separate requirement of "good faith" of the U.C.C. means that the holder was acting honestly in the conduct or transaction involved. The U.C.C. defines "good faith" as "honestly in fact and the observance of reasonable commercial standards of fair dealing".42)

37) U.C.C. § § 3-303, 4-210 and 4-211.
38) "Value" under the U.C.C. § 3 is different from "consideration." The primary legal significance of value is a requirement for holder in due course. While value is an essential element in establishing this status, a defect in consideration for the instrument is a defense against a person who lacks the rights of a holder in due course. Refer to the U.C.C. § § 3-303(b), 3-305(a)(2).
39) Seung-Kyu Yang, supra note 8, at 169.
40) Ibid, at 169; Kee-Won Choi, supra note 8, at 428-431.
41) Seung-Kyu Yang, supra note 8, at 164
42) U.C.C. § § 3-103(a)(4); Since at least as early as Miller v. Race, 1 Burr. 452, 97 Eng.Rep, 398, 1758, the courts have been trying to develop a definition of "good faith" that is satisfactory to all concerned. The 1990 U.C.C. § 3 change the test of good faith into both subjective and objective (refer to 3-103 official comment 4). A duty to investigate may now be an element of good faith and thus may be a necessary step in becoming a holder in due course whenever commercially reasonable fairness would require inquiry. Refer to Steve H. Nickles, supra note 6, at 239.
The Korean law also requires "good faith". However, the meaning is different. "Good faith" is usually construed to mean that one (i.e. the transferee, holder) does not know the relevant facts. For instance, if a transferee takes the possession of a forged check without knowledge of the forgery, he is in good faith, and could be a bona fide holder.

Related to "good faith", the Korean law requires "without gross negligence". Suppose even though the transferee did not know that the item had been forged, he could have easily known the forgery. In this case, he might not be a bona fide holder because of this requirement "without gross negligence". If an ordinary prudent person can easily perceive a forgery on the check, he can not be a bona fide holder because "without gross negligence" requisite is lacking. If a transferee does not demand the transferor to show transferor's identification, he is considered to have purchased with negligence and may not be a bona fide holder.

4. Without Notice

Under the U.C.C., the holder must purchase the instrument "without notice that it is overdue, or has dishonored, or of any defense against or claim to it on the part of any person". In Korea, however, it is the added requirement that the holder should take "in good faith and without gross negligence".

5. Others — By way of Negotiation —

In order to be a bona fide, under Korean law, besides the above mentioned requirements, a holder shall take an instrument by way of "indorsement" (in the case of an instrument payable to order) or "delivery" (in the case of an instrument payable to bearer) that is the way of negotiation. A holder who takes a check or draft by inheritance is not considered a bona fide holder. I think that the intent of U.C.C. §3-302(c) is comparable with the above

43) Korean Bill & Note Code. § 16(2), Korean Check Code. § 21.
44) Seung-Kyu Yang, supra note 8, at 166; The 1990 U.C.C. requires the same investigation by the requirement of good faith.
45) U.C.C. §3-302(a)(2): Stewart v. Thornton, 568 P.2d 414, 1977. If it appears that at the time the purchaser acquired the instrument, the purchaser knew, or had reason to know, any of the following facts, the purchaser cannot be a holder in due course.
V. Defenses on Negotiable Instruments

This rule is similar between the two countries. Like the U.C.C., the Korean law states that while a bona fide holder (corresponding to a holder in due course) controls a negotiable instrument free from most defenses, some defenses are available even against a bona fide holder. The Korean law tries to minimize the real defenses that can be available against a bona fide holder in order to insure the negotiability.\(^{46}\)

1. Real defenses

By the U.C.C., a holder in due course is free of most defenses to the instrument. The few defenses that may be asserted against a holder in due course are commonly called real defenses.\(^{47}\) The effect of real defenses is almost the same as in Korea.\(^{48}\) However, the scope of real defenses of the Korean law is smaller than that of the U.C.C.. In this section, I only point out the differences.

(1) Duress

Duress that might be a defense under the U.C.C., is excluded from real defenses in the Korean law.\(^{49}\) The U.C.C. provides that duress "is a matter of degree." An instrument signed at the point of a gun is void, even in the hands of a holder in due course. However, one signed under threat to

\(^{46}\) Seung-Kyu Yang, supra note 8, at 174

\(^{47}\) U.C.C. § 3–305.

\(^{48}\) The literal translations of "real and personal defense" in Korea are exactly the same.

\(^{49}\) U.C.C. § 3–305.
prosecute the son of the maker for theft may be merely voidable. Thus the defenses is cut off against an holder in due course.\textsuperscript{50)}

Contrary to the U.C.C., the Korean law does not classify according to the degree. All kinds of duress are personal defenses. If someone wants to make the instrument that he signed at the point of a gun void, he should make public announcements and get a court's declaration to that effect.

(2) Fraud in the Factful

Under the U.C.C., there are two kinds of fraud. "Real” fraud (fraud in factum) is assertable against a holder in due course and is defined as "such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain to knowledge of its character or its essential terms."\textsuperscript{51)} Kim immigrant, who can not read English, signs a promissory note after his attorney tells Kim that it is a credit application. Even in the hands of a holder in due course unaware of this lie, the note is not enforceable against Kim if he asserts fraud in the indorsement.\textsuperscript{52)}

Contrary to the U.C.C., fraud under the Korean law is merely a personal defense like duress. The treat is the same as duress. Therefore, in the above case the note is enforceable against Kim.

(3) Discharge Known to a holder in due course

Under the U.C.C., a holder in due course takes a negotiable instrument subject to "any other discharge of which the holder has notice when he takes the instrument".\textsuperscript{53)} Therefore, an agreement that would discharge liability on a simple contract would be a real defense under U.C.C. against any later holder in due course who knew of the agreement before acquiring the instrument.

Under the Korean law, this is a personal defense. If a holder knows the discharge, he may not be a bona fide holder, and the personal defense may be valid against the holder. For example, A becomes the holder of a note on which his sons A1 and A2 are prior endorsers. When he sells the note to B, A obtains B’s agreement not to sue either A1 or A2 on the instrument. In this case, the discharging is not a real defense but a personal defense.

\textsuperscript{50)} Standard Finance Co. v. Ellis, 657 P.2d 1056, 1983.
\textsuperscript{51)} U.C.C. § 3-305(a)(1)
\textsuperscript{53)} U.C.C. § 3-604(a).
However, B cannot enforce the note because he is not a bona fide holder even though it is a personal defense. If B endorses the note to C, and if C purchases the note in good faith, without gross negligence, C can enforce the note against A1 or A2. The personal defense is cut off when the bona fide holder (C) takes the possession of the note.

2. Personal Defenses

Except the above mentioned issues, the effect and category of personal defenses are very similar between the two countries.

VI. Liability of the Parties of the Instrument

Under the U.C.C., when a claim is made on the instrument, the liability depends on the parties involved: the maker, indorser, drawer, surety. The maker is primarily liable, while the drawer or indorser is secondarily liable and thus entitled to procedural rights of presentment, and notice of dishonor. The liability of the parties involved under the Korean law is largely the same except some issues.

1. Obligation of an Indorser

Under the U.C.C., indorsing one's name to the back of a negotiable instrument makes the indorser a type of surety for all prior parties. By indorsing the instrument, the indorser promises to pay it to any later holder. However, this is conditioned on the indorser first being accorded the technical procedural rights of presentment, notice of dishonor, and protest.\(^{54}\) The Korean law has the same provision.\(^{55}\)

Under the Korean law, an indorser who does not wish to incur the above obligation may add the words "without recourse" to the indorsement and thereby avoid any promise of payment identical to the U.C.C.\(^{56}\) Additionally, an indorser who does not wish to incur the above obligation may add the words "prohibition of further indorsements" to his indorsements, and may thus

\(^{54}\) U.C.C. \(\S\) 3-415.

\(^{55}\) Korean Note & Bill Code. \(\S\) 15(1), 77(1).

\(^{56}\) Korean Note & Bill Code. \(\S\) 15(2).
avoid such obligation.\(^{57}\) A different effect occurs between "without recourse" and "prohibition of further indorsement". While the indorser of "without recourse" may avoid any promise of payment to any later including his direct indorsee, the indorser of "prohibition of further indorsement" may not avoid the obligation of payment to his direct indorsee.

Under the U.C.C., "indorsement further negotiation" such as "pay to Adams only" has no effect on negotiability. Even where an order instrument is indorsed "pay to Adams only", further negotiation by Adams or any subsequent holder is permitted.\(^{58}\) Such an indorsement does not of itself give notice to subsequent parties of any defense or claim against the indorser. Hence there is no real limitation on the holder's right to further negotiation of the instrument.

2. Obligation of an Accommodation Party\(^{59}\)

Under the U.C.C., a surety who signs where a maker usually signs makes the same obligation as a maker does.\(^{60}\) A surety who signs in the place where an indorser usually signs takes the obligation of an indorser. Accommodation maker and accommodation indorsers therefore the U.C.C. rights of nonsurety makes and indorses plus the special common law and the U.C.C. rights given to sureties. If a surety adds words of guaranty to the signature, there is a further obligation, the nature of which depends on whether the surety guarantees payment or collection.\(^{61}\)

The Korean law has a similar guaranty system for a negotiable instrument,\(^{62}\) and the liability of a surety under the Korean law is comparable to that

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57) Korean Note & Bill Code. § 15(2), Korean Check Code. § 18(2): These added words do not bar the instrument from negotiation regardless of the languages "prohibition of further indorsements". The words only limit the obligation of indorser who adds (Seung-Kyu Yang, supra note 8, at 304).

58) U.C.C. § 3–206.

59) The U.C.C. refers to the surety as an "accommodation party", while the principal is called the "accommodated party." If the surety adds of guaranty to the signature, the surety becomes a "guarantor." Refer to U.C.C. § 3–419, official comment 4.

60) U.C.C. § 3–412.

61) U.C.C. § 3–419: The surety is not liable to the accommodated party, regardless of the place in which the surety has signed the instrument (Gibbs Oil Co. v. Collento & Collento, 252 N.E.2d 217, 1969).

of the U.C.C.

3. Presentment, Dishonor, Protest

Presentment is a demand for payment or acceptance made by the holder of the instrument. The requirements and effects of presentment and dishonor are similar between the two countries.

(1) Rights of Presentee (Maker or Drawer)

Under the U.C.C., when presentment is made, the maker or drawee may demand: i) exhibition of the instrument; ii) reasonable identification from the person making presentment; iii) evidence of the presenter's authority if presentment of the instrument is made on behalf of another; iv) production of the instrument at a reasonable place and hour; v) a signed receipt on the instrument for any partial or full payment; vi) surrender of the instrument of the presentee pays it in full.63)

The Korean law takes presentment to be a kind of obligation. As to negotiable instruments, the inspection obligation of payer (presentee) is alleviated substantially. If a payer pays without "fraud and gross negligence",64) his liability on an instrument is discharged. A payee does not have to inspect the genuineness of the signatures. All he has to do is: i) require the person making presentment to show reasonable identification; ii) inspect the formal continuity of indorsements.65) Therefore, even if he makes payment with a forged instrument, the payer's liability may be discharged by doing this. The obligation of payer in the Korean law seems to be lighter than the U.C.C..

(2) Dishonor

Dishonor occurs when the maker of a note or the drawee of a draft returns it after presentment without payment or acceptance within the allowed time.66)

There is a difference in the allowable time for decision. In the case of the presentment of acceptance, the both countries have the same rule that the

64) Here, "fraud" means that a payer knows "not only that the presenter is not a true holder but also that the payer can easily prove that the presenter is not a true holder". Only knowing that the presenter is not a true holder is not "fraud"
66) U.C.C. § 3-502.
drawee may delay acceptance until the close of the next business day following presentment without triggering a dishonor, and the holder may allow a further day without affecting the liability of secondary parties.

However, in the other cases, the both countries are different. Under the U.C.C., when a check or draft is presented to a drawee across the counter for immediate payment, the drawee has time to decide until the close of business on the day of presentment within which to pay the drawee bank may have an extra day within which to decide.\textsuperscript{67} This is called "midnight deadline". The Korean law does not prescribe the time for decision in the above cases. Usually, it is construed that the drawee (bank) does not have time to decide whether to pay.

(3) Protest

"Protest" is a certificate of dishonor made by a government consul or vice consul, a notary public, or other person authorized where a dishonor has occurred.\textsuperscript{68}

(a) When required

Under the U.C.C., protest is not required but optional. It may still be frequently used because a protest is presumptive evidence of dishonor and any notice of dishonor that it describes.\textsuperscript{69}

The Korean law is contrary to the U.C.C. Failure to make protest discharges the liability of any drawer or indorser of the instrument whenever dishonor happens.\textsuperscript{70} If a holder who has a dishonored instrument does not make protest, he may lose right of recourse. Protest plays a important role in deciding whether a presentee dishonors.

(b) Form

Under the U.C.C., a protest must identify the instrument, state that presentment was made, and state that the instrument. The protest must be

\textsuperscript{67} U.C.C. § 4-301(a)(1); Rock Island Auction Sales, Inc. v. Empire Packing Co., 204 N.E.2d 721, 1965.

\textsuperscript{68} U.C.C. § 3-505(b). Korean Bill & Note Code. § 44(1), 77(1).

\textsuperscript{69} By the U.C.C. § 3-505(a) protest is optional. Nevertheless, it is still frequently used because a protest is presumptive evidence of dishonor and any notice of dishonor that it describes.

\textsuperscript{70} Korean Note & Bill Code. § 44(1), Korean Check Code. § 39; There are some exceptions: in case of exempted from making protest in advance, or declaration of bankruptcy. Refer to Korean Bill & Note Code § § 46(1), 77(1).
signed by a U.S. consul or vice consul, a notary public, or some other person so authorized by the law of the place where dishonor occurs.\(^{71}\) The Korean law has the same provisions.\(^{72}\) The Korean law requires further strict formality than the U.C.C. Under the Korean law, a protest must be made on an instrument or a slip attached to instruments; a protest made in a separate paper is void.\(^{73}\)

4. Acceptance

Acceptance is the drawee’s signing agreement to honor the draft as presented. It may consist of the drawee’s signature alone.\(^{74}\) If the draft is a check, the drawee bank’s acceptance is called "certification."\(^{75}\)

(1) Check Certification

Under the U.C.C., when a drawee bank agrees to certify a check, it typically freezes a like amount in drawee’s account so that funds will be available when the check is presented for payment. Once the bank has certified the check and either returned it to the presenter or notified the presenter of the certification, the bank becomes primary thorcon by making the contract of an acceptor, and it is too late for the drawer to stop payment.\(^{76}\)

In Korea, "certification" is hardly used because, in real transactions, it is substituted by "Myself Check."\(^{77}\) The effect of certification is also different from that of the U.C.C. Only a secondary liability is imposed on check certification in the Korean law. The drawee bank that certifies does not have to pay unless the check is presented within the presentment time.\(^{78}\) Certification does not discharge the obligation of an indorser; if a bank that certified a check does not pay the instrument, a holder may recourse against

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71) U.C.C. §§ 3–503(b).
72) Korean Bill & Note Code. § 44(1).
73) Seung-Kyu Yang, supra note 8, at 380.
74) U.C.C. §§ 3–409(a), Korean Bill & Note Code, § 25(1).
75) U.C.C. §§ 3–409(c), Korean Check Code. § 55(1).
77) The check which is payable to the order of drawer (bank) itself. Most of the checks used in Korea are myself checks. Using a check in Korea is not as common as in U.S.A.
78) Korean Check Code. § 55(1).
the former endorsers.  

(2) Formula of Acceptance

Under the Korean law, the acceptance must be made on the front side of instrument; if it is made on the backside, it might be confused with a blank indorsement. The 1990 U.C.C. provides that the acceptance "must be written on the draft" itself to delete a degree of uncertainty.  

(3) Acceptance varying draft

Under the U.C.C., if the drawee refuses to accept a draft, unless some alteration is made in its terms, the presenter may treat this as a dishonor and, after giving notice of dishonor, may proceed against prior parties. The Korean law has a similar provision that "if the drawee accepts with some conditions or some alteration in its terms, a dishonor occurs and procedure against prior parties take place".

Contrary to the provision of the U.C.C. that if the presenter agrees to the drawee's conditional acceptance, all prior nonconsenting parties are discharge, the Korean law does not admit this kind of acceptance. The presenter may not assent to an acceptance varying the terms of a draft.

VII. Conclusion

In the comparative study of the negotiable instrument law, I find some remarkable differences between the Korean laws and the U.C.C.. If I compare as a whole the Korean laws with the U.C.C., the main differences are as follows:

1. The requirements of the U.C.C. to be negotiable seems to be simpler than those of the Korean law.

2. To have complete rights to the instrument, in contrast to the U.C.C.,

79) Korean Check Code. §56
80) U.C.C. §3-409(a).
81) U.C.C. §3-410(a).
82) Korean Bill & Note Code. §26(2).
83) U.C.C. §3-410(c). For example, a bank (A) presents to B a draft drawn on B as drawee by S. B refuses to accept the draft unless its terms are changed from "pay to bearer 60 days after sight" to "pay to bearer 90 days after sights". Under the U.C.C., if A bank agrees to this change, the drawer S and all prior indorsers will be discharged from their obligations unless they affirmatively assent.
the Korean law does not require valid indorsement in order to be an "holder".

3. In the case of a forged indorsement, under Korean law, those who take the instrument in good faith without gross negligence have complete right to the instrument free from any condition in spite of the forged indorsement.

4. Conditional indorsements and indorsements for benefit of indorser are not allowable under Korean law.

5. The rules of "defenses on negotiable instruments" are similar, but there are some discrepancies as to the scope of real defense and personal defense.

6. The effect of check certification is different.
韓美 有価証券法 比較研究

張 德 祑

経済기 발전에 따라 기대목적물이 다양하게 되어 権利도 거래의 대상이 되기에 이르렀고, 이러한 권리의 흔한한 유통과 행사품 보다 용이하게 하기 위하여 有価証券이 나타나게 되었다. 有価証券은 제산적 가치가 있는 私欄을 표장한 증권으로서 제산권의 유통을 가능하게 하였을 뿐만 아니라, 국제간의 교류 증대에도 큰 몫을 차지하고 있다.

有価証券은 이와 같이 국제간의 교류에 있어서도 支給決済의 手段으로서 이용되는 것이므로 그 법제의 통일이 강하게 요구되었다. 이에 따라 世界統一 有価証券法制定의 운동이 나타났고 현재까지도 부단히 진행되고 있다. 이와 같은 有価証券의 통일적 성질에 의하여 각국 법제간의 차이점을 比較研究하여 이를 구명하는 과제는 대단히 중요한 연구분야이다. 이러한 문제점을 인식하고 법제개를 달리는 미국의 統一商法典 제3장의 규정과 우리의 耳聞手表법을 연구의 대상으로 삼아 비교검토한 바, 具體的 事例를 예로 들어 양 법법의 차이점을 실질적으로 두각시키고자 하였다. 미국의 통일법범전 제3장은 1990년 有価証券과 관련된 실무에서의 새로운 관행을 반영하고자 개정되었고, 본 연구에서는 1990년 개정 통일상법전을 비교연구의 대상으로 하고 있다.

먼저 耳聞의 僞造와 無欄代理에 있어 우리법에 의하면 위조이음에 대한 선의취득이 가능함에 반하여, 미국법에 의하면 이러한 이음에 대한 취득에 대하여는 정당한 소지인이 되지 않다고 하고 있어 耳聞의 권리를 취득하지 못하는 것으로 하고 있다. 미국은 위조자와 무권대리인의 책임을 동일하게 보고 있으나, 우리 나라에서는 위조자에 대한 책임에 있어 耳聞상의 책임을 인정할 것인지 여부에 대하여 논의가 있다. 耳聞要件에 있어 미국법은 발행인의 서명, 무조건의 지급약속, 유통성 등을 규정하고 있는 반면에 우리법은 이에 더하여 발행지, 지급지, 발행일 등을 규정하고 있어 보다 많은 사항을 耳聞요건으로 규정하고 있다. 그리고 背面에 있어서도 미국법에 의하면 조건부배서가 인정되고 있으나, 우리법에 의하면 배서에 부기된 조건은 효력이 없는 것으로 하고 있어 차이점이 나타나고 있다. 그리고 우리법의 善意取得의 개념에 해당하는 미국법상의 正當한 所持人이라는 개념은 그 요건으

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로 ‘價值의 代替’로, ‘當該 有価証券が 不渡が なだど량 抗辯이 부착되어있다는 동
의 通知を 反지 아니하고’라는 요건 등을 요구하고 있기는 하나, 우리법의 ‘善意’
라는 개념을 해석함에 이러한 것을 참고하고 있는 것을 감안한다면 그다지 큰 차
이가 있는 것으로 보이지는 않는다. 어음抗辯에 있어서는 物의抗辯과 人的抗辯으로
구분하는 것과 그 효과는 거의 동일하나, 단지 우리법이 물적항변으로 인정하는 항
변의 종류가 보다 많다. 이외에도 關聯 當事者の 責任, 어음상의 權利의 消滅, 公示
催告, 還어음의 引受け 등의 대하에도 그 차이점을 비교研究하여 보았다.

이상에서 연구하여 본 결론은 양 법제 모두 어음의 流通性을 확보하겠다는 근본
적인 취지는 동일하다는 것이다. 우리법은 어음關係의 原因關係를 철저히 분리하여
어음의 摘要性을 관철시키고, 어음要件的 嚴正을 강조함으로써 어음의 유동성을 확
보하고 있다. 그런데 미국법은 実質상의 便宜を 중시하여 어음의 嚴正性을 완화하
고, 이론적인存則함보다는 実利を 중심으로 규정하고 있는 것으로 보인다. 有償証
券法은 보편성을 미쳐 되는 법 중의 하나로, 각 국가의 독자적인 입법에도 불구하
고 그것이 합리적인 한 국경을 초월하여 채택된다 하더라도 그다지 큰 문제가 없
다면, 有償証券法의 통일에 대비한다는 의미에서도 각 국가간의 有償証券法 比較研
究는 중요한 의의가 있다고 하겠다.