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Question 1

- Duty to disclose

Whether Mr Kim committed an act of deception will depend on whether Mr Kim has a duty to disclose and whether Mr Kim had the requisite intent to deceive and to induce Ms Lee to conclude the contract.

If it can be concluded that a road plan affecting a portion of the garden is not something which has a substantial impact on the buyer's decision, there cannot be any duty to disclose on the part of Mr Kim.

- Ms Lee's first notice of termination

Assuming that Mr Kim has no duty to disclose, Ms Lee's first notice of termination shall be invalid. Ms Lee shall be in repudiatory breach. Ms Lee shall also be in mora creditoris.

- Mr Kim's impossibility of performance

On or after the closing, both parties' contractual obligations shall remain obligations without a due date. As Ms Lee is in mora creditoris, Mr Kim shall only be liable for intentional or grossly negligent breach. Mr Kim's failure to pay interest on his loan, which led to the foreclosure of M Bank, shall be assessed as Mr Kim's **intentional** breach of contract. Mr Kim shall thus be held liable for his impossibility of performance. Ms Lee's second termination notice shall therefore be valid.

- Damage

Ms Lee shall be entitled to damage award (in addition to termination). But the amount shall be reduced taking account of the parties' comparative negligence.

- Alternatively, in the event Mr Kim is found to have a duty to disclose

If the court or the tribunal finds that the road plan which affects a portion of the garden has a **substantial** impact on Ms Lee's decision to purchase the property, then Mr Kim shall have a good faith duty to disclose the road plan. Mr Kim's failure can, in such a case, amount to a deception if Mr Kim had the requisite intent. Ms Lee's first 'termination' notice can in that case be interpreted as a notice of rescission (voidance). If Mr Kim did not have the requisite intent to deceive and to induce Ms Lee to conclude the contract, Mr Kim's failure to disclose can still constitute a breach of contract. In such a case, Ms Lee's first termination notice can most probably be valid (assuming that the road plan is found to have a **substantial** impact on Ms Lee's decision to purchase the property, Mr Kim's failure to disclose will be assessed to be a 'material' breach).

Question 2

- If Y does not terminate the contract, but seek damages in lieu of performance

Then the amount of Y's damage entitlement must be assessed as of the date of impossibility (1 Jan 2018). Y shall be entitled to the market value of the property as of 1 Jan 2018, which is 1.4 billion KRW plus interest from 2 Jan 2018.

X shall not have any defence. X shall be entitled to keep the money received from Y.

- If Y terminates the contract and seeks damage (which is not a wise step for Y to take)

Both parties must restore everything. Additionally, X has also to pay interest on the purchase price he received from the date he received the money. Y has also to pay market rate of rent for the property from the date he took the delivery.

Additionally, Y can choose between performance measure damage (0.4 billion KRW) or reliance measure damage.

X can have a defence of simultaneous performance to refuse (i.e., delay) payment of damage until Y disgorges the benefit of using the property (assuming Y has not done so to Z, see 2016Da240).

- If X did not know, at the time of the contract, that the property did not belong to him [however, this point was not considered in grading as it was not covered by this semester's syllabus]

X can terminate the contract (Art, 571(1)). Then all the consequences of termination and the defence of simultaneous performance explained above shall apply.

X shall have to pay damage to Y (but Y can choose between performance measure damage and reliance measure damage).

Termination of contract

1. On the basis of a contractual provision

- Right to terminate as stipulated in the contractual term (in addition to the statutory right of termination)
- Contract interpretation (regarding 'materiality' of a breach). Parties may agree to terminate the contract even on the ground of an immaterial breach?

2. On the basis of a breach

- Material breach (□□□ 1997. 4. 7 □ 97□575 □□,

2004Da67011; 2005Da53705 painting booth case; 2003Da15518)

- Late performance + expiration of a reasonable extension granted by the creditor; Late performance + expression of an intent not to perform (Art. 544)
- Late performance when time is of the essence (Art 545)
- Impossibility of performance (Art 546)
- Repudiatory breach: 2004Da53173 (repudiatory breach recognised on the ground of "good faith"); 2008Da29635 (repudiatory breach recognised on Art 390 of the KCC); 2018Da214210
- Question of fault? Relevant only when the other breaching party proves that the performance was rendered impossible by causes attributable to the other party or to none of the parties. (Art 546, 537, 538)

3. Method

- Notice
- Irrevocable, unconditional
- indivisible (Art. 547) unless agreed otherwise

4. Preclusion of the right to terminate

- When asked to reply whether to terminate (Art. 552): Expiry of the reasonable time for termination shall destroy the right of termination (if any). Nothing but a clear, unequivocal notice of termination within the reasonable period can save the termination right (if any).
- When the object is altered or damaged (Art. 553)
- When the claim is foreclosed upon expiry of limitation period
- Lapse of 10 years (2000Da26425)
- Waiver of termination right by express agreement. □□□ 2006.11.9 □□, 2004□22971 □□. "□□□□□ □□□ □□□□□□ □□ □□□□□□

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5. Restitution (Art. 548)

- Title reverts automatically, immediately.
- Monies received must be returned with interest calculated from the date they were received. Disgorgement of unjust enrichment. The interest is not of the nature of “delay damage”.
    - Interest must be paid notwithstanding the defence of simultaneous performance (return). 2000Da9123.

- However,
    - Upon termination by mutual consent (including implicit consent), no obligation to pay interest. (95Da16011, 97Da6193)
    - When the contract has expired, is void, or voided, Art 548(2) does not apply. 92Da45025 (Where contract is voided, a good faith possessor is entitled to keep the fruit, not obligated to pay interest on the money received.) 96Da54997 (Where the contract is void, Art 548(2) does not apply.)

- Benefit/profit of using the thing must also be

disgorged. But the portion of the profit attributable to the possessor's skill or investment must be deducted from the amount to be disgorged. □□□ 2006.9.8, □□, 2006 □26328 □□

- Whether the possession was in good/bad faith is irrelevant. □□□ 1997.12.9, □□, 96□47586 □□

6. Third party's interest (Art 548(1), proviso)

- While the title reverts automatically upon termination,
- a third party who has acquired a right opposable to others shall be protected
    - 95Da32037 (when the property was let by the purchaser with the seller's approval, the tenant will **not** be protected)
    - 96Da17653 (when the purchaser let the property once the property was under his name, the tenant is protected)
    - 99Da40937 (the creditor who attached the property while it was under the purchaser's name will be protected)
    - 99Da51685 (the creditor who attached the right to demand conveyance will **not** be protected)
    - 2005Da6341 (a third party who relied in good faith on the real estate register entry shall be protected even if the entry was no longer valid due to termination)

7. Damages

Termination does not affect the damages claim. Art. 551

Incapacity

1. Minors

Upon reaching 19, a person has full capacity. Art. 4.

Upon marriage, however, minors (18 year olds) are released from parental supervision and enjoys full capacity. Art. 807, 826-2.

Unauthorised contracts concluded by unmarried minors are binding, but they may be rescinded (voided) (Art. 5(2), Art. 140)

- by the party under age, before or after coming of age
    - Can rescission be rescinded (for reasons of incapacity, duress, etc.)?

- by his parents or guardians while he is under age
- rescission can be done within three years (from coming of age, if the rescission is done by the party who was under age). Rescission is not allowed after 10 years from the contract. Art 146.

Rescission has retroactive effect

- *restitutio in integrum*
- 'innocent' third parties not protected
- the party under age needs only to return what remains as "unconsumed benefit". Art. 141. Money presumed to remain unconsumed. 2008Da58367

Rescission is not allowed if there was

- Prior approval by parents or guardians
- Ratification by parents, guardians or the party after coming of age
- Constructive ratification. Art. 145
- Deception by a minor: where a minor resorted to deceptive manœuvres causing the counterpart to believe that he is of age or that there was an approval by parents or guardians. Art. 17. Supreme Court 71Da2045
- Burden of proof lies with the party resisting the rescission (69Da1568; conf. 68Da2147)

Approval or ratification is not required for the following:

- a transaction which benefits the minor without imposing any burden. Art. 5(1)
- a transaction within the scope of an authorised line of business or authorised disposal of assets. Art. 6, Art. 8
- routine transactions related to necessaries
- exercising the right to rescission. Art 140
- How about exercising the right of termination?

Protection for the counterpart

- Counterpart may allow one month or more within which ratification can be made (either by the party after coming of age or by the party's parents or guardian). Art. 15
- No answer within the period shall be deemed to be a ratification. If, however, an approval of the auditor of guardianship is required for ratification (see Art. 950), the contract shall be deemed to be rescinded if the duly approved ratification is not dispatched within

the allowed time (Art 15(3)).

- Only if the counterpart did not know the incapacity of the party under age at the time of the contract, the counterpart may rescind the contract while it has not been ratified. Art. 16

2. Legal protection of adults

Guardianship for an adult (□□□□)

- The family court may order commencement of guardianship for an adult who is continuously lacking the ability to deal with one's own affairs due to ailment, disability, old age, or any other reasons. The order must be upon application of the person in question, his/her spouse, a relative within 4th degree, the guardian of a minor, the auditor of guardianship for a minor, the limited guardian, the auditor of limited guardianship, an ad hoc guardian, the auditor of ad hoc guardianship, a public prosecutor or the head of local government. (Art. 9)
- Guardian for a minor must be a natural person and there cannot be more than one person. But, guardian for an adult can be more than one person if appointment of multiple persons as guardians is appropriate under the circumstances. A corporate person may be appointed as guardian for an adult. (Art. 930)
- The adult under guardianship must act through the guardian (Art. 949). Transactions concluded by an adult under guardianship can be rescinded. (Art. 10) But the family court may stipulate a range of transactions which can be validly concluded by the legally protected adult. Guardian may, however, validly ratify a transaction concluded by the adult ward.

Limited Guardianship (□□□□)

- Limited guardianship: the guardian with limited powers do not have the power of representation unless the family court confers it (Art. 959-4).
- Family court will stipulate the range of transactions which would require an approval of the the limited guardian.

“Respect” for the ward’s wishes, family court’s supervision for internment : Arts. 947, 947-2

Ad hoc guardianship (□□□□)

- Ad hoc guardianship (Art. 14-2) can be declared for a person requiring short-term assistance or assistance for a defined matter due to ailment, disability, old age or other reasons.
- Family court may confer the power of representation on the ad hoc guardian for a defined range of transactions (Art. 959-11). Ad hoc guardian may not have the power to rescind the transaction concluded by the ward. The ward has full capacity.

Guardianship contract

- Guardianship contract (Art. 959-14):The guardianship contract is a system where a a person who has or anticipates incapacity to manage affairs due to ailment, disability, old age or other reasons, can entrust all or part of one’s affairs to another person and grant the power of representation regarding the entrusted affairs.
- The guardianship contract must be in writing, must be notarized (Art. 959-14(2)), and must be registered (Art. 959-15(1)).
- The guardianship contract shall have effect as from the moment when the family court appoints an auditor of contractual guardianship (Art. 959-14(3)).

3. Case by case assessment

In the absence of statutory or judicial recognition of incapacity, an individual contract may be void only if it is shown that the party's mental condition was so severely affected at the time of the contract that the party was unable to form an intention.

> *92Da6433*
>
> *Although the party's mental condition at the time of the contract was such as to warrant a declaration of diminished capacity or absolute incapacity, as long as there was no such declaration effective at the time, the contract may not be rescinded even if the party was subsequently declared to be of diminished capacity.*

4. Liability in tort

A minor or a person declared to be of diminished capacity (or of absolute incapacity) may be held liable in tort if he was intelligent enough to appreciate the responsibility and consequences of his conduct. Art. 753. 68Da2406 (18, 17, 16, 13 year old boys attacked the victim with an iron bar, killing him.)

cf. Criminal responsibility: 14 years or older (Penal Code, Art. 9)

Juvenile "protective detention": 10 years – 18 years (Juvenile Act, Art. 4)

Parents or guardian of a minor or a ward who does not have the capacity to bear responsibility, shall be held liable for the damage caused by the minor or the ward unless the former show that they fulfilled their duty of supervision. Art. 755. (Vicarious liability). 2005Da24318 (12 year old 6th grader committed suicide due to bullying. Agressors' parents and the local education authority were jointly held liable in tort.

Agressors themselves – victim's classmates – were not sued.)

Even when a minor is capable of bearing responsibility in tort, the parents are not exonerated from the duty of supervision. If the neglect of parental supervision is causally connected to the loss, the parents shall also be held liable as co-tortfeasors. The claimant must prove the causal connection between the neglect of supervision and the wrongdoing of the minor. 96Da15374 (17 year old boy driving his uncle's truck without license; parents held liable), 93Da13605 (17 year old boy causing an accident while riding a motorbike with license; parents' negligence not proven by the plaintiff)

Korean Contract Law I – End Term Exam 2015

- The duration of the examination is 75 minutes (from 9:00 am to 10:15 am).
- You may freely consult materials of your own, including online resources.
- On each Answer sheet, you must write your student number only. Please do not write your name.
- You must attempt the following two (2) Questions.

Question 1.

Explain the difference between general damage and special damage under Korean law.

Question 2.

Adam claimed that he is the procurement manager of Beta

Bicycle Co. Adam contacted Charles (who is a bicycle frame manufacturer) and ordered 100 bicycle frames on behalf of Beta Bicycle at the price of USD200 per frame. When Charles delivered the frames to Beta Bicycle Co, the latter refused to take the delivery or pay the price, claiming that Adam was fired from the company long time ago.

What are the remedies available to Charles under the Korean law?

Law of Obligations I End Term Exam Comments

Exam questions are here.

Question 1

The fruit producer/seller (Lucky) should be held liable for damages resulting from infected fruits – to the extent that such damages are foreseeable. The question, therefore, is whether wholesaler (Joy)'s liabilities to the retailers are foreseeable for the fruit producer/seller.

There is little doubt that if a tiny portion of fruits supplied are infected with lethal virus, the entirety of the delivered stock would be unfit for human consumption. Reasonable costs of treating the affected customers would also be within the range of foreseeable loss to the wholesaler.

It is irrelevant whether Lucky had 'actual knowledge' that the fruits they sell were already infected or likely to be infected. (If Lucky nevertheless sold the fruit with such a knowledge, then it would amount to a criminal offence!). Civil

damages are claimable not only against deliberate wrongdoers but also against a party who had every good intention and who had no clue that his own fruits could ever be infected. If the fruits turn out to be infected, then the seller shall be deemed to be “negligent”. Negligence, in this context, is a very technical and artificial concept.

Question 2

The seller of the building (Mr Y) gave an undertaking that he would obtain all regulatory permits necessary to run a cafe or a restaurant as from 1 May2009. It seems that the seller did carry out the undertaking. The seller should not be indefinitely responsible for subsequent revocation or cancellation. Even if the seller should be viewed as having failed to fulfill this undertaking, this would simply be an issue of breach of contract under Korean contract law. It is not an issue of mistake.

Mistake is about a fact, not about a promise. In this case, we are dealing with the seller’s promise to obtain the necessary permits. Broken promises give rise to a breach of contract. It has nothing to do with mistake.

If Lessee suffered loss due to Lessor’s breach of contract, Lessee may “set off” the portion of the rent corresponding to the loss sustained by the Lessee. This has nothing to do with Defence of Simultaneous Performance. The Defence, as its name indicates, provides a ground to “refuse to perform”. In the case of a Lessee who purports to “set off” the portion of the rent corresponding to his alleged loss, the Lessee is not at all “refusing to perform”. Rather, the lessee’s assertion is that the rent has indeed been paid (by setting off against the corresponding amount of loss to the lessee).

In this example, the plumbing issues may have caused “some” loss to Mr X. But it cannot be “1□□ every month”! It is equally unclear how much of 100 mil. KRW is actually the rent

(rather than the purchase price). Until 1 Feb 2010, Mr X had no defence of simultaneous performance whether it was on the ground of lease or on the ground of sale.
After 1 Feb 2010, however, neither parties are in mora. But Mr X would have to pay the already accrued late performance damages (corresponding to the period until 1 Feb 2010).

As it is clear the Mr X is unwilling to perform the contract, there would be little point in requiring Mr Y to "tender" the performance as a prerequisite for terminating the contract. The termination, therefore, is duly made. The contract is terminated by Mr Y and Mr X must pay the agreed amount of late payment interests (plus statutory rate of interest on that amount from the date of termination until he actually pays). Mr X's purported "rescission" of the sale contract is groundless. Mr X made no mistake.

Question 3

There is no doubt that C Co believed that it was entering into a contract with Mr Lee. C Co merely thought that that very person was called "Mr Kim". C Co also believed that that person owned the property in question. Mr Lee also knew that this was how C Co understood this contract. So both parties all agreed about the parties to the contract.

Therefore the "true" Mr Kim was never a party to this contract.

You should always go by the real and substantive entity, rather than the names or the government-held records. In short, ignore what is written on the ID Card. Focus, instead, on the real person. Whether "that person" is called Mr Lee, Mr Chun, Mr Kim, Mr Ma, etc. is of little significance.

Moreover, Mr Lee never invoked the institution of agency. He never indicated that he was "acting as Mr Kim's agent". Therefore, there is no room for applying Arts. 125, 126 or 129.

The only exception, recognised by Supreme Court rulings, is where the impersonator DID actually have some power to represent the person he impersonates. But in the case of Question 3, Mr Lee did not have any authority to represent Mr Kim.

Law of obligations I End Term Exam (2011)

Law of Obligations I
18/19 June 2011

- This is 24 hour 'take home' examination beginning from 5:00 pm on Saturday 18 June 2011.
- During the course of the examination, candidates may not discuss the examination questions with anyone.
- On each Answer sheet, candidates must write their student number only. Please do not write your name or major subject of study.
- All candidates must attempt ALL Questions.
- Answers must be hand-written and must be submitted by 5:00pm on Sunday 19 June 2011 at Room 334 of the Law Faculty Building (New Wing).

[1] Question 1

Joy Trading, Co. ("Joy"), a fruit wholesaler, bought 1 ton of water melons from Lucky Agricultural Cooperative ("Lucky") at a price of 15 million KRW. Joy sold the water melons to various supermarket chains and fruit shops and received the total of 20 million KRW from its purchasers.

A small proportion (less than 5%) of the water melons supplied

by Lucky were found to be infected with lethal virus which had so far been unknown. A number of consumers who ate the infected water melons fell seriously ill and hospitalised. There was a generalised panic about the spread of plague and all supermarkets and fruit shops who bought the water melons from Lucky returned the entire remaining stock to Joy, demanding full refund plus compensation. Joy entered into a settlement with those supermarket chains and fruit shops and paid 30 million KRW as compensation (= refund of 20 million KRW + additional compensation of 10 million KRW).

Joy sued Lucky and sought damages. Lucky responded that only a tiny portion of water melons are infected and that Lucky is willing to offer 5% discount of the contract price. Since Lucky did not know or expect that any of the water melons were infected, Lucky argued that it had no obligation to compensate the extended damage resulting from the infection. In response, Joy argued that it is not at all difficult to see that when a person falls ill having consumed the water melon, the seller must compensate.
How should the dispute between Joy and Lucky be resolved?

[2] Question 2

Mr X bought a building from Mr Y at a price of 1 billion KRW. Mr X paid the contract deposit of 10 million KRW upon execution of the sale contract on 1 March 2009. It was further agreed that Mr X shall make 9 monthly payments of 100 million KRW each from 1 May 2009. The final payment of 90 million KRW shall be made on 1 February 2010. The ownership of the building will be transferred to Mr X at the same time as the final payment is fully made. Mr X intends to open a cafe using the building.

Mr Y stated that the building will have all regulatory permits necessary for it to be used as a cafe or as a restaurant as from 1 May 2009. The parties also agreed that Mr Y shall lease the building to Mr X beginning from 1 May 2009 until 1

February 2010. Regarding the payment of rent, it was agreed that the monthly payments Mr X shall make pursuant to the sale contract would also cover the rent. If, however, Mr X fails to make the monthly payment on time, it was agreed that Mr X shall pay late payment interest at the rate of 20 % p.a.

Mr X took possession of the building on 1 May 2009 and opened the cafe soon thereafter. But the business was slow and the building also had a problem of bad plumbing which filled the space with unpleasant smell. From 1 September 2009, Mr X was unable to pay the monthly payment. At about the same time, the local government sewage service began inquiries as to the structural soundness and plumbing issues of the building.

When Mr Y demanded Mr X to make monthly payment in late 2009, Mr X responded that while the plumbing issues of the building are not resolved, no monthly payment can be made. Mr X also informed Mr Y that there may be a problem of noncompliance with building regulations. Mr Y's position, however, was that the lease agreement and sale contract are distinct and that there is no ground for Mr X to withhold the agreed monthly payments for the building purchase price. According to Mr Y, since Mr X is in arrears, Mr X must pay late payment interests as well.

Things have stayed in this manner until May 2011, when the local government revoked the building regulation compliance certificate on the ground that the building is discharging sewage in an unsafe manner. Mr Y terminated the sale contract alleging Mr X's failure to make payments on time. Mr Y also seeks damages including the late payment interest at the agreed rate of 20% p.a.

Mr X denies all liabilities and rescinds the sale contract alleging that the sale contract was entered into with a mistaken belief that he would have all necessary regulatory permits for opening a cafe. Now that the building regulation compliance certificate is revoked, it would mean that there

was a material mistake as to the elements of the contract. Discuss how this dispute must be resolved.

[3] Question 3

Mr Kim, who lives in Seoul, has his ancestors buried in a small hill at his home town in Andong. The land is registered under Mr Kim's name but it in fact belongs to Mr Kim's clan. Various relatives of Mr Kim also have their ancestors buried there too.

Mr Lee, who is a remote relative of Mr Kim through marriage, lives in Andong near the land. When Mr Kim visits his ancestral mountain, Mr Lee sometimes prepared food for Mr Kim's family, while Mr Kim's family members tended their ancestors' tombs and made ceremonial offerings.

A plan to build a marina and resort town near Andong was recently announced by the government and Mr Kim's land became the prime location for hotels. C Co. wanted to acquire the land and an employee of C Co., Mr Park approached Mr Lee to inquire about the land. Mr Lee forged his photo ID and pretended that he was Mr Kim. The forgery of the photo ID was done with a great deal of skill (Mr Lee had a number of previous criminal convictions) and it was practically impossible to discover that the photo ID was not genuine. Mr Lee acquired all other necessary documents through normal course using the forged photo ID.

C Co. thus bought the land from Mr Lee believing that he was Mr Kim. Mr Lee also agreed with C Co. that all tombs in the mountain would be removed and the remains would be burned and the ashes would be held in a private memorial. Mr Lee left the country soon after the purchase price was fully paid to him. When the land was being prepared for hotel construction, Mr Kim discovered the truth.

Mr Kim immediately applied for an injunction to stop the construction and demanded C Co. to move out of the land. C Co.

responded that it has validly purchased the land from Mr Kim or from a person who represented Mr Kim. C Co also argued that there is ample ground for its employee (Mr Park) to believe that the party who acted as the seller had the power to sell the land and that C Co purchased the land in good faith.
How should this dispute be resolved?

[End of questions. You must answer all three questions.]

Illegality

2008Da75119 Real estate sale agency contract entered into by an unlicensed ‘agent’ – null and void

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Good faith

2009Da103950: It is against good faith and abusive exercise of right for the State to advance a defence of the lapse of limitation period in a tort case (false imprisonment case)

Damages

1. ‘Difference’ theory

Damages should correspond to the difference between the

economic position in which the aggrieved party finds himself as a result of a breach (infringement) and the economic position in which the party would have been absent the breach (infringement).

2. ‘Performance’ measure v. Reliance measure

- The amount of damage aims to put the aggrieved party, as far as practicable, in a position where he would have been in if the contract had been duly performed (‘performance’ measure).
- 91Da33070 (conveyance effected by forged documents); cf. tort measure of damage
- Where contract is terminated on the ground of the other party’s breach, performance measure of damage is normally claimable. But the plaintiff may instead elect to claim reliance measure of damage (□□□□□ □□□□ □□ □□ □□ □ “□□□□” □□□ □□□□ □□ □□). □□□ 2002. 6. 11 □□ 2002□2539 □ □, □□□ 2003. 10. 23 □□ 2001□75295 □□ (The costs incurred in reliance of the contract are claimable. The costs which are usually incurred for the purpose of concluding the contract and readying oneself for the performance of the contract are claimable regardless of whether the other party knew about such costs. Any costs over and above the usual costs are claimable only to the extent foreseeable by the other party. However, the amount claimable under the reliance measure of damage may not be more than the performance measure of damage.)

3. Damages must be real and measurable

- Hypothetical possibilities not to be compensated.
- Reasonable degree of certainty is enough: 2001Da22833
- However, difficulty of assessment is no bar to an award of damages
- 2000Da5817, 2004Da48508 (The court may determine the

quantum “on the basis of the totality of all relevant facts emerged from the proofs and pleadings”)
- Chaplin v. Hicks [1911] 2 K.B. 786 (a candidate in a beauty competition was, in breach of contract, not allowed to compete in a later stage of the competition)

4. Loss which must be compensated

- causation: deals with “what loss” must be compensated
- ordinary loss/special loss: deals with “how much” of the loss must be compensated
- ordinary loss, Art 393(1):
    - the loss which would obviously arise in the ordinary course of things viewed from an objective standpoint.
    - the defendant may not plead that the loss was not foreseeable for him (for it was objectively foreseeable)
    - 2004Gahap9444 (dairy cow meat)
    - 95Da11344 (a lorry hitting an electricity pole, causing the power cut which lasted for more than 12 hours. Farmers sustained loss from the frosting of flowers which were being grown in the nearby green houses. Held, the loss was not foreseeable.)
    - damnum emergens + lucrum cessans
    - Art. 51(2) of Sale of Goods Act 1979 of UK (Damages for non-delivery) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract.
    - Art. 53(2) of Sale of Goods Act 1979 of UK (Damages for breach of warranty) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

- special loss, Art 393(2):
    - the loss which occurred because of the special circumstances
    - Special loss needs to be compensated only when it was foreseeable (at the time of the contract (Art 74 of CISG)? or at the time of the breach?)
    - 84Daka1532 (Daewoo)
    - 91Da29972 (cotton T-shirts)
    - Art. 54(1) of Sale of Goods Act 1979 of UK: Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

5. ‘Reference date’ for damage assessment

- General principle: at the close of hearing (□□□□ □□) □□□ 1115□.
- However, special rules apply:
    - Buyer’s loss in the event of repudiation/impossibility of the seller’s performance: loss assessed at the time of the breach. Subsequent increase of the market price can only be a “special loss” (claimable only when foreseeable by the seller), subsequent decrease of the market value is irrelevant (because it is not the buyer’s property, therefore buyer has no reason to bear the loss from the downward fluctuation) 94Da61359, 2005Da63337
    - Where the buyer claims damages in lieu of performance against the seller who is in delay, the damage calculation must be done as of the time when the seller fails to comply with the buyer’s

demand for performance within a reasonably extended deadline. This is the moment when the buyer definitively gives up the claim for the performance and seeks damages in lieu of performance. 66Da1842

- Seller's loss in the event of buyer's repudiation:
  - If the seller terminated the contract and subsequently sold the thing to a third party at a lower price (assuming that it is not 'unusually low'): the difference between the two prices plus interest between the original due date and the date on which the lower price was received (2004Da3543).
  - If the seller terminated the contract but did not sell the thing: the difference between the contract price and the market value of the thing at the close of hearing (because that is the "economic benefit which remains with the seller in the case of termination").
  - If the seller terminated and subsequently sold the thing at a higher price than the economic benefit the seller would have obtained if the original contract had been properly performed on time by both parties (contract price+interest from the original due date), then no loss. Hence no damage.
  - If the seller terminated and chose to retain the thing: the difference between the "economic benefit the seller would have obtained if the original contract had been properly performed" (original contract price plus interest from the original due date) and the market value of the thing at the close of hearing. If the price drop in the meantime was unforeseeable by the buyer, seller may not claim. The seller may not disregard the appreciation of the market value in the

meantime (whether foreseen or unforeseen by the buyer). Benefit does not need to be foreseeable. It is only the loss which needs to be foreseeable if the compensation is to be ordered.

- If the seller does not terminate the contract in spite of the buyer's repudiation, then the seller shall be entitled only to a delay damage (if the thing sold was already delivered) plus specific performance. Seller cannot normally claim delay interest on the purchase price if the seller does not surrender possession of the thing sold and enjoys the possession of the thing sold.

6. Liquidated damages, Art. 398(1)

- Agreement as to the amount of loss, in advance of a breach
- Actual amount of loss is irrelevant. No need to prove, nor is it possible to disprove the amount of loss.
- Excessive amount of liquidated damages would justify court's intervention
- The court can, even if the party does not claim a reduction, reduce the amount of damage. □□□ 2009. 2. 26 □□ 2007□19051 □□
- Penalty v. liquidated damages
- In common law, penalty clause is invalid

7. Comparative negligence, duty to mitigate

comparative negligence: Articles 396, 763

'duty to mitigate' 2003Da22912

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Keechang Kim, "Measure of Damages under Korean Contract Law", 2 Asian Business Lawyer (2008)

Damage v Cost or expenses: 99Da9646

Art 74, CISG

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

FIDIC Standard Conditions of Contract (for Construction, EPC/Turnkey Projects, Plant and Design Build) template clause:

> *Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract…*

Croudace Construction Ltd v Cawoods Concrete Products Ltd [1978] 2 Lloyd's Rep. 55 at 62. ('consequential' does not cover any loss which directly and naturally results in the ordinary course of events from late delivery)

Ferryways NV v Associated British Ports [2008] 1 C.L.C. 117 at 138

Koufos v C. Czarnikow Ltd. [1969] 1 A.C. 350 at 385 (Sugar

price falling, delivery of sugar delayed for 9 or 10 days. Loss of profit must be compensated. Forseeable loss = directly and naturally caused loss?): “The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract […]”

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Offer

1. Requirements of an offer

An offer must be sufficiently clear, detailed and definitive so that the counterpart may simply accept it to constitute a binding agreement.

A tentative, non-committal proposal may not be sufficient to bind the author of the proposal; it is not an offer.

A ‘promise’ to be bound if the counterpart accepts the offer.

> *Supreme Court 2001Da53059*
>
> *An offer, which is a legal element of a contract, is an expression of detailed and definitive intention to create a contractual relationship upon an acceptance corresponding to it. The offer must include sufficient details so that the content of the contract can be determined.*

2. Invitation to treat

Preparatory exchanges, proposals for the negotiation.

Advertisement is an invitation to treat, not an offer. But the content of the advertisement may form part of the terms of the contract. 2005Da5812

Often difficult to distinguish from an offer.

> *Seoul Appellate Court 94Na12526*
>
> *On 14 August 1991, D issued a public notice announcing that it shall sell the land at the current market price to the party from whom the land had been requisitioned. On 27 September, P submitted all of the purchase application documents required by D. On 12 January 1993, D gave a formal notice of sale to P informing that the land shall be sold to P at the price of KRW7,611,562,000, which is the current market price, and that P must enter into the sale contract paying the contract deposit not later than 10 February. [It was held that this was not an offer.]*

Online shopping mall's presentation of product information (detailed specs and price with availability): usually not an offer

3. Irrevocability of an offer

'firm' offer v. 'simple' offer. Art 527 of the KCC.

What about a 'revised' offer? Is the offeror not allowed to revise his offer while the offer is not accepted?

If an offeror explicitly states that the offer may be revoked, Art 527 does not apply. Does it have to be stated when the offeror is made? The intent not to be bound by Art 527 can be expressed 'afterward' (after a 'firm' offer was made).

When an offer is revoked or revised, can the counterpart

(offeree) ‘accept’ the earlier offer (which no longer exists) and seek contractual remedies?

An offer shall not be revocable “once it is accepted”? See Act on the Consumer Protection in E-Commerce Transactions, Art. 17; Act on the Consumer Protection in Financial Transactions, Art 46. These statutes use “□□□ □□” to describe a situation where the consumer withdraws his/her offer *after* it has been accepted.

However, an offer will expire if the acceptance does not arrive “within a reasonable period of time” (Art. 529) After the lapse of a reasonable period of time, the offeree may not accept. Offeror may deny the contract even if the offer was not explicitly revoked (because it expires automatically.)

Art 679: Offer of a reward may be rovoked (in the same manner as the reward was announced) if no deadline is specified. (If a deadline is specified, the offer may not be revoked; it can only expire upon reaching the deadline.)

Offer to terminate an employment contract: revocable until the acceptance reaches the employee (offeror).

> *Supreme Court 94Da14629 (also see 2000Da60890)*
>
> *Where an employee makes an offer to terminate the employment contract, the offer may be withdrawn as long as the employer’s acceptance to terminate has not reached the employee.*

Termination of a contract by consent: a new contract.

- 2004Da11506(terminating an employment contract by consent): “Termination of a contract by consent, or a termination contract means … a new contract whereby the parties agree to extinguish the effect of the existing contract and to achieve a status quo ante as if no contract was concluded in the first place.”

- 2000Da5336 (“Implicit” consent to terminate an existing contract): Lessee demanded return of the lease deposit, lessor did not demand rent for nearly two years; lease is deemed to have been terminated by an “implicit” consent. Art 548(2) (payment of interest on the monies received) does not apply in such a case.

4. ‘Revocability’ and good faith

The court’s technique to allow revocation of an ‘offer’.

In some cases, however, to revoke an ‘offer’ and to refuse to complete the negotiation may constitute a civil wrong, and thus provide a ground for an action in tort.

> *Supreme Court 2001Da53059*
>
> *If, in the course of negotiation, a party provided the ground for the other party to hold a reasonable expectation or reliance that a contract will certainly be entered into, and if the other party acted on the basis of that reliance, the party’s refusal to enter into a contract shall be wrongful, considering the principle of good faith. The party’s refusal, which causes loss to the other party, is beyond the limits of freedom of contract and it constitutes a tort.*

Compare…

Supreme Court 92Nu16942

A resignation handed in by a public servant can, in principle, be withdrawn as long as the government’s decision to terminate the employment has not been made. However, the withdrawal shall not be permitted even before the government’s decision has been made, if there are special circumstances which make it against good faith to withdraw the resignation.

5. Philosophical foundations of contractual remedies

Consent
Promise
Detrimental reliance (loss)
Trust

Reading:

주석민법, 채권각칙 1 (제5판)(2021), 계약 총론 부분(3-60)

김명숙, “계약의 성립과 청약의 구속력” 고려법학 54호 (2009)161-199 김기창, “청약의 구속력과 계약 자유” 비교사법 12권 (2005)