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2. 民國 101/01/01 開始 實施 的 584 條 的 “國家 安全 法” 的 內容 如下

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3. 證明：若 $\triangle ABC$ 中， $\angle A = 90^\circ$ ， $\angle B = 30^\circ$ ， $\angle C = 60^\circ$ ，則 $\triangle ABC$ 為直角三角形。

4. 在下列各数中，找出最大的数，并把它圈出来。

[2□ □□]

2. Types of unjust enrichment

A. Benefit resulting from a party's discharge of a 'duty' where the duty turns out to be invalid:

- Disgorgement to be done only between the parties to the transaction (ie., discharge of the purported duty).
- 94Da54641: A property belonging to the state was leased by the plaintiff to the defendant. Defendant failed to pay rent and the plaintiff terminated the lease. Defendant alleged, but could not prove, that the property was reclaimed by the state or that the defendant was otherwise prevented from using the property. Plaintiff may seek (1) payment of unpaid rent for the duration of the lease; and (2) disgorgement of benefit, which is equal to the rent, for the period the defendant was in possession of the property (after the lease was terminated until the property is returned). [State may not seek disgorgement from the lessee.]
- If the plaintiff's property was actually being used by the defendant, D must disgorge the benefit of using it even though D need not return the property until P tenders the lease deposit (which must be returned to the defendant simultaneously with the return of the property). 80Da1495
- 99Da66564: A co-owner of a building contracted with a builder to refurbish the windows. The builder completed the work which resulted in substantial increase of the value of the building. The builder may not demand disgorgement of benefit from the co-owners of the building. [The builder must seek contractual remedies against the counterpart of the contract. If the latter becomes bankrupt, the risk must be borne by the builder. The co-owner who contracted the refurbishment may seek reimbursement from the other co-owners on the basis of negotiorum gestio or mandate, if the remaining co-owners had requested the refurbishment.]

- Claim need not be based on ownership. For example, X sold and delivered the property to Y and the sale turns out to be invalid. Then X can demand the return of the property even if X is not the owner.
- However, a good faith possessor may resort to Art. 201(1) and keep the fruit. To this extent, Art 748(1) (the party who received the benefit in good faith shall return the 'benefit that still remains') does not apply.

B. Benefit resulting from appropriation without legal ground or from infringement on other's entitlement.

- Claimant must show (1) his exclusive entitlement and that (2) the entitlement is infringed upon by the defendant.
- Defendant may put forward a defence showing that there is a legal ground for him to enjoy the benefit.
- 98Da2389: If a person owning a building on another person's land without an authority or a legal ground to use the land shall be, in the absence of special circumstances, deemed to have unjustly benefited from using the land in the amount equivalent to the rent and thereby causing corresponding loss to the land-owner.
- Exclusive entitlement needs to be shown. 2001Da8493: Plaintiff's land had already been used for passage of the public. P may not seek disgorgement of benefit from D who began to occupy the land. P may evict D.
- 2000Da57375: P's land had already been used for irrigation channels by a local government. P may not seek disgorgement of benefit merely because the irrigation channels were converted to a car park.
- 92Da51280: D completed the required period of possession to claim title on the basis of adverse possession. While D has not, however, registered his ownership, the owner claimed the property back and sought disgorgement of benefit (of using the property). D successfully claimed that he has a legal ground to enjoy the benefit. [If D

can show a valid contractual ground to enjoy the benefit, the owner would not have been able to claim disgorgement of benefit from D in the first place (even if D's possession did not amount to the required length.)

- 99Da32905: D secured property (or a receivable) on the basis of a judgment which was obtained through fraudulent means. But the judgment became final and the petition to quash it failed. D has a valid legal ground to retain the property (or the receivable) in view of res judicata.
- 2003Da8862: A embezzles B's money and used it to repay A's debt which is owed to C. C shall not be required to disgorge the benefit if C was merely negligent in not knowing A's embezzlement. C, in such a case, has a valid legal ground to retain the benefit (C has the right to demand, receive and retain the payment from A). If, however, C knew or grossly negligent in not knowing A's embezzlement, C may not plead that he had a legal ground to retain the benefit. [C is, in this case, viewed as appropriating B's money. The risk of A's bankruptcy is shifted to C.]

C. Benefit resulting from another's mistaken investment or efforts

- Embellishment of a property believing that it is one's own. Art. 203

3. Just/unjust benefit

- Where the party unjustly enjoying the benefit of an object (respondent) disposed of the object, the proceeds at the time of the disposal must be returned [with interests, presumably]. If the respondent generated profit using the object, he may keep the profit generated by his own operation. However, the profit which would have accrued ordinarily without the

respondent's particular intervention must be returned to the claimant (94Da25551). If the respondent suffered loss from operating the object, the loss must be borne by the respondent [just as the profit may be kept by the respondent] (96Da47568)

- The claimant seeking disgorgement of benefit from the respondent who has received the benefit in good faith, must prove that the respondent has unconsumed benefit (69Da2171). However, if the benefit received was money or monetary gain, the benefit is presumed to exist regardless of whether it was actually consumed or not (96Da32881)

4. Disputes arising from official auctions

- 97Da32680: If movables which do not belong to the debtor are sold in an official auction, the successful bidder would usually acquire the title as a good faith purchaser. The proceeds from sale, however do not belong to the debtor and, in that case, the creditor's receipt of the proceeds would not have the consequence of extinguishing the claims. The creditor must return the proceeds to the original owner of the movables who lost the title to the successful bidder.
- 2001Da3054: If a party who is entitled to participate in the distribution of proceeds could not in fact do so because of an erroneously finalised distribution schedule, the party may seek disgorgement [from the parties who received more than they ought to have].
- 99Da53230: If sales proceeds were erroneously distributed to those who have no right to participate in the distribution, the party who may claim disgorgement is the creditor who would have received more if the proceeds were not erroneously distributed to those who have no right. Only when there is no such creditor, may the debtor exercise the disgorgement claim.

Settlement Agreement

1. Definition

A settlement agreement becomes effective when the parties agree to terminate a specific existing dispute between them as to the existence, extent and nature of a party's legal rights or obligations. Art. 731.

What is the difference between price negotiation and settlement negotiation?

2. May not be unsettled on the basis of a mistake

- Settlement agreement may not be rescinded on the ground of a mistake. If, however, the mistake was about whether a party had the powers to settle or about matters other than the dispute which was settled, the settlement agreement may be rescinded on the ground of a material mistake. Art. 733
- "matters other than the dispute which was settled": matters which were not subject to mutual concession; matters which both parties accepted as 'given', undisputed and therefore formed the basis of the negotiation, matters which were not open to negotiation.
- Settlement agreements, like any agreement, may be rescinded on the ground of deception or duress (Art. 110).

3. Court's approaches

Allowing rescission:

95Da48414: Car accident victim settled with the aggressor on

the assumption that the accident occurred due to the victim's fault. The amount was much less than the loss sustained by the victim. When it emerged that the aggressor was also at fault, the court allowed rescission on the basis of a mistake. The aggressor's fault was not open to mutual concession, thus not part of the dispute which was settled.

2001Da49326: A doctor agreed with the survivors of a patient who died 2 hours after a metoclopramide injection was administered by the doctor. The doctor thought the death was not related to the shot but could not rule out the possibility that the death occurred as a result of the shot. The doctor accordingly agreed to pay a substantial amount in settlement of the dispute. It turned out that the death was unrelated to the injection. The court ruled that the settlement was made on the assumption of the doctor's liability and that the assumption was undisputed and was not open to concession. Thus doctor may rescind the settlement showing that he was mistaken as to his liability.

Narrowly construing the scope of settlement:

97Da423: A three year old child was hit by a car. Soon after the accident, the mother settled with a small amount of payment (about USD300). The injury, however, turned out to reduce the working capacity of the victim by 38% and the loss amounted to more than USD40,000. The court ruled that the settlement is valid only to the extent of claims reasonably foreseeable at the time of the settlement. If the terms of settlement are such that the victim, had he expected the true scope of injury, would not have agreed upon, then the claims which are beyond the damages expected by the victim are not covered by the settlement. 99Da63176

Unknown claims: 2001Da70337 (parties settled as to the 'leakage' (shortage) of the fish sauce, without realising that a substantially larger quantity of the fish sauce which was stored in the tank was 'rotting' due to infiltration of water)

- What was the 'scope' of the settlement? Regarding the 'loss' or the 'rotting' of the sauce.
 - Is it possible to rescind the settlement? Court suggested that the settlement was only to the extent of the 'loss' of the sauce.
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Partnership Agreement

1. Consensual contract

- Need to distinguish the contractual relationship from the entity (economic and business entity) which operates on the basis of the partnership agreement.
- Need to distinguish from the Partnership Company under the Commercial Code (which has a statutorily recognised legal personality separate from the partners)
- Partnership agreement under the Civil Code merely creates "contractual" obligations among partners.

2. 'Special' features of a partnership agreement

- A partner owes duties (including the duty to make contribution) to all partners, not to (a) particular partner(s).
- If a partner is unable to make the agreed contribution, only the particular partner is excluded from the partnership relationship, which is unaffected by the partner's inability to participate. Partnership is formed among the remaining partners, unless they agree otherwise.
- Warranty liability of a partner to the other partners? Probably not. Partners need to re-negotiate and re-define their relationship. 2005Da38263 (Partnership

agreement is not a contract with reciprocity of considerations, not a synallagmatic contract.)

- Usual rules about termination on the basis of a breach of contract do not apply.
- 94Da7157: In a partnership agreement such as a joint-undertaking of a business, a partner may seek dissolution, quit, or remove other partner(s). A partner may not terminate the partnership agreement and seek restoration from the counterpart [unless their agreement stipulates otherwise].

3. Similar entities or arrangements

- Mutual aid scheme (“□”): The organiser has a personal project. The obligations of payment and repayment exist between the organiser and the members of the scheme. Not a partnership. Where the scheme breaks down, no room for seeking ‘dissolution’ of a partnership. 93Da55465
- Contractors’ consortium: a partnership agreement.
- Apartment owners where each of them separately owns a distinct unit of one building. They are in a relationship of partnership.
- 2005Da5140: Joint-owners, in principle, are not in a partnership relationship merely because they are joint-owners. If, however, they have agreed upon the manner of acquisition and disposal of the property, their relationship may be viewed as a partnership.
- If one party agrees not to partake in the profit of the joint undertaking, it cannot be a partnership. 98Da44666
- As long as all parties partake in the profit, they are in a partnership even if it is agreed that some of them do not bear the loss.

4. Partner’s contributions and partnership assets

- Anything of value: skills, labour, good will, undertaking not to engage in a line of business.
- All partners must join hands in exercising the claim to

seek a partner's agreed contribution.

- An executive partner may, on behalf of all partners, seek the particular partner's performance of the contribution, which must go to all partners.
- In the absence of an executive partner, any partner may, on behalf of all partners, seek the performance from the defaulting partner. But this is not the former's personal claim to the latter.
- An individual partner may not seek 'his portion' of another partner's contribution to the partnership to be made out to the individual partner. Creditors of a partner may not attach or seek satisfaction from the partner's such claim (because the partner has no such claim in the first place). 97Da4401
- A partner who delays in making the contribution must pay damages and interests to all partners.
- Partnership assets: partners' contributions, assets acquired in the course of the partnership undertaking.
 - All partners join hands in the ownership of each of the assets; No notion of 'individually disposable share', thus distinct from co-ownership.
 - Distinct from individual partner's personal property. Individual partners may not dispose of their 'share' except by consent of all partners. Dividing up of partnership assets requires all partners' consent.
 - Disposal of partnership assets requires all partners' consent (Art. 272). But the 'business decision' for the disposal may be taken by a majority of executive partners, or by a majority of partners where there is no executive partner (Art. 706(2)). The partners who oppose such a decision may not withhold consent to the disposal. If individual partners wish to have such a veto

power, they should have explicitly reserved it in the partnership agreement.

- Creditors of a partner may attach a partner's 'share' of the partnership assets. But this is effective only to the dividends or to the distribution of assets upon dissolution. While the partnership exists, individual partner's 'share' may not be disposed of unless all partners agree.
- If a partner negligently handles the partnership business and incurs loss, other partner(s) may not seek compensation as individual claimant(s). The loss is caused to the partnership, not to individual partners. So all remaining partners must join hands in seeking compensation.

95Da35302, 98Da60484

- A partnership may be recognised even if it has no tangible assets.

5. Partnership liabilities

- All partners bear the partnership liabilities in proportion to their loss-sharing ratio.
- No insulation between a partner's 'share' of the partnership liabilities and the partner's personal assets. (Unlimited liability)
- A creditor of the partnership may either (i) seek satisfaction (for the entirety of the claim) from all partners in respect of the partnership assets themselves or (ii) seek satisfaction (for a portion) from individual partners in respect of their personal assets to the extent of the partner's loss bearing amount.
- If a creditor decides to pursue individual partners,
 - each of them is liable only up to his apportioned amount of liability (with all his personal assets; unlimited liability). However, if the credit arose from a "commercial transaction", each partner shall be jointly liable for the full amount of the

credit. Commercial Code 57(1). 92Da30405

- if the creditor does not know the loss bearing ratio among partners, the creditor may claim an equally divided amount from each partner. Art. 712
- if any of the partners is insolvent, creditor may claim insolvent partner's portion of liability from the remaining partners (with the amount equally divided up for each remaining partner)

6. Conduct of partnership business

- Partnership agreement may stipulate executive partner(s). Partners may, by consent of 2/3 of partners, appoint executive partner(s). Art. 706(1). Where executive partners are appointed, non-executive partners may not conduct partnership business. Art. 706(3)
- Partners (executive partners, where they exist) must act with the consent of the majority of partners (executive partners), unless otherwise agreed. Art. 706(2).
- Unless otherwise agreed, each partner (where no executive partner is appointed) or each executive partner is entitled to carry out the 'ordinary day-to-day operation of partnership business' on behalf of all partners (provided that other partners or executive partners do not oppose).
- A partner who conducts the partnership business (not necessarily an executive partner) owes a duty of care to remaining partners. Art. 707 (mandatarius' duty of care; Art 681)
- A partner who conducts the partnership business is presumed to have the power of attorney to act on behalf of all other partners in respect of the business he is carrying out. Art. 709
- 2000Da28506: Disposal or alteration of partnership property does not form part of 'ordinary day-to-day operation of partnership business.'

Executive partners

- May not resign without justifiable grounds, may not be de-commissioned without consent of all partners. Art. 708
- Owes the duty of care to other partners in carrying out the partnership business. Art. 707 (as well as non-executive partners when they do carry out the partnership business)

Authorisation among partners

- Counterpart concludes a contract with a partner who acts on behalf of (with the power of attorney to represent) all partners.
- If a partner concludes the contract in his own name and without indicating that it is on behalf of the partnership, the counterpart may not enforce it against other partners.

Loss caused to the partnership

- 98Da60484: An executive partner acted outside his authority and committed conducts which are against his duties. Partnership assets are squandered and it became impossible to achieve the purpose of the partnership. The loss is caused to the partnership. Individual partners may not seek damages in the personal capacity. Remaining partners must join hands in seeking compensation from the defaulting partner.
- Also see 95Da35302: A partner, in order to secure a loan for his personal purpose, offered the partnership property. Upon the partner's default, the property was subject to foreclosure and the partnership lost the property. Remaining partners must join hands in seeking compensation from the culpable partner. Partners may not, in their individual capacity, seek compensation for the loss of their respective 'share' of the partnership property.

7. Distribution of profit

- In the absence of agreement, the contribution ratio would also be interpreted as the ratio of profit distribution, and vice versa.
- 2005Da16959: Where a partner failed to perform his duty of contribution, the partnership may – in distributing the partnership profit – set off the damages. The partnership may not refuse to distribute the profit to the defaulting partner (defaulting partner is not automatically foreclosed from sharing the profit of the partnership) in the absence of an agreement to that effect.

8. Resignation and dissolution

Resignation

- If the duration of partnership is unspecified or to last for the lifetime of partners, a partner may resign at any time with a notice to all partners. However, if the resignation is to have adverse consequence for the partnership, the partner may resign only upon unavoidable grounds for resignation. Art. 716(1)
- If the partnership has a definite and limited duration, partners may resign only upon unavoidable grounds for resignation. Art. 716(2)
- Automatic 'resignation'
 - death, bankruptcy, diminution of capacity or expulsion by the partnership
 - 2003Da26020: Partnership agreement or a resolution by partners may not, in principle, validly stipulate that a partner can retain the partner status in spite of his bankruptcy. However, if the creditors of the bankrupt estate agree to the bankrupt partner's retention of partner status, it would be possible for the partner to continue as a partner.
 - 2004Da49693: If a partner 'resigns' from a partnership which was formed by two partners, the

partnership agreement comes to an end. But the 'partnership' is not dissolved, and thus there is no need for liquidation of the partnership assets. The remaining 'partner' shall own the partnership property. The remaining partner shall be liable for the partnership liabilities.

Dissolution

- When the partnership achieves its purpose, or is impossible to achieve its purpose, or when an event stipulated in the partnership agreement as the ground for dissolution of the partnership occurs, or when all partners agree to end the partnership relationship, then the partnership dissolves.
- In the event of unavoidable circumstances which make it impracticable to continue the partnership, a partner may demand dissolution of partnership. Art. 720. Deadlock, breakdown of the relationship of trust, serious depletion of the partnership assets, etc.
- 95Da4957: Bad performance, breakdown of trust. 90Daka26300: Even the partner who is responsible for the breakdown of the relationship may demand dissolution.
- 78Da1827: When one of the two partners who formed a partnership seeks dividing up of the partnership property, the demand may be interpreted to be a demand for dissolution of partnership.
- 94Da46268: One partner lodged a criminal complaint against the other partner alleging a breach of trust. The latter was convicted. The former sent a notice of termination of the partnership agreement. It can be interpreted as a demand for dissolution of the partnership.

9. Joint-venture partners setting up a joint-stock company

- The running of the company to be governed by Commercial Code as well as the contract between the JV partners.

- 2003Da22448: Civil Code provisions on partnership contract would also be applicable in addition to the Commercial Code provisions applicable to a joint-stock company.
- Joint-venture agreement or shareholders agreement does not disappear simply because the JV partners set up a joint-stock company.
- 台灣 最高法院 2 年 上字 第 1000 號 民事 判決 認為 兩 人 合夥 經營 事業， 嗣後 其中 一人 退出 經營 關係 而 轉讓 其 股份 予 第三人， 嗣後 該 第三人 經營 事業 與 原 合夥 關係 無 涉。(台灣 2007. 6. 14 台 2005 年 5140 號)

台灣 2005.10.18, 台 2005 年 583 號 民事 判決: “Dong-Up” contract may be interpreted as a partnership contract. The purported “termination” may be interpreted as resignation and demand for the return of contribution. Partners have a comprehensive duty to disclose. A partner’s failure to disclose material facts amounts to “unavoidable circumstances” for another partner to resign.

Negotiorum Gestio

1. Statutory obligations

Where a party carries out another’s affairs without having been requested to do so, certain obligations arise by operation of law to regulate the parties’ relationship

- to ensure proper handling of the affairs
- to strike a balance between the parties’ interests
- to ensure that the party who managed another’s affairs does not have to sustain loss, does not gain from the gestio.

2. Distinct from donation:

- gestor manages other's affairs with intent to seek reimbursement (no intent to offer the service at one's own expenses)
- ex.: Volunteers tidying up the polluted coast after the oil-spill. Can they seek reimbursement?

3. Awareness that the affairs managed are not one's own

- 97Da26326: A requested B to pay 20 million KRW on behalf of A in settlement with C. B agreed. A promissory note in B's name was accordingly issued to C. When C presented the notes to B and demanded payment, B declined. A requested D to pay 25 million to C. D agreed and paid. When A could not reimburse D, D demanded reimbursement from B arguing that D's payment was negotiorum gestio for the benefit of B. *Dismissed*. Intent to manage the affairs as the other's affairs is required. *The gestor's management must not be against the wishes of the principal* (B in this case, who declined to pay and obviously did not want others to pay on B's behalf).
- 94Da59943: P paid 30 million to D (vice president of a Transport company) believing that the money was for purchasing the scrap auto parts of buses sold by the Transport Company. P was led to believe so by a broker X who needed money for 2 scrap buses he previously purchased. D treated the money as the purchase price of scrap buses previously purchased by X. P sued D and sought reimbursement arguing the D failed to take due care as P's gestor. *Dismissed*. D was receiving the money, not as P's gestor, but as the seller of his own goods. If the affairs are not in fact other's affairs or if the gestor did not have the intent to manage other's affairs, no claim may arise out of the management of the affairs.
- As long as the gestor had the intent to manage affairs of "another", it does not matter whether the gestor was

mistaken as to the precise identity of the beneficiary.

- As long as the affair is another person's affair, it does not matter whether the gestor actually incurred an obligation in gestor's own name. The affair does not become gestor's own affair merely because the gestor incurred the obligation in gestor's name. Incurring the obligation was itself a part of *gestio*, which was done on behalf of the other (the principal).

4. Managing other's affairs believing that they are one's own, or believing that one has a duty to manage the affairs

- Distinct from donation
- Distinct from *negotiorum gestio*, which is spontaneous, voluntary management of other's affairs
- Unjust enrichment issues may arise
- Ex.: Carrying out 'contractual' duties without realising that the contract was void, already rescinded or terminated.

5. Managing other's affairs with intent to arrogate the benefit to himself

- Unjust enrichment
- Wrongful interference with other's affairs

6. Gestor's duties

- No contractual duty of care
- Statutory duty to act in the best interest of the principal. Art. 734(1)
- Statutory duty not to act against the (presumed) wishes of the principal: otherwise, wrongful interference with other's affairs, in which case any loss to the latter must be compensated (gestor's lack of fault is not a defence).
- If, however, gestor's management was in the interest of the public or to avoid imminent danger to the principal's life, person, reputation or property, no

liability arises except for gross negligence or bad faith. Arts. 734(2), 735

- Duty to account
- Duty to notify the principal
- Duty not to discontinue once commenced.

7. Scope of reimbursement

- Gestor's expenses (whether necessary or useful; whether or not they resulted in increase of value) must **all** be reimbursed provided that the gestor was not negligent.
- Gestor's loss sustained in the course of the management without any fault of the gestor, must be compensated. But the compensation may not exceed the benefit accrued to the principal as a result of the gestio. Art. 740
- If the gestor's management was against the wishes of the principal, no duty of reimbursement under Negotiorum Gestio. But unjust enrichment enjoyed by the principal must be disgorged.
- 97Da58507: Police sold perishable items (peanuts) seized from the suspect to avoid deterioration. The suspect was later found to be innocent. The police's management (sale of peanuts to avoid perishment) was against the wishes of the principal. But the police may nevertheless claim reimbursement of expenses (to effect the sale) to the extent they were beneficial to the principal.

Mandate / Negotiorum Gestio

1. Mandate: Consensual contract

- Request+agreement: If, upon request of a party (mandator), the counterpart (mandatarius) agrees to carry out the affairs of the former, a contract of

mandate is concluded.

- The mandatarius' obligation is 'to carry out' the mandator's affairs, not to bring about an agreed 'result'. No guarantee as to the 'success' of the operation.
- A relationship of trust; mandatarius' duty of care.
- Expenses of carrying out the affairs must be reimbursed. But 'fee arrangement' is not essential.
- No mandate as to one's own affairs.

2. Mandate and agency

- Creation of agency (granting the power of attorney) is not an essential element of a contract of mandate.
- Mandator's request may consist of any lawful manner of carrying out the mandator's affairs (factual, legal, economic, non-economic).
- 93Da4472: Police requested a hospital to treat a victim of an accident. The hospital treated the patient following the police's request. No mandate. Whose 'affair' was it?

3. Mandate and partnership contract

- A partner who carries out the partnership business owes a duty of care to the partnership, rather than to the other partner or to any particular partner. 2004Da30682
- Article 681 (mandatarius' duty of care) applies mutatis mutandis to a partner when he carries out partnership business (Article 707).
- But this does not mean that a partner is a mandatarius of another partner or a mandate is automatically created or exists between partners.
- A partner cannot be a mandatarius of the partnership business (because the partnership business is his own affairs as a partner).

4. Mandatarius' duty of care

- Even if no fee is agreed, mandatarius who freely accepted to carry out the mandated business must do so with the level of care expected of a good manager (*bonus paterfamilias*)
- 2000Da55775: Sales agent (mandatarius) of a manufacturer of heavy plant (mandator) has the duty to scrutinize the creditworthiness of buyers and obtain adequate security to ensure payment of price.
- 96Da22365: Estate management company (mandatarius) held liable for failure to inform the residents' governing body (mandator) of the newly available choice in electricity supply contract for the apartments complex. The residents thus remained with the existing electricity supply contract which was less favourable than the newly available supply contract.
- Even if mandator made a 'specific' request, the mandatarius (especially, the ones with professional expertise) must offer competent advice as to the consequences of the requested course of action:
 - 2000Da61671: A notary was asked to cancel the existing hypothec (which was in the name of mandator's wife) and register a new hypothec in the name of the mandator. At the time of the request, however, the property was attached by another creditor (after the hypothec had been registered). The notary had a duty to explain that the existing hypothec could have been 'assigned' to the mandator without losing the priority over the attachment. Hypothec which is registered after the attachment has no priority over the creditor who attached it.
 - 2005Da38294: An importer of rye seed requested a customs broker to apply for the 0 rate customs for the seed indicating that the seed would qualify for exemption of customs duty. The customs broker followed the request and no duty was paid. The customs authority concluded that the rye seed is

subject to customs duty and the importer was ordered to pay a penalty rate of customs duty.

- 2001Da71484: Estate agent who has not (yet) received the fee nevertheless has the duty of care. Mandator's breach (non-payment of the agreed fee) does not "automatically" terminate the mandate or relieve the mandatarius of his duty of care.
- 2004Da7354: A lawyer (mandatarius) retained for a case must provide advice for the client (mandator) **even after the conclusion** of the particular litigation where an unfavourable judgment was rendered (the prospect of successful appeal and steps to be taken to correct the obvious errors of the judgment)
- The same rule applies to a contractor: (Supreme Court case 2014Da31691) The owner instructed to use bricks to build a retaining wall which was quite high. The contractor carried out the work as instructed without explaining that using bricks is not appropriate when the retaining wall is high and that alternative methods should be used. After the work is completed, the retaining wall began to crack and to crumble down. The Supreme Court held that "regardless of the demand of the owner, the contractor, as a professional of civil engineering and construction, has the basic duty to make sound judgment to achieve the safety, durability and appropriateness of the retaining walls which are to be built on a slanted terrain." The contractor's defence that he merely complied with the owner's demand was rejected.

5. Mandatarius' duty to account, etc.

- Must give an account of the affairs upon mandator's request and at the end of the mandate. Art. 683
- Must hand over to the mandator what was received in the course of carrying out the mandator's affairs. Art 684
- Mandatarius may, only in unavoidable circumstances,

entrust the mandated business to a sub-mandatarius. On the other hand, mandator may authorise mandatarius to do this. Sub-mandatarius owes the duty of care directly to the mandator as well as to the mandatarius. Art. 682

6. Mandator's obligations

- Must reimburse the mandatarius' expenses which were necessary to carry out the mandate. Interest begins to accrue from the moment the expenses have actually been spent. Art 688(1). Whether the expenses were 'necessary' shall be determined in light of the duty of care. Expenses negligently spent (wasted) may not be claimed. As long as the mandatarius was not negligent, even if the expenses subsequently turn out to be unnecessary, they will still have to be reimbursed so long as the mandatarius incurred the expenses upon a *reasonable* belief that they were necessary.
- If mandatarius obligated himself in the course of carrying out the mandate, mandator shall be required to discharge such obligation on behalf of the mandatarius (upon demand of mandatarius). Instead of demanding the mandator to discharge the obligation, mandatarius may demand mandator to provide adequate security (to ensure reimbursement). Art. 688(2)
- Mandatarius may demand an advance payment of necessary expenses. Art. 687 Any surplus which is left over must be returned to mandator. Art. 684(1). If mandatarius had to rely on a judgment to claim and receive an *advance payment*, and if it turns out that the estimated expenses turn out to be inaccurate (too much or too little), what about *res judicata*?
- 93Da43873: First demand bank guarantee. If it is objectively manifest that the beneficiary's demand is abusive, the guarantor (mandatarius) has a contractual duty to refuse payment. If the guarantor nevertheless paid to the beneficiary under such circumstances, the

debtor (mandator) may refuse to reimburse the guarantor's expenses as they were negligently 'wasted'.
□□□, □□□□□ □□□□ □□□, □□□□ □29□ (2005) p. 97

- Must hold mandatarius harmless: If mandatarius, through no fault of his, sustained loss caused by a third party in the course of carrying out the mandate, the mandator must compensate (even if the mandatarius acquires a claim against the party who caused the loss). Art. 688(3). Upon compensation, the mandator may exercise the mandatarius' claim against the party who caused the loss (subrogation under Art. 481).

7. Termination at will; Art. 689

- Either party may terminate mandate provided that it was not at a moment which would adversely affect the counterpart. If, due to the timing of the termination, it caused loss to the counterpart, the loss must be compensated.
- 98Da64202: Even where a fee was agreed, mandator may terminate without having to compensate for the mandatarius' loss of the fee. Only the loss caused by the 'timing' of termination needs to be compensated. Where a fee was agreed to be paid 'upon completion of a task', the mandator may terminate before the completion of the task. In such a case, the mandatarius would lose the fee (because the task was not completed). Such termination is not necessarily a termination at a time which is disadvantageous to the mandatarius.
- 98Da47108: Mandatarius was being paid a salary and there was a covenant not to terminate the mandate for the first two years. Mandate is in the interest of mandatarius as well as mandator. Although termination is still possible, if the mandator's termination was without justifiable ground, the resultant loss to the mandatarius must be compensated.
- If mandatarius has already incurred an obligation to a

third party in order to carry out the mandate, mandator may not terminate with impunity. Termination, under such circumstances, is at a moment which would adversely affect the counterpart. Termination is possible but mandator must hold the mandatarius harmless. Incurring an obligation to a third party is already an “expense” of the mandatarius.

8. Termination by operation of law; Art. 690

- Death, bankruptcy of a party.
- Mandatarius' loss of full capacity.
- Emergency measures: Mandatarius' successor has a **duty**/right to take emergency measures until the mandator (in the case of mandator's death, his successor) can handle the business for himself. (Art 691)
- The party affected by death or bankruptcy must notify the counterpart of the termination. Until such notice is made, the counterpart may treat the mandate as valid. Art. 692 (vis-à-vis the counterpart). Also see Art. 129 (vis-à-vis third party)

9. Other relationships where mandatarius' duty of care is applicable *mutatis mutandis*

- Partner in the execution of a partnership business (Art. 707)
- Director in carrying out the company's business (Art. 382 of Commercial Code)
- Court appointed Manager of absentee's assets (Art. 24)
- Parent or guardian in managing the children's or ward's assets (Art. 919, Art. 956)
- Creditor who exercises the debtor's right via *action oblique*
- Assignor of a credit who received the payment from the debtor before the notice of assignment is served to the debtor (97Do666)
- Guarantor who provided a guarantee for a debtor upon the

10. Negotiorum Gestio

Contract for a completed piece of work

1. Consensual contract

- Where a party agrees to pay for a completed piece of work which is to be carried out by the other party (contractor).
- 94Da42976: If the contractor's own material is to be used and the completed item is 'generic' (not specifically catered for the principal), it is a contract of sale. If the completed item is specifically for the principal, then it is a contract for a completed piece of work. Contract to manufacture and supply waste water treatment facility (including evaporation tubes)
- 88Daka31866: Contract for the supply of axle housings which were to be manufactured with contractor's own material (steel shaft). Owner inspected but was unable to discover the defect. Owner sold it to a buyer, who discovered the defect and terminated the sale with a claim for damages. Owner now sues the contractor.
 - Art 667 applies. Art 580(1) does not apply (irrelevant whether the plaintiff should, or could not, have known the defect.
 - Owner has the 'right', not a 'duty' to inspect. Owner has the power to reject the work if the parties agreed that "the inspection of the owner is final."

- But contributory negligence of the owner may be taken into account.
- 1999, 1999 1999 199999 19 19, 1999999 1351, 4391

2. Sub-contracting: allowed in principle

- The manner of carrying out the work is for the contractor to decide. The owner, however, may give instructions – without impairing the contractor's independence.
- Unless otherwise agreed or the nature of the contracted work does not allow, contractor may sub-contract the work, for which the contractor remains responsible. Contractor shall be liable for sub-contractor's fault (Art. 391)
- 2001Da82545: Sub-contracting itself is not a breach.

3. Ownership of the completed piece of work

- Where the principal (project owner) provided the material, the completed item belongs to the principal. If, however, the value added by the contractor is "manifestly greater" than the cost of materials, then the contractor acquires the ownership (but has the contractual duty to hand over the completed item to the principal). Art. 259.
- 98Du16675: Building contractor who used his materials will acquire the ownership of the completed building – unless otherwise agreed between the parties.
- 97Da8601: Where the planning permission was prepared in the principal's name and it is agreed that the completed building was to be registered under the principal's name, then the ownership of the completed building vests with the principal even if the contractor used his own

building materials. The case, however, dealt with a situation where the contractor purchased the land from the land owners. The building permission was submitted in the name of the land owners and it was also agreed that the completed building would be registered under the land owners' name. But the Court interpreted that these arrangements were merely to "secure the payment of land purchase price". The registration, therefore, conveys the title of the building only to the extent necessary to secure the payment of land price. The contractor acquires the ownership of the building. As soon as the land price is paid, the contractor fully recovers the ownership.

4. Contractor's warranty liability

- Where the completed work (if the work is to be completed in stages, the completed stage) is defective, the principal may demand repair, and additionally, seek compensation for loss caused by the defect. Art. 667
- If the defect is not material AND if the cost for repair is excessive, damages only may be sought. Contractor shall not be compelled to repair in such a case (to avoid economic waste).
- Defence of simultaneous performance. Art. 667(3). In principle, the owner may withhold the entirety of payment until the defect is repaired or damage is paid. But 91Da33056 reduces the scope of defence so that the owner may withhold only the "portion" of the payment corresponding to the defect. 2001Da9304 provides a more detailed guidance for this rule: When the repair cost (or damage in lieu of repair) is relatively small compared to the owner's unpaid payment and when it is doubtful whether the owner would willingly pay even if the defect is repaired, then the contractor shall be entitled to receive the payment due minus the repair

cost; the owner may not refuse payment of the entire amount due (even if the repair has not been done).

- 2001Da9304: Where payment was to be made in stages of completion, the principal may withhold payment regardless of whether the defect was in the stage of work corresponding to the payment obligation. Defect in a previous stage of work which was discovered after the payment for that stage was fully made, can be a ground to withhold payment for the current stage of work.
- Measure of damage: (Where repair may not be compelled) the difference between the market value of the completed (stage of) work without the defect and the market value of the present work with defect. The pain and suffering caused by the defective work is special damage (contractor's foreseeability must be proven). 96Da45436
- 95Da30345: Where the repair may be compelled, the principal may elect to seek compensation instead of the repair. The actual cost of repair may be claimed. If there is other loss, that may also be claimed.
- Where the principal elects to seek compensation, can the contractor "insist" upon repair? Probably not. The contractor can limit the amount of damage award to the actual cost of repair.
- Termination: if the defect of the completed (stage of) work defeats the purpose of the contract, the principal may terminate the contract. Art. 668.
- 93Da25080: If the completed stage of work is beneficial to the principal and if it is wasteful to order restoration of the completed stage of work, the termination may not have retroactive effect. the principal must make payment *pro rata* (contract price x percentage of completion calculated in terms of the cost of carrying out the work). Also see 2000Da40995
- Where buildings and installations are "completed", the principal may not terminate the contract even if the defect is serious enough to defeat the purpose of the contract. Art. 668. While the buildings or installations

are not yet completed, the termination shall be governed by the general principle of 'materiality' of the breach. Still, however, the completed stage may not be affected by the termination. 94Da18584 and 93Da25080

- Limitation period:
 - Ground work and installations: 5 years
 - Stone, Concrete, Brick, metal or other durable structures: 10 years
 - Other works: 1 year.
 - Limitation period begins to run from the date of actual delivery or completion of work (where delivery is not necessary).
 - If the completed work is destroyed or damaged, claims must be brought within 1 year. (Art 671(2))
 - Any manner of 'demand' (including extra-judicial demand) is sufficient.
- Exclusion of warranty or reduction of limitation period is possible. However, exclusion or shortening of limitation period is ineffective with regard to defect known to the contractor (and unknown to the principal). Art 672

5. Payment for the completed work

- In cash or in kind. Payable upon completion of work and delivery, where delivery is necessary.
- Where an advance payment was agreed in order to enable the contractor to purchase materials and hire workmen, the amount shall be set off against the completed stage of work corresponding to the percentage of the given stage's progress. The principal may not set off the entirety of the advance against any given stage of work. 2001Da1386. If, for example, 30% of the contract price was paid upfront as an advance and a stage of work representing 10% of the entire work is completed, then

the principal needs to pay 7% of the contract price and the remaining 3% of the contract price can be set off against the advance payment (10% of the advance payment may be set off).

- Contractor's lien to secure payment for the completed work. Art. 320. If, however, the building was built with contractors' own materials and if there was no agreement to make it a property of the principal, then on completion of the building the contractor becomes its owner. The contractor cannot have a lien over his own property. 91Da14116
- Contractor may 'demand' the owner of the completed building to set up a hypothec to secure payment due to the contractor. The hypothec will arise only when it is registered (and the contractor may compel the owner to register the hypothec). Art. 666.

6. Principal's duty to cooperate

- Depending on the nature of work, the principal may have a contractual duty to cooperate.
- 96Da14364: Where the principal's refusal made it impossible for the contractor to complete the work, the contractor is entitled to full payment of the contract price.
- Principal does not have a duty to inspect unless explicitly agreed otherwise. Even when the parties agree that the principal must inspect, this is often interpreted to empower the principal to reject the work upon inspection.

7. Risk

- As long as it is commercial reasonable to complete the work, the contractor must complete it even if completion is disrupted for any reason. The parties usually provide

express terms to cope with force majeure and adopt a sensible solution for the contractor.

- Where the completed stage of work is preserved and only the future work is affected by unavoidable circumstances, the contractor would be entitled to the corresponding portion of the contract price.
- When the completed (stage of) work is destroyed before the delivery, or contractor's notification of completion of, the completed stage of work, contractor bears the risk (the principal is relieved of the obligation to pay the contract price)
- 91Da14116: Once the contractor informed the principal to accept the completed stage of work, subsequent demolition by a third party will not relieve the principal of the obligation to make the payment corresponding to the completed stage of work.
- When the work is completed and delivered, then the risk passes to the principal. When payment is made in respect of the completed stage of work, the risk also passes to the principal to that extent.

8. Principal's Termination at will (Art. 673)

- Principal may, at any time before the completion of the contracted work, may terminate the contract.
- Contractor's loss must be compensated. Contractor, however, must take reasonable steps to mitigate the loss.
- 2000Da37296: Upon termination by the principal, the contractor is entitled to damages (actual costs spent so far + the profit it would have enjoyed had the work been completed). If the contractor could reasonably use the resources (which were freed by the termination) to alternative contracts, or could have sold the materials (no longer needed because of the termination), the profit he could have enjoyed must be deducted from the

damages payable by the principal.

- Art 832 of Commercial Code (Termination of voyage charter)

9. Bankruptcy and termination at will

- In the event of the owner's bankruptcy, the contractor or the owner may terminate the contract and seek payment for work done. (Art 674) Neither of the parties may seek damage.
- Debtor rehabilitation and bankruptcy act, Arts. 119, 121 apply only when the contractor is bankrupt. (2001Da13624) If the contract was not completed, the trustee of the bankrupt estate of the contractor may choose whether to terminate or to continue with the contract. If the bankrupt estate of the contractor terminates the contract, the owner may claim damage.

Lease

1. General features

- Consensual contract whereby the lessor agrees to make available the object of lease for the lessee to use, and the lessee agrees to pay rent.
- Maximum period of lease? Art. 651(1) (which stipulated that the lease period may not exceed 20 years) was declared to be an unconstitutional restriction of freedom of contract. Constitutional Court 2011HeonBa234 Decision, 26 Dec 2013
- Minimum period of lease:
 - Civil Code has no provision regarding minimum

period.

- Residential Tenancy Protection Act (2 years) / Commercial Tenancy Protection Act (1 year): but the tenant may insist upon a shorter period.
- Commercial Tenant's right of renewal: exercisable for up to 10 years. (Art. 10 of Commercial Tenancy Act)
- Residential Tenant's right of renewal: exercisable once, for 2 years. (Art 6-3 of Residential Tenancy Protection Act)

2. Lessor's obligations

- to make available and to deliver the object of lease
 - 93Da37977: The lessor may lose title but the contract of lease is still binding. If the lessor becomes unable, in reality, to make available for the lessee to use the thing, then lessor is liable for breach of contract.
 - 94Da54641: After the lease contract, it turns out that the object of lease belongs to a third party. The lessee may not, for that reason alone, terminate the lease. Lessee is still bound by the lease. Only when the lessor is no longer able, in reality, to make the object available for the lessee, can the lessee terminate the lease and refuse to pay rent.
- to maintain the object of lease in good repair (Art. 623)
 - lessee has an obligation to 'cooperate' (Art. 624)
 - lessor has obligation to repair even if the damage was caused by lessee (in which case, the lessee shall be liable for the damage if it was due to lessee's fault)
 - separate agreement whereby lessee undertakes to conduct the repair at lessee's own expense: if the agreement is unclear, the extent of lessee's

repair is limited to ordinary level of maintenance (94Da34692: agreement – Plaintiff is a lessee operating a guest house. The building also has a public bath on the ground floor which was leased to another lessee. “ boiler repair, plumbing work, etc. ” – construed to exclude major repair (changing the boiler or replacing the plumbing work), which remains as the lessor’s obligation)

- to recover the possession of the object in the event of a third party’s intrusion or obstruction
- to reimburse lessee’s expenses (Art. 626)
 - expenses which were necessary to maintain in good repair, to recover from an intruder, to discharge burdens or imposts affecting the object of lease (the reimbursement must be done upon demand; lessee has lien over the object to secure reimbursement from the lessor)
 - expenses which resulted in ‘objective’ increase of value of the object (lessee may demand reimbursement only at the end of lease, and only to the extent of objective increase of value which remains at the end of the lease; lessee may have lien over the object but the court may cancel the lien upon application of the lessor – Art. 626(2)). But when the lessee has the duty to restore, lessee may not claim reimbursements for any increase of value. The lessee has no right to improve the object of lease.
 - Reimbursement claims must be made within 6 months from the return of the object to the lessor. Arts. 654, 617
 - Lessee’s reimbursement claims in respect of object of lease can only be made against the lessor. Lessee may not rely on Art 203 (which applies to a possessor who had spent expenses without any contractual ground, believing that it was his own

property). 2001Da65751.

- to ensure health & safety ?
 - Generally, no: 99Da10004 (it is lessee's responsibility to ensure health & safety for himself; poor security of the house and, as a result, break-in occurred during the period of lease)
 - Hotel, inn or other lodging: 2000Da38718 (the lessor has the obligation to ensure health & safety of the guests; the lessee (ie. guest) having no control over the property)
 - Lessor's warranty liability to ensure that the object is not defective (fit for the purpose)? Art. 567. Ex.: Grazing land was leased. Toxic weeds killed cattle. Lessor's liability? Only if the lessor had known about it. Otherwise, rent is exempt.) Jar was leased. Because of a crack, the wine was ruined. Lessor held liable regardless of knowledge. Dig.19.2.19.1 Bed bugs...

3. Lessee's obligations

- to pay rent
 - reduction/augmentation *in futurum* on the ground of change of economic circumstances (Art. 628): agreement not to increase or decrease rent shall be disregarded (96Da34061)
 - reduction on the ground of inability to use (a portion of) the object due to loss, damage or other reasons which are not due to the lessee's fault (Art. 627)
 - 92Da31163: agreement to authorise the lessor unilaterally to augment rent is void as it is against Art. 652. What about an agreement to authorise the lessee to reduce the rent unilaterally? Agreement not to increase rent, ever? (96Da34061 Dramatic and unforeseen change of

circumstances would allow the increase or reduction of rent notwithstanding the agreement.)

- Unless otherwise agreed, rent is payable at the end of the month (movables, buildings, residential land), at the end of the year (land leased for all other purposes) or without delay after harvest (for those which bear fruits). Art. 633 (payment in arrears, rather than in advance)
- default of rent payment (for buildings or installations): If the amount of rent in arrears reaches two installments' worth of periodic rent payment, the lessor is entitled to terminate the lease and repossess the buildings or installations. Art. 640.
- if lessee was replaced with lessor's approval, the new lessee's default of rent must amount to the required sum. 2008Da3022. If the lessee was replaced without lessor's approval, then the previous lessee's default shall be counted as well. (99Da17142; the case was about superficies but lease should be no different in this respect)
- if lease of land was to own a building or installation thereupon, and the building or installation is securing a debt, the lessor must notify the creditor whose credit is secured by the building or the installation (so as to allow the creditor to take necessary steps – to pay rent – to avoid demolition) Art. 642
- If the lessor of a land, on the basis of a claim arising from the lease, attaches lessee's movables affixed or appurtenant to the land, the lessor shall have a lien over the attached movables. The same applies to fruits attached by the lessor. Art. 648
- If the lessor of a building or installation, on the basis of a claim arising from the lease, attaches lessee's movables affixed to the building

- If the lessor of a land, on the basis of his rent claim, attaches the lessee's building which is on the land, it shall have the effect of a hypothec, to the extent of the last two years' worth of rent. Art. 649

- Art. 374.

- **Duty to restore** the object of lease to its original condition.

- Art. 654, 615
- 2002Da38828: Even where the contract stipulated that the lessee shall “restore the leased property to its original condition and return it”, the Supreme Court interpreted that as the lessee agreed to maintain the property (including tax payment) at lessee’s expenses, the parties’ true intent was that in return for the lessee’s waiver of reimbursement for **necessary** expenses, the lessor also relieved the lessee of the duty to restore (“**賃借物の返却（原状回復）義務は、賃借人が物件の維持管理に同意したことを前提として、必要経費を負担する旨の合意がある限り、免除される。**”)

- 2006Da39720: However, an agreement that the lessee shall not claim reimbursement for **improvement** would rather confirm the lessee's duty to restore. The lessee's agreement not to claim reimbursement for improvement shall not be interpreted as absolving the lessee's duty to restore.
- 95Da12927: Where the parties explicitly agreed upon the lessee's duty to restore the building to its original state, the court interpreted that there is an implied agreement that lessee shall not seek reimbursement for improvement of the object of lease. As the lessee must put back the building to its original condition, lessee may not seek reimbursement of expenses spent to 'change' the building.
- 2002Da42278: Even if the lease was terminated because of the lessor's wrongful breach, the lessee is not absolved from the duty to restore the object of lease to its original condition.
- Does an agreement to waive the lessee's duty to restore imply a lessor's waiver of claims in respect of damage negligently caused by the lessee? Does the agreement not to seek restoration mean that the lessee is relieved of the duty of care?
- 97Na15953 (affirmed; 98Da6497): Public bath was leased. Parties agreed that the lessee shall undertake all repair works at his own expenses. The court interpreted that this implies an agreement to waive the duty to restore in exchange for lessee's undertaking to bear the maintenance expenses. But the court held that the lessee's duty of care remains unaffected. The lessee negligently caused damage and was ordered to compensate.

In short:

- If the lessee undertook to meet the maintenance expenses, lessor may not demand restoration (lessee has no duty to restore). 2002Da38828
- Lessee's undertaking not to claim reimbursement in respect of the improvement expenses does not absolve the lessee from the duty to restore. 2006Da39720
- If duty to restore is explicitly agreed, no reimbursement for improvement expenses. 95Da12927
- In the absence of an explicit agreement, the lessee's duty to restore would prevail (the lessee would not be able to claim for reimbursement in respect of 'improvement' of the object of lease).
- Agreement relieving the lessee's **duty to restore** does not mean that the lessee is relieved of the **duty of care**. Any damage caused intentionally or negligently must be compensated by the lessee.
- See, *SOFA* [4] [4] [4] [4], [26] (2004) pp. 48-58
Art. 4(1) and Art. 4(2) of SOFA between ROK and US
1. The Government of the United States is not obliged, when it returns facilities and areas to the Government of the Republic of Korea on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate the Government of the Republic of Korea in lieu of such restoration.
2. The Government of the Republic of Korea is not obliged to make any compensation to the Government of the United States for any improvements made in facilities and areas or for the buildings and structures left thereon on the expiration of this Agreement or the earlier return of the facilities and areas.

4. Fixtures introduced by lessee (Art 646)

- Fixtures: an object, neither inseparable nor detached, which enhances the amenities of the object of lease in an 'objective' manner (regardless of particular uses of the object of lease)
- Fixtures introduced by lessee upon lessor's approval, or purchased by lessee from the lessor: at the end of the lease, lessee may exercise a put option.
- Unauthorized fixtures introduced by lessee: duty to restore (no right to claim reimbursement)
- If an object is inseparable (economically impracticable to separate), it becomes part of the main object?
 - Art. 256 provides that if, in the absence of a contract, A introduced something and that became one with the thing owned by B, B may not demand A to remove it (as it would lead to wasteful operation). B will have to pay an amount (for the unjust enrichment) to A in respect of the inseparable portion which increases the value of B's thing.
 - The proviso of Art 256 stipulates: "However, this does not apply to fixtures (物件) introduced upon another person's title (legal ground to introduce the fixtures)."
 - But if the introduced fixtures are impossible to detach (i.e., they cannot have an independent use, cannot be detached without being destroyed), then the result must be concluded as one thing even if the addition was on the ground of a title. 民法 1975. 4. 8 第 74-1743 条. ([第 256 条](#) 关于 物件 附合 的规定 不适用于 承租人 基于 租赁 关系 而 在 出租人 所有 之物 上 增设 的 附合物 的情形。) But, (where the lessee has a duty to restore) the lessor may demand the lessee to restore the object of lease (by removing the introduced, inseparable

fixtures).

- 英國最高法院在 *Elitestone Ltd v MGN Ltd* (1981) 案中，裁定在土地上建造的臨時房屋，如果其目的是為了永久使用，則屬於不動產。該案涉及一個在土地上建造的臨時房屋，該房屋被用作一個臨時住所。法院認為，該房屋是永久性的，因此屬於不動產。該案的判決被廣泛引用，並成為判斷不動產與動產之間區別的重要標準。該案被引用於 [\[1985\] 12. 24. \[1984\] 2428 \[1985\] 2008. 5. 8. \[2007\] 36933, 36940 \[1985\] 1 \[1985\] 1](#)).
- Fact specific assessments:
 - An oil tank buried under the ground of a petrol station is found to have become one with the land. (unclear whether the burial of the tank was authorised by the land owner. 94Da6345. As long as it became one with the land, i.e., inseparable, then accession occurs). In that case, it is not a fixture. The tank is owned by the land owner. The question of lessee's duty to restore/right to seek reimbursement may be at issue. If the lessor authorised the introduction of an inseparable object, can it be interpreted that the lessor has waived the right to demand restoration?
 - But, depending on the particular circumstances, the underground oil tank may be ruled as not acceded to the land and, as such, will be treated as a "fixture" (英國) and also appurtenance (英國) which is owned by the person who introduced it (it remains as the lessee's property). If it was introduced upon lessor's authorisation, then the lessee may demand the lessor to purchase it as a fixture under Art 646. In 2009Da76546, the court concluded that, in this particular case, the buried oil tank did not become 'inseparable' and therefore did not become one with the land.
- Detached object is not a fixture even if its purpose is to enhance the amenities of the object of lease. Lessee

need not seek lessor's approval for introducing such an object.

- 93Da25738: A leased building was refurbished by the lessee as a restaurant. Lessee fitted the heating installation, electricity, door frames, interior decoration and painting. It was held that these do not increase 'objective' value of the building as the refurbishment was only for the lessee's line of business. Lessee's claim of reimbursement of expenses for improvement failed. The annexed objects are not fixtures either.
- 94Da20389: Shop signs do not result in 'objective' increase of the building's value.
- If the lease was terminated because of lessee's breach, lessee shall not have the put option.
- If the lessee notifies the exercise of put option, lessee may refuse to deliver the fixture (and the object of lease, to the extent necessary to preserve the lessee's right to refuse delivery of the fixture) until the receipt of the price (amount to be determined by the court if the parties could not agree upon the price).
- 95Da12927: Where lease was lawfully transferred to a new lessee, the new lessee may have the put option (against the current lessor) unless the parties agreed otherwise.

5. Buildings, installations and trees on a leased land (Art. 643)

- Upon termination of the lease, the owner of buildings, etc. may exercise put option to the lessor of the land (even if construction was not authorized by the lessor, lessee is entitled to a put option **provided** that the building is not against the purpose of the lease of the land and if the building is not unusually expensive; 93Da34589) What about the lessee's duty to restore?
- Even if the building is subject to a hypothec, the value of the building must be assessed without taking into

account of the amount of debt secured with the hypothec. But the lessor may withhold payment to the lessee in respect of the amount secured by the hypothec until the hypothec is cancelled. 2007Da4356

- 93Da42634: If part of the building is on a land which is not leased by the lessor, lessee's put option is permissible only when the portion which is on the leased land is capable of being owned as a separate property. Lessor shall not be forced to buy the portion which does not lie on the land he leased.

6. Lease Desposit v. Shop Premium

- Upon termination of lease, lessor must return it to lessee after deducting any sum the lessee owed to the lessor.
- During the course of the lease, lessor may decide whether to deduct any sum owed to the lessor which has fallen due and in arrears. During the course of the lease, lessee may not demand that rent be set off against the deposit.
- 2002Da52657: Lessor who is entitled to demand restoration, but chooses not to exercise it, may not deduct the cost of restoration from the lease deposit. (But lessor may freely benefit from it as the lessor has no duty to demolish it. Lessor need not compensate (disgorge the 'benefit' to) the lessee who failed to fulfill the duty to restore.)
- If the object of lease is transferred to a new owner, and if the new owner is deemed to be the lessor (because the lessee's lease is protected), then the new owner/lessor is liable to return the deposit, with necessary deduction, of course, if any. The old lessor (who transferred the title to the new owner) is not liable to return the deposit. 96Da38216 (Lessee himself was the successful bidder and bought the house.) However, 2000Da69026 rules that the old lessor is still

liable to return the deposit (unless the lessee releases him; probably the lease was not a protected lease).

- Shop premium: it represents the 'commercial value' of a lease contract; it is not part of the lease. Lessee pays the premium (either to the lessor or to the lessee who transfers the lease to the new lessee) in order to become the lessee. It is a price (paid to be a lessee), hence not returnable. Lessor/former lessee is not liable to return it as the counter-performance consists in allowing the lessee to be the lessee.
- In return for a payment of shop premium, the lessee acquires, unless otherwise agreed:
 - a guaranty to have the lease for an agreed period of time
 - a right to transfer the lease (or sub-lease) to a new lessee (who is acceptable to the lessor; lessor may not unreasonably withhold authorisation for transfer of lease or sub-lease)
 - an expectation that renewal of lease shall not be unreasonably refused?
- If the lessor violates these rights or expectations of the lessee, lessor is liable to return the shop premium (or a portion thereof). 2002Da25013 (where lessor received the shop premium from the lessee), 2000Da4517

7. Assignment of lease, Sub-Lease

Assignment of lease

- In principle, assignment of lease requires lessor's approval. Art. 629
 - Unauthorized assignment constitutes lessee's breach. If it is material (when the assignee actually possesses the object), lessor may terminate the lease.
 - Under special circumstances, unauthorized assignment is permitted. 92Da45308: Assignee, who was lessee's wife, was already residing with the

lessee at the time the lease contract was signed. After divorce and re-marriage with the same person, the lease was assigned to the wife. Unauthorized assignment is permitted as the relationship of trust between the lessor and lessee is not altered.

- 92Da24950: Building together with the lease of land thereunder were subject to a hypothec. Creditor exercised the force sale. The purchaser acquired the title to the building. What about the lease of land thereunder? Art. 622(1) merely provides that if the registered owner of building has a lease of land thereunder, the purchaser of land shall be deemed to be the lessor (new owner of the land must accept the existing lease). In this case, however, the question was: can the new owner of the building claim the benefit of the lease against the existing land owner? No, but if the new owner of the building proves that the transfer of lease is not against the purpose of the lease, the land owner (lessor) may not terminate the lease merely because of the change of building ownership (change of the lessee).
- Upon authorized assignment, the assignor is no longer a party, no longer liable on contract of lease. But the existing liabilities remain with the assignor, unless otherwise agreed.
- Unless otherwise agreed, lease deposit must be returned to the assignor when the object of lease is delivered from the assignor to the assignee? Extremely unlikely in reality. When lease is assigned, the claim to receive deposit would also be assigned.
- 96Da17202: The case is special because lessee's claim to receive deposit was attached by a creditor before the assignment of lease.

Sub-lease

- Contract is between the lessee and the sub-lessee, but direct obligation arises between lessor and sub-lessee.
 - Sub-lessee has obligation to lessor (rent, safekeep, etc.) Art. 630
 - Lessor may not deny lease to sub-lessee on the basis of an agreed termination of the lease between lessor and lessee. Art. 631
- Lessee is not absolved of contractual obligations.

8. Protection of tenancy: Dwelling house / Commercial space

9. 'Rent free' lease

Loan

1. General features

- Money or other consumables such as cereals
- Upon delivery, the object of loan becomes the property of the borrower, who has an obligation to return the same kind/quantity/quality together with interest (if agreed).

2. Obligation to lend?

- If the parties agreed to lend, perhaps yes. However:
- If the prospective borrower or prospective lender becomes bankrupt, the agreement to lend automatically becomes void. Art. 599.
- If the party's financial position or credit worthiness changes significantly, is the agreement to lend still binding?
- If the agreed loan is to be interest free, prospective

lender or prospective borrower may, at any time before the loan, terminate at will the agreement to lend. If, however, the termination causes loss to the counterpart, it must be compensated. Art. 601

- Promise to lend in exchange for promise to pay interest: a synallagmatic contract

3. Obligation to repay (principal/interest)

- Once the loan is made, the obligation to repay arises. Lending can be done without a contract (obligation) to lend.
- The obligation to pay interest arises **only** when an agreement was made. However,
 - If the parties agreed upon an interest without specifying the rate of interest, 5% p.a. rate of interest shall apply. Art. 379.
 - Between merchants, 6% per annum interest is payable by default (i.e., when there was no 'express' agreement on interest). Arts. 54, 55 of Commercial Code
 - After the due date, **delay damage** (at the statutory rate of interest or, if a higher rate of interest is agreed upon, at the agreed rate of interest) must be paid (even for an interest-free loan). Art 397.
 - If a lawsuit (or an equivalent proceeding) is brought to enforce payment of a sum of money, a special statutory rate (12% p.a.; as from 1 June 2019) of interest applies to the delay damage (□□□ □) from the date following the day the complaint was served. If the court finds that there were reasonably arguable (but ultimately unsuccessful) grounds to dispute the claim, the statutory rate of interest applies from the date the judgment (including the award of a tribunal) was rendered.

Art. 3, Special Act to Expedite Litigation Proceedings, etc. (대한민국 헌법 제119조 제1항 제2호(헌법 제119조 제1항 제2호). 제119조 제1항 제2호, 대한민국 헌법 제119조 제1항 제2호 제119조 제1항 제2호)

- After the date of judgment (of the court having fact-finding jurisdiction), there is no exception whatsoever to the higher rate of interest under the Special Act. (Supreme Court Judgment 2017Da206922, dated 18 July 2017; Supreme Court Judgment 86Daka2768, dated 23 February 1988)
 - 2016Da17668: Restoration upon termination of a contract: Interest payable under Art 548(2) is **not in the nature of delay damage**, but unjust enrichment. Interest under Art 548(2) is payable even if the party is not in delay (due to a defence of simultaneous performance). The higher rate of interest under the Special Act does not apply (while the obligation is not in delay due to the defence of simultaneous performance).
 - 2001Da76298: However, if the restoration obligation is in delay, the higher rate of interest is applicable (because the interest is then in the nature of delay damage as well).
 - The statutory rate of interest under the Special Act to Expedite Litigation Proceedings, etc. forms part of the substantive law of Korea. [2009Da77754](#). If the governing law is not Korean law, a Korea court may not apply the said statutory rate.
 - Where an arbitral award applies the statutory rate of interest under the Special Act, the award is not against public policy, and thus may not be set aside for that reason. 2004Da67264
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- If the object of loan was defective (in the case of consumables) (Art. 602),
 - the borrower may repay the value of the defective

things, if the loan was interest free.

- the borrower may seek damages or replacement, if the loan was at an agreed interest or if the lender knew about the defect (regardless of whether the loan was interest free).
- If the borrower was provided with negotiable instruments or other goods in lieu of the agreed sum of money, the obligation to repay shall be determined solely on basis of the value of the goods/instruments at the time of delivery (the agreed repayment amount shall be disregarded). Art. 606.
- If interest was agreed, it shall be calculated from the moment the loan was actually made or tendered (if the borrower delayed the receipt due to its fault).
- Art 397: Damage in respect of non-performance of an obligation to pay a sum of money shall be limited to delay damage (to be calculated at the statutory interest rate or, if the agreed interest rate is higher, at the agreed interest rate). However, "special loss" may be claimable. 91Da25369. If the agreed interest rate is lower than the statutory rate (5% or 6%), then the delay damage shall be at the statutory interest rate. 2009Da85342

4. "Option" as to accord and satisfaction (Art. 607)

- Applicable only to 'prior' arrangement (an option) for accord and satisfaction which was made before the debt falls due (or before the loan was actually made? Probably not.)
 - 91Da25574: If the debt has already fallen due, the accord and satisfaction between the debtor and the creditor is not regulated by Art. 607
 - 68Da1468: If a prior arrangement for accord and satisfaction was made to settle the account of a

mutual-aid scheme (which was distinct from a loan), Art. 607 does not apply.

- The 'prior' arrangement for accord and satisfaction in respect of a loan is invalid to the extent that the value of the substitute property at the time of the arrangement exceeds the amount of the principal and interest at the repayment date.
 - The debtor may,
 - before the accord is satisfied, repay the debt disregarding the prior arrangement for accord and satisfaction
 - after the accord and satisfaction, claim the excess amount (difference between the value of the thing at the time of the arrangement and the repayment amount of the principal and interest) from the creditor
 - If the substitute is real estate, motor vehicle or heavy plant and if the creditor's option to acquire it as accord and satisfaction is registered, the [Act Regarding Registration of Option to Secure Debts 1983](#) applies.
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Hire Purchase

1. Seller remains the owner; the purchaser becomes the hirer.

- Inapplicable to immovables, motor vehicles or heavy plant: title belongs to the registered owner regardless of the parties' agreement. 2009Do5064
- Mainly for movables: Unless the third party purchaser in good faith can satisfy Art. 249 (in which case, the

purchaser would acquire a clean title), the owner can recover the movables.

- 99Da30534: Even if the third party had no knowledge that the title was reserved to the seller; even for sale of unascertained goods (steel, as building material).
- 2009Da93671: Even if the purchase price was nearly paid...
- 2009Da15602: Steel was sold with title reserved to the seller. Purchaser used the steel to build a building of a third party. Third party did not know that the title was reserved. The seller demanded unjust enrichment (in respect of the steel, which now forms part of the building) from the third party. Seller's claim against the third party failed.
- Can the third party purchaser pay up the remainder of the original purchase price to the original seller and acquire title? (ie., can the purchaser transfer its 'conditional title' to the third party w/o seller's authorisation?)

2. Seller's right

- Repossession upon purchaser's default
- In the event of purchaser's bankruptcy, the seller can recover the thing as it does not belong to, and must be separated from, the bankruptcy estate.
- If the purchaser is subject to 'official' auction to discharge a judgment debt, the seller may file a claim to separate the thing from the debtor's (purchaser's) estate.
- Re-selling without assigning the credit?

3. Purchaser's 'right'

- Upon full payment of price, the purchaser acquires title.

- While the price has not been fully paid, the thing may be sold to a sub-purchaser with the knowledge of the hire purchase. The sub-purchaser becomes the owner upon full payment of the price.

4. Passing of risk

- Risk passes with possession