

Mistake

1. 'Material elements' of a contract

If there was a mistake as to 'material elements' of a contract, the party who made the mistake may rescind the contract. However, if the other party proves that the mistake was due to gross negligence of the mistaken party, rescission is not allowed. Art. 109(1). Korean law does not distinguish between mutual mistake and unilateral mistake.

Whether the mistake goes to the 'material' elements of a contract will be assessed using an 'objective' test. The mistake must be serious enough so that a reasonable person would not have agreed to the present terms had he not been mistaken. It is not enough that the particular party in question would not have entered into the contract under the same terms had he not been mistaken.

2005Da6228

Credit Guarantee Fund provided a guarantee for a company believing that its owner was A, who had a clean credit record. In fact, the company was owned by B, who had a poor credit rating. Upon default of the company, its creditor demanded payment from the Credit Guarantee Fund. The Fund may rescind the guarantee because the credit-worthiness of the debtor company is a critically important prerequisite for the guarantee. It is a material element of the guarantee contract.

2001Da36450

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○○○○ ○○○○ ○○ ○○ ○ ○○○ ○○○ ○○○○○ ○○○○○ ○○ ○○○ ○○○○○ ○○○○ ○○○○

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Where mistake was provoked by the counterpart, the 'materiality' is recognised easily.

Supreme Court case 69Nu83: the official who made the decision to sell a plot of land held a false belief that the land in question has not yet been sold. But the mistake was provoked by the purchaser who applied to purchase the land. The Supreme Court ruled that although the official's mistake was not about the sale of the land itself, but about the decision-making process or the motivating circumstances of the sale, "since the mistake was wrongfully provoked by [the purchaser], the latter's purchase does not deserve legal protection and the [seller] is entitled to rescind the contract."

3. Gross Negligence

Rescission is not allowed if it is shown that the mistake was due to gross negligence of the mistaken party.

- 92Da38881: where the purchaser requested the seller to confirm whether it is possible to build a factory on the land in question. The seller expressly refused to provide any confirmation. Thus, the buyer's mistaken belief (that a factory can be built on the land) was

4. Rescission

The mistaken party may, as a matter of its legal right, rescind the contract *ab initio*. Once the exercise of the right to rescission is notified to the other party, the contract shall be deemed void from the beginning. Art. 141. Thus, the dispute usually revolves around whether the right to rescission had indeed accrued to the mistaken party (whether the purported rescission was indeed a valid exercise of right). The Korean court does not recognise a distinction between law and equity. Rescission is not a discretionary remedy. The judgment is declaratory in nature: confirming that the rescission was indeed valid or that the rescission was not valid and the contract remains in full force.

Upon valid rescission of a contract, the parties shall be required to effect *restitutio in integrum*. For example, thing sold and delivered must be returned; monies received must be repaid. The parties shall be deemed to be possessors in good faith until they were made aware of the exercise of rescission. If the validity of rescission is contested and a judgment affirming the rescission was subsequently made, the contesting party shall be deemed to have been a bad faith possessor as from the moment the lawsuit was lodged. Fairness dictates that the other party must also be treated likewise. Art. 749. 94Da51253, 92Da45025 (Changwon City Case)

A bad faith possessor must pay interest on the money received and compensate for any loss incurred. Also, a bad faith possessor has a duty of care in respect of the thing in his possession. Art. 202. A good faith possessor has only to return the thing as it is and shall not be required to compensate for damage caused to the thing while it was in his possession. Art. 748.

cf.) (Unlike rescission) Upon termination on the basis of a party's material breach (□□ □□), however, each party is required to pay interest from the day it received the money

(regardless of good faith or bad faith). Art. 548(2) The party who has been using the thing must return (disgorge) the benefit of using the thing as well (97Da30066).

The different scopes of restitution following a rescission on the one hand and an exercise of the statutory right of termination on the other, is perhaps due to the element of 'blame' which is relevant to statutory right of termination as it is exercisable upon the other party's material breach of contract. In the event of a contractual right of termination, Article 548(2) does not apply. Payment of interests and disgorgement of the benefit should be determined by agreement of the parties and, failing that, the rules of restitutio should apply (i.e., payment of interests and disgorgement of the benefit of using the thing should be determined based on good faith or bad faith of the possessor).

It is not in the nature of damage. It is return of unjust enrichment. (□□□□ □□ □□ □□ □□)

Termination of a contract does not preclude rescission. Even if the contract was terminated on the ground of a breach, the mistaken party may rescind it and avoid the consequences of his breach. 95Da24982

Even if a party could have resorted to remedies in respect of a breach of warranty (termination and damages), that does not preclude the remedy of rescission on the ground of a material mistake. 2015Da78703

Protection of a third party in good faith:

Limits to the exercise of right to rescission

Rescission must be done within three years

Good faith

94Da44620 (seller was mistaken as to whether the buyer was a natural person or a corporate person. At the time of the

conclusion of the contract, the mistake would have a significant impact on tax. But the relevant regulation was changed and there came to be no difference whether the buyer was a natural person or a corporate person. The rescission in this case was not allowed as it was against good faith.)

4287Minsang77 100 times

93Da5871 10 times, 7 years

Ratification

Destruction 553

4. Settlement

5. Procedural actions

2007Da2848 Withdrawal of an appeal. Fraud does not apply. (appellant withdrew the appeal relying on a settlement agreement. When the respondent did not honor the settlement terms, the appellant attempted to 'rescind' the withdrawal of the appeal.)

95Da11740 Withdrawal of an action. Mistake does not apply. (An attorney representing the appellant instructed his assistant to hand in a letter of resignation. The assistant misunderstood and submitted an application to withdraw the appeal.)