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*
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> *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.*
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> *2001Da36450*
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> 공사도급계약과 관련하여 체결되는 이행(계약)보증보험계약이나 지급계약보증보험에 있어 그 보험사고에 해당하는 수급인의 채무불이행이 있는지 여부는 그 보험계약의 대상으로 약정된 도급공사의 공사금액, 공사내용 및 공사기간과 지급된 선급금 등을 기준으로 판정하여야 하므로, 이러한 보증보험계약에 있어 공사계약 체결일이나 실제 착공일, 공사기간도 공사대금 등과 함께 그 계약상 중요한 사항으로서 수급인측에서 이를 허위로 고지함으로 말미암아 보험자가

그 실제 공사의 진행상황을 알지 못한 채 보증보험계약을 체결한 경우에는 이는 법률행위의 중요한 부분에 관한 착오로 인한 것으로서 민법의 일반원칙에 따라 보험자가 그 보험계약을 취소할 수 있다.

2006Da41457

착오가 법률행위 내용의 중요 부분에 있다고 하기 위하여는 표의자에 의하여 추구된 목적을 고려하여 합리적으로 판단하여 볼 때 표시와 의사의 불일치가 객관적으로 현저하여야 하고, 만일 그 착오로 인하여 표의자가 무슨 경제적인 불이익을 입은 것이 아니라면 이를 법률행위 내용의 중요 부분의 착오라고 할 수 없다.

96Da26657

고려청자로 알고 매수한 도자기가 진품이 아닌 것으로 밝혀진 경우, 매수인이 도자기를 매수하면서 자신의 골동품 식별 능력과 매매를 소개한 자를 과신한 나머지 고려청자 진품이라고 믿고 소장자를 만나 그 출처를 물어 보지 아니하고 전문적 감정인의 감정을 거치지 아니한 채 그 도자기를 고가로 매수하고 만일 고려청자가 아닐 경우를 대비하여 필요한 조치를 강구하지 아니한 잘못이 있다고 하더라도 , 그와 같은 사정만으로는 매수인이 매매계약 체결시 요구되는 통상의 주의의무를 현저하게 결여하였다고 보기는 어렵다

2. Mistake as to ‘motivating circumstances’ of a contract

Funding arrangements, assessment of financial and business risk of the contract, prospect for profitability of the contract do not normally form part of ‘elements’ of a contract. They may have ‘motivated’ the parties to enter into the agreement; they may have been important ‘reasons’ for concluding the contract. But they do not form part of the contract itself.

Mistake as to motivating circumstances would not, in principle, provide a ground to rescind the contract. However, the court has allowed rescission on the ground of a mistake as to motivating circumstances if the motives were communicated to the other party in such a manner as to incorporate them into the contract. While an agreement to incorporate them into the contract is not necessary, the communicated motives must be material enough so that a reasonable person would not have entered into the contract under the same terms if there was no mistake as to those motivating circumstances. The court does

not always seem to maintain a sharp distinction between a mistake of present facts and inaccurate expectation of some future events.

2000Da12259

The purchaser was informed that about 4% of the plot of land in question would be subjected to eminent domain. Relying on this information, he decided to purchase the plot as he thought the remaining plot would be sufficient to build a dwelling house on it. He was allowed to rescind the contract when 30% of the land subsequently became subject to compulsory sale in order to make a public road. The court held that the motives for purchasing the land were communicated to the seller during the negotiation and that the motives were material enough so that a reasonable purchaser would not have entered into the contract under the same terms had he not been mistaken.

2002Na7701 Future prediction went wrong. No mistake. 착오가 있다고 하려면 법률행위를 할 당시에 실제로 없는 사실을 있는 사실로 잘못 깨닫거나 아니면 실제로 있는 사실을 없는 것으로 잘못 생각하듯이 표의자의 인식과 그 대조사실이 어긋나는 경우라야 할 것이므로, 표의자가 행위를 할 당시에 장래에 있을 어떤 사항의 발생이 미필적임을 알아 그 발생을 예기한 데 지나지 않는 경우는 표의자의 심리상태에 인식과 대조에 불일치가 있다고 할 수 없어 착오로 다룰 수는 없다 *(affirmed 2003Da38221)*
(Similar position is expounded in Amalgamated Investment & Property Co. Ltd v. Walker & Sons Ltd. [1977] 1 W.L.R. 164.)

2006Da15755 distinguishes mistake of the then existing facts from a future prediction gone wrong (매매계약 당시 장차 도시계획이 변경되어 공동주택, 호텔 등의 신축에 대한 인 · 허가를 받을 수 있을 것이라고 생각하였으나 그 후 생각대로 되지 않은 경우, 이는 법률행위 당시를 기준으로 장래의 미필적 사실의 발생에 대한 기대나 예상이 빗나간 것에 불과할 뿐 착오라고 할 수는 없다)

However, the court does not always seem to place much weight on the distinction between mistake of law and mistake of fact.

91DA11308

The claimant had purchased a building with a misunderstanding that the relevant council regulations would allow the owner of the building to purchase the ground from the city council (in Korean law of property, a building is a separate property from the land on which it stands). The claimant could rescind the building purchase agreement when it turned out that he could not purchase the land. The court found that the reasons for purchasing the building were communicated to the seller of the building at the time of the agreement. Although they were not written down, the motives were material enough to allow rescission.

93DA24810

The claimant had sold a building at a price which purported to include the amount of capital gains tax payable by the seller. The estimate for the capital gains tax was worked out by the purchaser and the seller was informed of this calculation. When the Tax Authority finally levied the capital gains tax, it turned out to be much higher than the parties' estimate. The seller was allowed to rescind the sale contract.

If the mistake was provoked by the other party, the court tend to allow rescission upon a more lenient standard. (For a comparable approach in the common law, see *Scriven Bros. v. Hindley & Co.* [1913] 3 K.B. 564.)

Seoul District Court (Appellate Division) 99Na77808

이 사건 매매계약 체결 당시 수분양자인 원고로서는 위와 같은 피고측으로부터의 중도금대출이라는 동기의 제공이 없었더라면 단기간 내에 거액의 중도금을 조달한 자력이 없어 이 사건 매매계약의 체결에 나아가지 아니하였을 것이나 피고들에 의하여 유발된 위와 같은 동기의 착오로 인하여 이 사건 매매계약을 체결하였다고 할 것이므로 그 동기는 법률행위의 중요부분에 해당한다

Supreme Court 97Da26210

건물에 대한 매매계약 체결 직후 건물이 건축선을 침범하여 건축된 사실을 알았으나 매도인이 법률전문가의 자문에

의하면 준공검사가 난 건물이므로 행정소송을 통해 구청장의 철거 지시를 취소할 수 있다고 하여 매수인이 그 말을 믿고 매매계약을 해제하지 않고 대금지급의무를 이행한 경우 *… [At the time of the contract, the purchaser did not realise that a portion of the building was situated beyond the boundary. He was mistaken. He discovered the true circumstances afterwards. But he paid the price knowing the fact. In such a case, the payment would normally be regarded as ratification. In the present case, however, the payment (which would otherwise have been treated as ratification) was actually made under the mistaken belief (provoked by the other party) that the offending portion of the building would not have to be torn down. The payment therefore shall not be treated as ratification.*

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

entirely ‘self-induced’ in the sense that the seller did not at all contributed to or brought about the buyer’s mistake.

- 2011Da106976: Purchaser (a construction company) rescinded the sale contract in respect of a portion of the land which turned out to be a forest land which is not buildable. The purchaser checked the certificate of land use planning (토지이용계획확인서), but did not make further inquiry into the detailed plans for the use of forest land (산지이용구분도). Purchaser erroneously thought that the land in question was buildable. In truth, it was not. Purchaser was allowed to rescind the sale contract.
- 동기의 착오가 법률행위의 내용의 중요부분의 착오에 해당함을 이유로 표의자가 법률행위를 취소하려면 그 동기를 당해 의사표시의 내용으로 삼을 것을 상대방에게 표시하고 의사표시의 해석상 법률행위의 내용으로 되어 있다고 인정되면 충분하고 당사자들 사이에 별도로 그 동기를 의사표시의 내용으로 삼기로 하는 합의까지 이루어질 필요는 없지만, 그 법률행위의 내용의 착오는 보통 일반인이 표의자의 처지에 섰더라면 그와 같은 의사표시를 하지 아니하였으리라고 여겨질 정도로 그 착오가 중요한 부분에 관한 것이어야 한다. 다만 그 착오가 표의자의 중대한 과실로 인한 때에는 취소하지 못한다고 할 것인데, 여기서 ‘중대한 과실’이라 함은 표의자의 직업, 행위의 종류, 목적 등에 비추어 보통 요구되는 주의를 현저히 결여하는 것을 의미한다(대법원 1998. 2. 10. 선고 97다44737 판결 등 참조).

Where mistake was provoked by the counterpart, the defence of gross negligence has no real prospect of success. The obvious rationale is that the party who provoked the other party’s mistake should not be allowed to put the blame on the other party. 97Da26210 supra.

On the contrary, if the mistake was not caused or provoked by the other party, the Court is likely to hold that the mistaken party was “grossly negligent” and rule that the party has no right to rescind. 2011Da106976 (implicitly assumes that the purchaser should have checked the land use plans), 92Da38881 (seller refused to confirm whether the land was suitable for building a factory).

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 withraw the appeal.)