

# 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. If, however, the mistake was due to gross negligence of the mistaken party, rescission is not possible. 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

한국의 법원은 계약의 '중요한 요소'에 대한 실수를 판단할 때 '객관적' 테스트를 사용한다. 실수는 합리적인 사람이 실수하지 않았다면 현재 조건에 동의하지 않았을 정도로 심각해야 한다. 특히, 실수는 계약의 성립에 필수적인 요소를 포함해야 한다. 예를 들어, 신용보증기금이 A라는 신용이 좋은 회사에 대해 보증한 경우, 실제로는 신용이 나쁜 B가 소유한 회사였다면, 이는 계약의 중요한 요소에 대한 실수이다. 한국의 법원은 계약의 성립에 필수적인 요소를 포함하는 실수를 '중요한 요소'의 실수로 간주한다.



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. 買賣契約は、将来の予測が誤りであるとしても、契約の目的が達成される限り、契約は有効である。 (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 (契約の目的が達成される限り、契約は有効である。 (affirmed 2003Da38221)  
(Similar position is expounded in *Amalgamated Investment & Property Co. Ltd v. Walker & Sons Ltd*. [1977] 1 W.L.R. 164.)

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 tends 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*

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Supreme Court 97Da26210

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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

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 (土地利用計画), but did not make further inquiry into the detailed plans for the use of forest land (森林利用計画). Purchaser erroneously thought that the land in question was buildable. In truth, it was not. Purchaser was allowed to rescind the sale contract.
- 東京地裁 平成28年(ワ)第1000号判決。原告は、被告と売買契約を締結し、土地の一部を取得した。しかし、その土地の一部が「森林地域」に指定されており、建築不能であることが判明した。原告は、この事実を知り、契約を解除し、返金請求を行った。被告は、原告が契約締結前に土地の利用計画を確認していたにもかかわらず、詳細な調査を行わずに契約を締結したことを理由として、原告の解除権行使を認めないとした。最高裁判所は、原告の解除権行使を認めた。

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. 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 (重大违约), 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.)