

# Deception

## 1. Deceitful conduct

- active deception (telling a lie): knowingly misleading statement, giving a knowingly wrong answer to a specific question
- passive deception (concealment): deliberate failure to discharge a duty to disclose
- refusal to answer when requested to provide an answer?

good faith duty to disclose (2013Da97076, 2011Da59247) :

*In a commercial transaction, where it is clear from rules of experience that if one party to the contract had disclosed particular circumstances which could have an impact on the validity of the contract or pose a risk to the other party's entitlement, the other party would not have entered into the contract or at least not under the same terms or conditions of the contract, then the former has a good faith duty to disclose such circumstances beforehand. However, if the other party is already aware of those circumstances or has a duty to investigate or, in view of the relevant trade practice, is expected to be aware of them as a matter of course, etc., then a non-disclosure of such circumstances may not be viewed as violating the duty to disclose.*

Examples of acceptable commercial practice

*2000Da54406, 54413 dated 4 September 2002*

*In the absence of special circumstances giving rise to a good faith duty to disclose, it cannot be said that a party to a transaction has a duty of care to provide for the other party an explanation or information about the market price or the facts which form the basis of determining the price of the subject matter of the transaction. Even if a party keeps*

*quiet about the market price of the thing sold or gives a falsely exaggerated price as the market price, that cannot be viewed as an unlawful interference with the other party's decision making.*

99Da55601, 55618 dated 29 May 2001 Exaggeration in advertisement

68Da1749

The plaintiff ("well experienced entrepreneur") intended to offer his property to secure a loan which he thought was to be made freshly to his acquaintance. He asked a branch manager of the defendant, a high street bank, whether his property was to secure a new loan to his acquaintance. The branch manager answered that it was the case. The branch manager knew that his answer was inaccurate because he intended to use the plaintiff's property to secure an outstanding loan in the same amount which was already made to the plaintiff's acquaintance. The contract of hypothec was rescinded. The Supreme Court upheld the rescission, ruling:

*It is clear from the lower court's judgment that rescission of the [contract in question] was allowed not because the defendant failed to fulfill its duty to disclose the start date of the loan. The branch manager of the defendant deceived the plaintiff into believing that upon concluding the contract, a loan of at least 20 million Korean Won would be made and this is how the contract in question was entered into. The lower court ruled that the contract was induced by deception and that the rescission was valid. The decision of the lower court was that rescission on the ground of deception can be done regardless of whether there was a mistake as to material elements of a contract. This is correct.*

Intent to deceive is required, but an intent to gain profit through deception is not required. Commentaries to Civil Code,

General Part (II), Park Jun Seo, ed., 3rd edn. (1999) p. 751.

2013Da97076: The case arose from a project debt transaction where a bank (the seller) sold the project debt collectable from a project company (who was pursuing a housing development project in the Philippines on a leased land) to a project financing company (the buyer). The buyer of the project debt purported to rescind the transaction arguing that the seller failed to disclose that there was a risk of an early termination of the land lease due to a prolonged delay of the housing development. But the Supreme Court ruled that if the seller did provide all relevant documents which are needed for the buyer to be apprised of the attendant risk, the seller would have fulfilled its duty to disclose because the seller has no further 'duty to investigate' into the detailed circumstances about the land lease.

## **2. Causation (Inducement)**

Whether the victim was induced by deception must be determined by looking at the subjective decision-making mechanism of 'that party' or 'the party' rather than a 'reasonable person'. If the deceitful conduct impacted the objective which was essential to *the party in question* (i.e. of subjective importance), then the causality will have been established.

If a party specifically requested a piece of information in the course of the negotiation, that piece of information will normally be regarded as having a sufficient causal connection with the party's subjective decision to enter into the contract.

Claimant's negligence is irrelevant: 2005Da5812 (Cemetery case)

*Once the duty to disclose is thus recognised, one is not – except in the rare cases where the party had the duty to inform itself, or where the relevant trade practice is such that the other party should obviously have had the knowledge*

*– relieved of the duty to inform the other party even if the party was negligent in not knowing the fact.*

*Where the other party had the knowledge, there is no room for discussing the duty to disclose. But if the other party did not know, his negligence can only have a bearing on the assessment of damages, rather than obviating the duty to disclose.*

Dishonesty itself may sometimes be sufficiently material.  
2006Do1813

A company's financial statements were "puffed up" to hide a net loss. The bank provided a loan on the basis of the financial statements. But the bank has often extended loans to companies with a net loss. The Supreme Court held:

*If the bank had known that the company tried to conceal its net loss by submitting improperly prepared financial statements, it would have considered the company to be less reliable. [The reputational factor must also be taken into account in assessing whether the deceitful conduct induced the other party to enter into the contract. The Court held that the bank would not have made the loan had it known that the company attempted to deceive it.]*

### **3. Wrongfulness**

Deception and inducement cast a strong presumption that the conduct is wrongful. It is incumbent on the deceiving party to rebut this presumption.

2005Da38355: A bank issued a statement showing the client's account transactions, deliberately omitting certain outstanding loans. The statement was intended to be presented to Credit Gurantee Fund. The client, however, presented the statement to a private party who relied on the defective statement and became a tenant of the client paying a substantial lease deposit to the client. When the client went

bankrupt, the client's debts turned out to be much greater than the amount indicated in the statement and the tenant could not recover the lease deposit. The tenant sued the bank in tort. The Court held:

*if the bank deliberately or negligently issued a statement showing inaccurate account transactions, the conduct is in itself wrongful, regardless of the uses to which the statement was to be put.*

#### **4. Remedies**

Rescission

Restitution

- The party in good faith may keep the fruit (while good faith lasted) when returning the thing. Art .201. This applies to the seller as well, in returning the money. □ □ 1993.5.14, □□, 92□45025, □□
- Termination of a contract has a different rule: □□□ 2014. 3. 13. □□ 2013□34143 □□ (Regardless of good faith or bad faith, full return required.)

Damages

2004DA48515.

A seller of an apartment who failed to inform the buyer that a landfill site was to be built in the vicinity was held responsible for fraud (a tort), with the sale contract voidable:

Alternatively, the buyer may keep the contract and sue for damage on the ground of the seller's breach of contract.

Claimant may elect to seek damage in respect of breach of warranty. The buyer is entitled to performance measure damage (in respect of the 'defect') without terminating the contract.

Seller's failure to disclose (before concluding the contract) can also be regarded as a "breach of contract" 2006Da79742