

Tender

1. Requirements

- Exact compliance is required with regard to time, place and mode of performance
- Actual tender is required; verbal communication of readiness and willingness is not enough
- Tender of partial performance is not enough:

84Daka781: The plaintiff owes to the Defendant an outstanding balance of KRW1,213,809. On 1 July 1983, the Plaintiff tendered an amount of payment but the Defendant refused to accept the payment. The Plaintiff paid into the court KRW510,000. Lower court held that the debt was partially repaid to the extent of the the amount paid into the court. Supreme Court overturned the decision, holding that given that it is not established how much was tendered, the payment into the court cannot have an effect of (even a partial) repayment of the debt.

2. Non-acceptance of the tender (*mora creditoris*)

- Art. 400 – Art 403, Art 538(1)
- Relaxed duty of care (obligor is liable for intentional breach or gross negligence only) Art 401 2010Da11323: in an exchange contract, party A tendered the performance (offered to transfer the title of a property to B, as agreed) and party B failed to accept it. B was therefore in *mora creditoris*. A subsequently disposed of the property to a third party. Supreme Court held that A shall be liable for the non-performance.
- Interest stops to accrue (Art 402)
- Increased costs of performance due to *mora creditoris* must be compensated. Art 403

- If the obligor's performance becomes impossible during the obligee's mora creditoris due to reasons not attributable to any party, the obligor's obligation shall be discharged but the obligee's counter-performance obligation survives. Art 538(1).
- Art 403 **Inapplicable** to a sale contract.
 - Art 374: Seller must bear the costs of maintaining and preserving the thing sold until it is delivered (even while the buyer is in mora creditoris and in delay, or in repudiatory breach of its obligation to pay the purchase price). 80Da211
 - Art 587: Seller is entitled to keep the fruits from the thing sold until it is delivered. Purchaser not required to pay interest until **delivery** (or deposit into court) of the thing sold (i.e., while the seller retains the possession of the thing sold) even if the Purchaser is in delay (95Da14190) or in repudiatory breach.

3. Tender in a sale contract where the parties agreed upon simultaneous performance

- One party's tender will put the other party in breach (if the other party does not perform its obligation)
- However, the breach will not continue unless the tender continues. 94Da26646, 2010Da11323
- In a sale contract, the purchaser need not pay delay interest, need not bear the seller's costs of safekeep or the increased costs of performance until the delivery of the thing sold (See Art. 587. N.B. Art 403 inapplicable). 96Da14190, 80Da211. This is because the seller not only has an obligation to maintain and to preserve the thing sold until it is delivered (Art. 374) but, more importantly, the seller (unlike a lessee who

has to return the object of lease) may fully benefit from the undelivered thing while it remains undelivered and also because the seller is entitled to keep the fruit from the thing while it remains undelivered.

- The seller could, if it so chooses, deposit the thing sold into court (= equivalent to the delivery to the purchaser). From then on, the seller shall be entitled to delay damage in respect of unpaid purchase price.

4. Does non-acceptance constitute a breach (a repudiatory breach) of contract?

- May the debtor terminate the contract?
- Indefinitely bound by the contract?
- Payment into Court
- Refusal to accept v. Refusal to perform
- 2019Da293036: In principle, mora creditoris is not a breach of contract. But in exceptional cases, it may constitute a breach of a contractual obligation which may be recognised on the ground of good faith principle. In such a case, the other party may terminate the contract if the purpose of the contract cannot be achieved without cooperation of the obligee.
- (cf.) English law: Sale of Goods Act 1979, section 37 (Buyer's neglect to take delivery may hold him liable to compensate for the seller's loss. Seller is discharged.)