

Delay

1. Time of performance

- Where 'uncertain' time is specified
 - performance is due when the promisor knows that the time has come. Art. 387(1)

- Where the time is not specified at all
 - Performance is due upon demand (on the day the demand is made)
 - a "reasonable time" is allowed when a demand is made for repayment of a loan of money or fungibles. Art. 603(2)

- Where the time of performance is specified
 - If the time is of the essence, delay would lead to impossibility of performance, damage in lieu of performance, termination (in addition to delay damage, if any)
 - If the time is not of the essence, delay would only lead to delay damage, if and to the extent the loss caused by the delay is proven. In order to seek termination, damage in lieu of performance, further and additional demand (providing a reasonable extension) must be made (and no performance is done). While the obligee does not decline to accept the performance, the obligor is entitled to delayed performance (as it must be accepted, with a delay damage).

2. The effect of a delay

- The party in delay shall be held liable for all losses **regardless** of fault (Art. 392)
- If, however, the loss would have occurred even if timely performance had been made, the party in delay will only need to compensate for the delay.
- What if, while the obligor repudiates before the due date (thus not in delay, presumably) and the obligee does not accept the repudiation, the performance becomes impossible for reasons inattributable to the parties (force majeure)?
- Where time is of the essence, delay of performance would justify the other party's immediate termination. Alternatively, the obligee may decline (irrevocably) to accept the performance and seek damage in lieu of performance (Art 395).
- Where the obligee seeks to compel the delayed performance and the obligor refuses. The obligor would argue that, due to the delay, the performance is now impossible or no longer compliant with the parties' agreement.
- Where the obligor insists that the obligee accept the delayed performance and the obligee refuses to receive the performance: In such a case, the obligee would argue that the delayed performance is of no benefit and therefore it is 'entitled' to decline without giving any extension for performance.

3. Termination on the ground of delay

- Not allowed in principle, unless time is of the essence (Art. 545).
- Termination is possible when a reasonable extension for the performance is provided and yet no performance is made. (Art. 544)
- If the obligor repudiates (*ahead of the due date, or after the due date*), the obligee may terminate forthwith

without providing an extension. (Art. 544, proviso seem to be interpreted by the court to refer only to repudiation while the obligor is already in delay.)

- Replacement damage (damage in lieu of performance) is available if (and only if) the delayed performance is pointless or no performance was done after the obligee demanded performance providing a reasonable extension. In order to seek replacement damage, the obligee MUST decline (irrevocably) to accept the performance. Art 395 of the KCC.
- If the obligor repudiates its own obligation while he fails to accept performance of the other party (thus in *mora creditoris*), the obligee may terminate forthwith. (93Da11821)
- 94Da35930: Even where a reasonable extension was not explicitly granted, the termination is valid when it was done after the lapse of a reasonable period of time after the performance was demanded. A termination notice (invalid because no extension had been given) can still be regarded as a demand for performance. Termination becomes valid after the lapse of a reasonable period from such a notice. 89Dak11685
- 79Da1859: In a sale of real estate, the payment of balance was due on 20 April. Buyer did not pay. On 24 April, seller tendered all necessary documents needed for completion and demanded buyer's payment by 26 April. Seller terminated the contract on 27 April. Termination valid.

4. Delay interest in a sale contract

- ... *The purchaser shall pay interest on the purchase price from the date the thing sold was delivered. However, this does not apply if there is a due date for the payment of the purchase price. (Art. 587)*

- Purchaser not required to pay interest until the thing sold is actually delivered (Art 587 of KCC; 96Da14190): “even where the purchaser fails to make timely payment of the purchase price, the purchaser need not pay interest on the purchase price until the thing sold is delivered.”
- However, if partial payment is delayed, interest is payable only on the partial payment until the closing date. □□□ 1991. 3. 27 □□ 90□19930 □□
- Where the parties agreed upon the due date for the simultaneous performance of the delivery and the payment, if neither party performs on the due date, the respective obligations of the parties shall become obligations ‘without a due date’. See Supreme Court Decision 73Ma969, dated 11 December 1974.

5. Where delay is ‘exceptionally’ not wrongful

- 2011Du2477,2484 dated 27 November 2014 (a provision of the Public Servants Pension Act which stipulated a reduced entitlement for pension payment for those who have additional income was declared unconstitutional with retroactive effect). The Supreme Court held that the delay of payment (to the extent which had been statutorily prohibited to be paid) is “not wrongful” and the delay interest need only be paid after the statute was declared unconstitutional.

5. *Mora creditoris* in a sale contract

- The party in *mora creditoris* is normally responsible for the obligor’s added costs of safekeep of the object and the added costs of performance. Art 403
- However, in a sale contract, the purchaser is not responsible for the seller’s costs of maintenance and preservation of the thing sold until it is delivered

(even if the purchaser is in mora creditoris). 80Da211
(Even when the Purchaser is in breach of its own
obligation, Seller still has the duty to maintain and
preserve the thing sold until delivery anyway. Art 374.)