

# (1) Deposit (Arrhes)

- voluntary payment largely governed by trade practice
- around 10% of the contract price
- contract binding even without a deposit unless the trade practice suggests otherwise

## 1. Interpretation

- evidence of the contract
- reservation of the right to terminate at will: exercisable until a party begins to perform. Art. 565
- the right to terminate at will becomes available only upon 'full' and actual payment of the agreed deposit amount (But the Supreme Court's jurisprudence is undergoing a change).
- (Only when the parties expressly agree to treat it as liquidated damage) liquidated damage; cf. Art. 398
- (Only when the parties explicitly agree to treat it as penalty) penalty: in such a case, proven damage may be recoverable separately

## 2. Cases

- 92Da23209: In the absence of an explicit intent to treat the deposit as liquidated damage, the deposit may **not** be so treated: P paid 41 million KRW to D as contract deposit. D gave a blank check to P in case the deposit needs to be returned. A dispute arose and P alleged D's breach and attempted to cash the check to recover the deposit. D terminated the contract. P demanded return of the deposit. The court ruled that D may not keep the deposit. But D can claim damage to the extent the amount

of D's loss can be proven.

- Contract deposit shall 'normally' be interpreted as reserving the right to terminate at will before a party begins to perform. Art 565, 80Da2499
- 72Da2243: the seller must actually tender double the amount of deposit if the contract is to be terminated. Verbal offer to tender the amount is not enough. Brewery was sold with 5 million KRW contract deposit. Seller purported to terminate the contract tendering 5.5 million KRW. It was held that the contract was not terminated.
- 2004Da11599: A party may 'begin' the performance even before the agreed time. The due date is presumed to be for the benefit of the obligor, who may give it up. (Art. 153) If that happens, the deposit can no longer entitle a party to terminate the contract at will. After the sale contract for a plot of land was concluded, the height restriction affecting the area was lifted. Land price soared. Seller demanded the contract price to be increased. In response, buyer tendered the contract price earlier than the agreed date. The seller refused to accept the buyer's performance and purported to terminate the contract offering double the amount of deposit. Early performance held to be valid and that the contract may no longer be terminated at will.
- However, once a party notifies the termination (even without the required full amount), the other party may not 'begin' to perform. In such a case, the 'early' performance is harmful to the obligee (Art. 153(2) proviso). The contract is terminated if and when the required amount of forfeiture (full amount of the agreed and paid deposit) is actually tendered.
  - 97Da9369 Land located in an area requiring permission for sale is sold with 220 million KRW contract deposit and a separate clause for 60.5 million liquidated damage payable by the seller in the event of failure to obtain permission to sell

the land. Seller purported to terminate the contract, offering KRW280.5 million (220+60.5). Buyer disputed the validity of termination and purported to perform early (pay the balance). Seller refused to accept the payment. Buyer sued seller with a view to enforcing the sale contract. Seller subsequently terminated the contract tendering KRW440 million. Termination held to be valid when the correct amount was tendered. Buyer's lawsuit against seller shall not be viewed as 'beginning' of the performance. [Buyer unable to 'begin' performance while the permission to sell has not been granted? Contract becomes valid only upon the Minister's permission.]

- 94Da17659: 'to begin' the performance ought to be distinguished from the tender of performance. (开始履行义务与交付履行义务是不同的, 例如, 买卖房屋时, 交付定金, 交付房屋, 交付房款等, 都是履行义务, 而开始履行义务是指买卖双方已经开始履行义务) A house was sold with 0.3 million KRW deposit. Subsequently 2 million KRW was paid as a partial payment of purchase price and the seller delivered the possession. The parties agreed to treat 2.3 million as a 'new' contract deposit. The seller purported to terminate offering 4.6 million KRW. Termination invalid as **both** parties have already 'begun' to perform.
- 2007Da73611: An 'agreement' to pay the deposit is not enough to entitle a party to terminate the contract at will. The right to terminate at will accrues only upon 'actual' payment of the 'full' amount of the deposit. Apartment was sold with 60 million KRW agreed as the deposit, of which 3 million was paid and 57 million KRW to be paid the following day. The following day, before the buyer pays the balance of the deposit, the seller purported to terminate the contract. Termination

invalid. The seller may demand the payment of the balance of the deposit but may not terminate at will while the full amount of the deposit is not yet paid. If the balance of the deposit is not paid, the seller may terminate the deposit agreement and, if the sale contract would not have been concluded without full payment of the deposit, the sale contract itself may be terminated on the ground of the buyer's material breach of the contract.

- 2015. 4. 23. 20140231378 : Agreed contract deposit was 110 million KRW, of which 10 million KRW was paid promptly and the balance was to be paid the following day. On the following day, however, seller purported to terminate the contract and closed the bank account so that buyer could not pay the balance of the agreed deposit. Seller's termination was invalid. The court ruled, "Even if the contract can be terminated as asserted by the [seller], the amount which entitles the termination must be 'the agreed deposit amount', rather than 'the actually paid deposit amount'."
- 2015. 4. 23. 20140231378, 2015-09 :85-113
- 99Da48160: Apartment sale. Buyer did not have money available on the day of contract. An IOU was issued, instead of actual payment of contract deposit. It was agreed that in the event of a breach, double the amount of IOU shall be paid. Court held that this is a valid agreement for liquidated damage in the event of a party's breach. Buyer was held to be in 'breach' because buyer was trying to re-negotiate the terms and refused to honour the contract.

### **3. Contract provisionally void**

- 97Da9369: While the contract is provisionally void (due to the lack of approval for the sale of land which

requires an approval), deposit may still be valid. See [this](#).