1. Seller unable to deliver the thing sold, or buyer evicted (Arts. 569, 570, 571)

1. Arts 570 and 571 apply

- Where a third party's property is sold but
  - the seller fails to perform (because the seller is unable to acquire the property from the third party); or
  - after the thing sold is delivered, the buyer is subsequently evicted (by a third party who prevailed over the buyer)
- Applicable only to a sale contract which was concluded by a seller who did not have the authority to dispose of the thing sold.
- 72Da982: If the seller concluded the sale contract with the owner's authorisation, then the seller had the authority to dispose of the thing sold. If such a seller fails to perform, then it is merely a breach of contract. Purchaser may claim damage even if he knew (at the time of the contract) that the thing sold did not belong to seller. Proviso of Art 570 does not apply. Seller may not avoid damage payment unless seller proves that he was not at fault (which is difficult in practice.): Seller bought the land from the owner. Without completing the title transfer, the seller sold the land to the purchaser. Before the purchaser completes the title transfer, the original seller (who is still the owner) set up a hypothec on the land to secure a debt. When the debt was not repaid, the lender foreclosed. The seller must pay damages to the buyer even if the buyer knew that the seller was not the owner of the thing sold at the time of the contract. The Supreme Court clearly assumed that the damage claim must

be based on Art 390 of the Civil Code.

- 81Da528: In a sub-sale gone wrong, if the sub-buyer (unwisely) relies on Art 570, sub-buyer's damage claim will fail due to the proviso of Art 570. (This case does not rule whether damage under Art 390 is available. Sub-buyer should, in such a case, have relied on Art 390.
- 95Da55245 expressly re-affirmed 72Da982: Buyer of a property sold the property in a sub-sale. Title transfer was to be done directly from the original seller to sub-buyer (plaintiff). While the title remained with the original seller, a mortgage was set up before the sub-sale. Upon original seller's failure to repay the loan secured by the mortgage, the creditor put the apartment on auction. The sub-buyer repaid the loan together with the interest and sought reimbursement from the seller (defendant). As the seller had already the power (contractually acquired power) to sell the original seller's property, Art 569 or Art 570 does not apply. The sub-buyer argued that it was not claiming damage under Art. 390, but claiming "reimbursement" under Art 576(2) of the costs expended to preserve the title to the apartment.

2. Buyer's remedies

- Buyer may terminate the contract (because the seller's inability to deliver is a material breach of the sale contract). Upon termination,
    - Restitutio in integrum: Buyer must return the thing sold to seller. See 92Da25946 below.
    - If buyer is already evicted by the owner, buyer need not return the thing to seller. Buyer need not return the 'value' of the thing either (Art 747(1) does not apply). See 2016Da240 below.
    - Buyer must disgorge the benefit of using the property in the interim to the seller (the buyer will not be required to disgorge the benefit to

the owner because, vis-à-vis the owner, the buyer will be a possessor in good faith. Art. 201(1)).
    - Seller must return the price together with interest (Art. 548(2)) and pay damage, if any.
    - In addition to termination, ‘innocent’ buyer may claim damage.
- When buyer is evicted by the true owner, buyer may choose to affirm the sale contract with the seller and claim damages in lieu of performance. Whether the sale contract is terminated or not, there is no practical difference. Performance measure of damage (with termination) or damages in lieu of performance (without termination) should be available for the buyer.
- Buyer’s remedies **not** subject to 1 year limitation period.
- Seller must compensate so that buyer can enjoy the benefit of the contract as if the contract is fully performed(매도인은 계약이 완전히 이행된 것과 동일한 경제적 이익을 배상함이 상당).

3. Reference date for assessing the quantum of damage

- In principle, the calculation of damage must be done as at the close of legal proceedings.
- However, where performance is rendered impossible, quantum must be assessed at the market value of the thing at the time of the impossibility.
- But, 66Da2618 dealt with a case where the seller’s performance was not impossible, but the seller was unwilling to perform and the purchaser chose to terminate the sale contract upon the seller’s material breach. In that case, the date of termination must be used.
    - Where damage in lieu of performance (전보배상) is sought upon termination of the contract [on the ground of the seller’s material breach], the calculation of damage must be done by referring to the market value of the thing sold at the time of

termination because the buyer only lost the claim for the original performance as a result of the termination. (손해액의 산정은 일반 채무불이행으로 인한 손해배상액의 확정시기와 마찬가지로 원칙으로 매매의 목적이 된 권리를 취득하여 이전함이 불능하게 된 때의 싯가를 표준으로 하여 결정할 것이고 본건에 있어서 원고가 피고의 매매계약 이행의사 없음이 명백함을 전제로 하는 본건 매매계약 해제를 전제로 이행에 대신하는 전보배상을 청구하는 본건에 있어 매도인이 본건 토지의 소유권을 취득하여 매수인에게 이전하지 못하므로 매매계약이 해제된 경우에는 매수인은 해제시까지는 목적물의 급여청구권을 가지며 해제에 의하여 비로소 이 청구권이 상실되므로 특별한 사정이 없는 한 매수인이 받을 이행에 대신하는 손해배상액은 해제 당시의 목적물의 싯가를 표준으로 하여 결정할 것) The use of “전보배상” is inappropriate here (because the contract is terminated). The Court probably meant that the “performance measure of damage” must be calculated on the basis of the market value of the thing at the date of termination.

- When seller repudiates to perform, the date of seller’s repudiation must be used (rather than the date of buyer’s termination). see 2005Da63337 below.
  - 2005Da63337 (seller’s repudiation). “이행지체에 의한 전보배상에 있어서의 손해액 산정은 본래의 의무이행을 최고한 후 상당한 기간이 경과한 당시의 시가를 표준으로 하고, 이행불능으로 인한 전보배상액은 이행불능 당시의 시가 상당액을 표준으로 할 것인바, 채무자의 이행거절로 인한 채무불이행에서의 손해액 산정은, 채무자가 이행거절의 의사를 명백히 표시하여 최고 없이 계약의 해제나 손해배상을 청구할 수 있는 경우에는 이행거절 당시의 급부목적물의 시가를 표준으로 해야 한다.” Also see Chang Soo Yang, “Anticipatory Breach as an independent type of non-performance of obligation”, Beob Jo, vol. 700 (2015), pp. 37-38
  - This is to prevent the buyer’s opportunistic behaviour of biding his time to choose a favourable moment for termination.

- 94Da61359, 61366 (seller’s performance became impossible, but the buyer did not terminate the sale contract; buyer sought the market value at the closing of the hearing.) The Supreme Court ruled that damage must be calculated as of the date of impossibility.

4. The ‘uncertainty’ of the deal already on the table?

- If, however, buyer knew at the time of sale that the thing sold belonged to a third party, buyer is deemed to have known about and taken the risk of seller’s inability to perform (seller unable to acquire the property from the third party). Hence, buyer may not claim damage. (Art. 570, proviso)
- But, if the seller had already concluded a contract with the original seller, the buyer is not deemed to have taken the risk (of the seller breaching the contract with the original seller). Buyer can claim damage. But what about original seller breaching the contract with the seller? (The risk is assumed by the seller.)
- If, however, the seller’s inability to perform is due to seller’s own fault, buyer may claim damage regardless of whether buyer knew that the thing sold belonged to a third party (Art. 390. 93Da37328).

[93Da37328]
A and B entered into a contract where A sold a plot of land to B. While the sale was not complete, B concluded a sub-sale of the land with C. B and C agreed that as soon as A conveys the land to B, B will convey it to C. B and C further agreed that the completion date for their sub-sale coincides with the completion date of the original sale between A and B.

When the completion date came, C refused to pay the balance of the contract price arguing that there is a risk that B may not acquire the land from A. B in turn failed to pay the balance to A arguing that the sub-buyer C failed to pay and B himself cannot finance the purchase price. A terminated the sale contract with B. A subsequently sold the land to X, who has no intention to sell it to anyone.

C sues B and seek damage. Discuss whether B has to pay damage to C.

Q 1. Did the buyer C know, at the time of the sale contract, that the thing sold belonged to a third party?

Q 2. When B and C concluded the sale contract, B had already concluded a contract to acquire the property from the third party (A). Did the buyer C took the risk of B not acquiring the property from A?

Q 3. Can B avoid liability by arguing and proving that he was not at fault? Breach of contract issue (fault based liability), rather than warranty liability issue (strict liability)

In practice, there is little difference between buyer relying on Art 570 and Art 390 (because the defence of 'no fault' is rarely allowed. 2001Da1386 (only *force majeure* will be admitted as a gound for accepting 'no fault')

- If it is due entirely to the buyer that the title to the thing sold could not be transferred to the buyer, then buyer may not claim damage. (79Da564. Seller handed over to the buyer all necessary documents for conveyancing. Buyer delayed and the property was acquired by a third party. Buyer may not claim damage.)
- If buyer **should have known** that the property belonged to a third party, then the buyer's comparative negligence must be taken into account in assessing the amount of damage. 71Da218. A local government (□□□) bought a plot of land from the central government. The land had previously been deemed to have been acquired by the central government by virtue of the Agricultural Land Reform Act whereby land which is not owned by cultivator is deemed to have been acquired by the state. But, in fact, the land in question was not 'agricultural land'. The original owner successfully claimed the land back from the purchaser (local government). Purchaser terminated the contract and sued for damage. Purchaser's negligence to be taken into account in assessing damage.

The land was located in 경기도 and the local gov should have known that the land did not belong to the State.

- Comparative negligence rule could be ‘applied’ even for the warranty liability (which does not require the seller’s negligence) 94Da23920 (담보책임이 민법의 지도이념인 공평의 원칙에 입각한 것인 이상 하자 발생 및 그 확대에 가공한 매수인의 잘못을 참작하여 손해배상의 범위를 정함이 상당하다.)
- 80Da2750: Having been sued by the true owner, buyer concluded a settlement with the owner and bought the land from the owner. Buyer is not at fault. Seller must pay damage. (Can seller terminate the contract and demand restitution in integrum?)

5. ‘Innocent’ Seller’s right to terminate.

- If seller did not know that the thing sold belonged to a third party, seller may also terminate the contract but seller has to pay damage to buyer. (Art 571(1))
- Why allow the ‘innocent’ seller to terminate? (why deprive equally innocent buyer the choice to affirm the contract and claim damage in lieu of performance?)
- Ultimately, the seller’s termination is of no ‘practical’ importance as the seller must pay damage.

92Da25946

- State –> A –> Defendant –> B –> Plaintiff
- A fraudulently completed title registration of the property on 24 Dec 1957 (the property belongs to the State).
- A conveyed the title to Defendant on 7 Jan 1958.
- Defendant conveyed the title to B on 1 Nov 1960.
- B conveyed the title to Plaintiff on 5 June 1967.
- The State sued Defendant, B and Plaintiff seeking cancellation of their title registration in 1975.
- Defedant and B lost and the judgment became final on 6 Jan 1981. Plaintiff finally lost on second appeal on 11 April 1989.

Plaintiff exercises via *action oblique* B's claim against Defendant and sues Defendant for damage. Defendant put forward the following defences:

- No loss, because Plaintiff could have claimed adverse possession against the State. Res judicata only applies to the State's claim to have Plaintiff's registration cancelled.
- Will not pay until Plaintiff returns the possession of the property to the Defendant.
- 鄭吉龍, "他人의 權利의 賣買契約이 解除된 경우의 法律關係 — 대법원 1993.4.9. 선고 92다25946 판결과 관련하여", (土地法學, Vol.23NaN2, [2007])

2016Da240: If the purchaser already returned the property to the true owner (i.e., evicted), the purchaser need not 'return' it to the seller.

But the disgorgement of unjust benefit could easily amount to more than the purchase price plus interest. See 2006다26328

- A tractor was sold at the price of 23 million KRW. At the time of the sale, the tractor was already attached by a creditor. Two years later, the creditor put the tractor on auction and disposed of it. The buyer *terminated* the sale contract and demanded return of the contract price. Buyer unsuccessfully (because he already knew the rist of losing the tractor, which was already attached by the creditor) sought damage in respect of loss of profit – arguing that he was earning 2 million KRW per month with the tractor. Seller counter-claimed 48 million KRW – arguing that the buyer (now that the sale contract is terminated) is obligated to disgorge the benefit of using the tractor.)

Breach of warranty v. Breach of contract

- Strict liability v fault based liability
- Art 390 (not liable to pay damage if the breach of contract was without fault)

- But, in reality, the Court almost always recognises fault except in *force majeure* situation) : IMF crisis is not a force majeure… The contractor liable for delay of performance. 2001Da1386