3. Partial failure of consideration (Art. 572)

Art 572 applies:

- When, unbeknownst to the buyer, a portion of the thing sold belongs to a third party and cannot be transferred to the buyer.
- When (the buyer knew at the time of the contract that the portion belonged to a third party but expected that the seller could acquire it and convey it to buyer) against the buyer's expection, the portion cannot be acquired by the seller and conveyed to the buyer.

Remedies:

- The buyer who knew about the risk (of the seller turning out to be unable to acquire and convey the portion) can only have 'price reduction' remedy. Buyer who knew the risk may not claim damages, may not terminate the contract (he is not allowed to argue that the undeliverable portion, which he knew about the possibility of impossibility, is critically important to the contract he concluded).
- The 'innocent' buyer may seek
    - Price reduction. Art 572(1)
    - Termination, if the buyer would not have purchased had he known about the shortfall. Art. 572(2)
    - Damages (over and above price reduction)

Absolute time limit (statute of repose)

- Buyer's remedy available for 1 year (1) from the date of contract if the buyer knew it at the time of the contract; (2) from the date the buyer was subsequently made aware that the seller is definitively unable to perform. Art 573

        - 89Daka17676
- Price reduction and termination may not be claimed after 1 year.
        - 91Da27396: Land, dwelling house and cattle housing were bought and sold on 17 July 1985. Of the contract price, the land price was agreed to be 8 million. The parties later realised that a substantial part of the land belonged to the State. The buyer leased the land from the State on 27 Feb 1989 for three years. The State notified on 5 Nov 1990 that it had no plan to sell the land. The land was worth 20 million KRW by then. The buyer subsequently (within a year from 5 Nov 1990) terminated the sale contract. Seller argued, in defence, that termination and the damage claim were foreclosed upon lapse of 1 year after the buyer knew that the portion belonged to the third party. Termination valid (because it was done within a year of knowing that seller is "definitively" unable to acquire and transfer the portion to buyer). Seller ordered to pay damage (20 million KRW).
        - Where several properties were sold in a contract and some of the properties belong to a third party (or to third parties), the same rule applies. 'Partial' termination (which has the same effect as price reduction) is not allowed upon lapse of 1 year.
        - 88Daka13547: A plot of land, building and plant machinery were sold in one transation at 526 million KRW. The two buildings turned out to belong to a third party and they are worth 39 million KRW (7.4% of the contract price). Sale contract was concluded in Feb 1983. Buyer knew that the portion belonged to a third party one month later in April 1983. Buyer purports to terminate the affected portion of the contract in

Oct 1986. Was the affected portion, in this case, material enough to defeat the purpose of purchasing the plant in the first place?

- Damages may still be available under Art 390?
    - Damages claim (over and above the price reduction remedy) which is mentioned in 572(3) is essentially a breach of contract remedy available under Art 390 in the first place (defence of no fault available). 2002Da35676 (extended loss: air conditioner defective and caused fire; the loss from fire cannot be claimed if the seller proves "no fault")
    - 2002Da51586 Seller buried a substantial quantity of rubbish before selling the land. Buyer entitled to claim damage in respect of the costs of removal and disposal of the rubbish. This claim is available concurrently with Art 580 (which refers to 575(1)) remedy. Extended loss?

Termination

- If the affected portion is substantial enough to make it a material breach of the seller (similar to Art 570), would the 1 year limitation period still apply? If the shortfall is significant enough to defeat the purpose of the contrat, isn't the situation no different from Art 570 (total failure of consideration)? Why should 1 year limitation period apply in such a case? Or, if the buyer did not terminate the contract for over a year, then does that mean that the shortfall in title was not material enough in the first place?
- Why termination is possible only for the 'innocent' buyer?

Damages v Price Reduction

- Buyer who did not know at the time of the contract that the portion belonged to a third party may claim damage

as well (in addition to ‘reduction of price’). Art 572(3) –> “price reduction” and “damages” are different concepts.

- The purpose of price reduction remedy: “Where a portion of contractual obligation is impossible to perform from the beginning, the price reduction remedy purports to adjust the contract price in order to maintain the parity of bargain (□□□□ □□□□□ □□□□ □□□□ □□)” (92Da30580)
- price reduction is also explained as ‘partial termination’: Buyer may ‘partially’ terminate the contract to the extent of the affected portion and refuse to pay the portion of the contract price corresponding to the terminated portion. 76Da473

Seller may not terminate

- Seller may not terminate. As long as the buyer wants, the seller must perform. (Art. 571(1) inapplicable)
- 2002Da33557: 15 plots of land sold at 5.8 billion KRW. Seller knew that the land will be used for development of an apartment complex. It turned out that a portion of the land belongs to Kyungki local government. The affected portion is now worth 4.9 billion (taking account of the ground work preparation for the apartment complex). The portion is worth 1.7 billion without considering the added value resulting from preparation for the apartment complex development. The buyer subsequently bought the affected plots of the land from the true owner at the price of 6.7 billion. The seller was ordered to compensate the buyer 4.9 billion as the seller could foresee that the buyer’s loss would amount to this much. Seller attempted to terminate claiming that the seller did not know either. The court ruled that this case was partial failure of consideration (Art 752) and that seller may not terminate under Art. 572.

Defence of simultaneous performance

- Where buyer is entitled to claim price reduction (in respect of the portion which is impossible to be delivered from the beginning), the buyer may refuse to pay the entirety of the contract price (until the price reduction amount is established). 92Da30580 (The case is about Art 574. But the principle should be the same for Art 572.)

mutatis mutandis application

- 2009Da33570: A portion of the building is built on a third party’s land. The third party prevailed in an eviction lawsuit and the invading portion of the building is to be demolished. Art. 572 applicable mutatis mutandis.