Loan

1. General features

- Money or other consumables such as cereals
- Upon delivery, the object of loan becomes the property of the borrower, who has an obligation to return the same kind/quantity/quality together with interest (if agreed).

2. Obligation to lend?

- If the parties agreed to lend, perhaps yes. However:
- If the prospective borrower or prospective lender becomes bankrupt, the agreement to lend automatically becomes void. Art. 599.
- If the party's financial position or credit worthiness changes significantly, is the agreement to lend still binding?
- If the agreed loan is to be interest free, prospective lender or prospective borrower may, at any time before the loan, terminate at will the agreement to lend. If, however, the termination causes loss to the counterpart, it must be compensated. Art. 601
- Promise to lend in exchange for promise to pay interest: a synallagmatic contract

3. Obligation to repay (principal/interest)

- Once the loan is made, the obligation to repay arises. Lending can be done without a contract (obligation) to lend.
- The obligation to pay interest arises **only** when an agreement was made. However,
    - If the parties agreed upon an interest without

specifying the rate of interest, 5% p.a. rate of interest shall apply. Art. 379.

- Between merchants, 6% per annum interest is payable by default (i.e., when there was no ‘express’ agreement on interest). Arts. 54, 55 of Commercial Code
- After the due date, **delay damage** (at the statutory rate of interest or, if a higher rate of interest is agreed upon, at the agreed rate of interest) must be paid (even for an interest-free loan). Art 397.
- If a lawsuit (or an equivalent proceeding) is brought to enforce payment of a sum of money, a special statutory rate (12% p.a.; as from 1 June 2019) of interest applies to the delay damage (□□□□) from the date following the day the complaint was served. If the court finds that there were reasonably arguable (but ultimately unsuccessful) grounds to dispute the claim, the statutory rate of interest applies from the date the judgment (including the award of a tribunal) was rendered. Art. 3, Special Act to Expedite Litigation Proceedings, etc. (□□□□□ □□ □□ □□□ □□□ □□□ □□(□□□ □□□□. □□ □□)□ □□□ □□, □□□□ □□□□□ □□ □□□□□ □□□ □□□ □□ □□□□)
- After the date of judgment (of the court having fact-finding jurisdiction), there is no exception whatsoever to the higher rate of interest under the Special Act. (Supreme Court Judgment 2017Da206922, dated 18 July 2017; Supreme Court Judgment 86Daka2768, dated 23 February 1988)
- 2016Da17668: Restoration upon termination of a contract: Interest payable under Art 548(2) is **not in the nature of delay damage**, but unjust enrichment. Interest under Art 548(2) is payable even if the party is not in delay (due to a defence of simultaneous performance). The higher

rate of interest under the Special Act does not apply (while the obligation is not in delay due to the defence of simultaneous performance).
    - 2001Da76298: However, if the restoration obligation is in delay, the higher rate of interest is applicable (because the interest is then in the nature of delay damage as well).
    - The statutory rate of interest under the Special Act to Expedite Litigation Proceedings, etc. forms part of the substantive law of Korea. 2009Da77754. If the governing law is not Korean law, a Korea court may not apply the said statutory rate.
    - Where an arbitral award applies the statutory rate of interest under the Special Act, the award is not against public policy, and thus may not be set aside for that reason. 2004Da67264

- If the object of loan was defective (in the case of consumables) (Art. 602),
    - the borrower may repay the value of the defective things, if the loan was interest free.
    - the borrower may seek damages or replacement, if the loan was at an agreed interest or if the lender knew about the defect (regardless of whether the loan was interest free).

- If the borrower was provided with negotiable instruments or other goods in lieu of the agreed sum of money, the obligation to repay shall be determined solely on basis of the value of the goods/instruments at the time of delivery (the agreed repayment amount shall be disregarded). Art. 606.
- If interest was agreed, it shall be calculated from the moment the loan was actually made or tendered (if the borrower delayed the receipt due to its fault).
- Art 397: Damage in respect of non-performance of an

obligation to pay a sum of money shall be limited to delay damage (to be calculated at the statutory interest rate or, if the agreed interest rate is higher, at the agreed interest rate). However, “special loss” may be claimable. 91Da25369. If the agreed interest rate is lower than the statutory rate (5% or 6%), then the delay damage shall be at the statutory interest rate. 2009Da85342

4. “Option” as to accord and satisfaction (Art. 607)

- Applicable only to ‘prior’ arrangement (an option) for accord and satisfaction which was made before the debt falls due (or before the loan was actually made? Probably not.)
    - 91Da25574: If the debt has already fallen due, the accord and satisfaction between the debtor and the creditor is not regulated by Art. 607
    - 68Da1468: If a prior arrangement for accord and satisfaction was made to settle the account of a mutual-aid scheme (which was distinct from a loan), Art. 607 does not apply.

- The ‘prior’ arrangement for accord and satisfaction in respect of a loan is invalid to the extent that the value of the substitute property at the time of the arrangement exceeds the amount of the principal and interest at the repayment date.
- The debtor may,
    - before the accord is satisfied, repay the debt disregarding the prior arrangement for accord and satisfaction
    - after the accord and satisfaction, claim the excess amount (difference between the value of the thing at the time of the arrangement and the repayment amount of the principal and interest)

from the creditor

- If the substitute is real estate, motor vehicle or heavy plant and if the creditor's option to acquire it as accord and satisfaction is registered, the Act Regarding Registration of Option to Secure Debts 1983 applies.