Lease

1. General features

- Consensual contract whereby the lessor agrees to make available the object of lease for the lessee to use, and the lessee agrees to pay rent.
- Maximum period of lease? Art. 651(1) (which stipulated that the lease period may not exceed 20 years) was declared to be an unconstitutional restriction of freedom of contract. Constitutional Court 2011HeonBa234 Decision, 26 Dec 2013
- Minimum period of lease:
    - Civil Code has no provision regarding minimum period.
    - Residential Tenancy Protection Act (2 years) / Commercial Tenancy Protection Act (1 year): but the tenant may insist upon a shorter period.
    - Commercial Tenant’s right of renewal: exercisable for up to 10 years. (Art. 10 of Commercial Tenancy Act)
    - Residential Tenant’s right of renewal: exercisable once, for 2 years. (Art 6-3 of Residential Tenancy Protection Act)

2. Lessor’s obligations

- to make available and to deliver the object of lease
    - 93Da37977: The lessor may lose title but the contract of lease is still binding. If the lessor becomes unable, in reality, to make available for the lessee to use the thing, then lessor is liable for breach of contract.
    - 94Da54641: After the lease contract, it turns out that the object of lease belongs to a third party. The lessee may not, for that reason alone, terminate the lease. Lessee is still bound by the

lease. Only when the lessor is no longer able, in reality, to make the object available for the lessee, can the lessee terminate the lease and refuse to pay rent.

- to maintain the object of lease in good repair (Art. 623)
    - lessee has an obligation to ‘cooperate’ (Art. 624)
    - lessor has obligation to repair even if the damage was caused by lessee (in which case, the lessee shall be liable for the damage if it was due to lessee’s fault)
    - separate agreement whereby lessee undertakes to conduct the repair at lessee’s own expense: if the agreement is unclear, the extent of lessee’s repair is limited to ordinary level of maintenance (94Da34692: agreement – Plaintiff is a lessee operating a guest house. The building also has a public bath on the ground floor which was leased to another lessee. “여관 수리는 임차인이 부담하고, 보일러 고장을 수리하는 것은 목욕탕을 가동할 때는 임차인이 그 수리비의 반을 부담하고 가동하지 않을 때는 그 전액을 부담한다” – construed to exclude major repair (changing the boiler or replacing the plumbing work), which remains as the lessor’s obligation)
- to recover the possession of the object in the event of a third party’s intrusion or obstruction
- to reimburse lessee’s expenses (Art. 626)
    - expenses which were necessary to maintain in good repair, to recover from an intruder, to discharge burdens or imposts affecting the object of lease (the reimbursement must be done upon demand; lessee has lien over the object to secure reimbursement from the lessor)
    - expenses which resulted in ‘objective’ increase of value of the object (lessee may demand reimbursement only at the end of lease, and only to the extent of objective increase of value which remains at the end of the lease; lessee may have

lien over the object but the court may cancel the lien upon application of the lessor – Art. 626(2)). But when the lessee has the duty to restore, lessee may not claim reimbursements for any increase of value. The lessee has no right to improve the object of lease.
        - Reimbursement claims must be made within 6 months from the return of the object to the lessor. Arts. 654, 617
        - Lessee's reimbursement claims in respect of object of lease can only be made against the lessor. Lessee may not rely on Art 203 (which applies to a possessor who had spent expenses without any contractual ground, believing that it was his own property). 2001Da65751.
    - to ensure health & safety ?
        - Generally, no: 99Da10004 (it is lessee's responsibility to ensure health & safety for himself; poor security of the house and, as a result, break-in occurred during the period of lease)
        - Hotel, inn or other lodging: 2000Da38718 (the lessor has the obligation to ensure health & safety of the guests; the lessee (ie. guest) having no control over the property)
        - Lessor's warranty liability to ensure that the object is not defective (fit for the purpose)? Art. 567. Ex.: Grazing land was leased. Toxic weeds killed cattle. Lessor's liability? Only if the lessor had known about it. Otherwise, rent is exempt.) Jar was leased. Because of a crack, the wine was ruined. Lessor held liable regardless of knowledge. Dig.19.2.19.1 Bed bugs…

3. Lessee's obligations

- **to pay rent**

- reduction/augmentation *in futurum* on the ground of change of economic circumstances (Art. 628): agreement not to increase or decrease rent shall be disregarded (96Da34061)
- reduction on the ground of inability to use (a portion of) the object due to loss, damage or other reasons which are not due to the lessee's fault (Art. 627)
- 92Da31163: agreement to authorise the lessor unilaterally to augment rent is void as it is against Art. 652. What about an agreement to authorise the lessee to reduce the rent unilaterally? Agreement not to increase rent, ever? (96Da34061 Dramatic and unforeseen change of circumstances would allow the increase or reduction of rent notwithstanding the agreement.)
- Unless otherwise agreed, rent is payable at the end of the month (movables, buildings, residential land), at the end of the year (land leased for all other purposes) or without delay after harvest (for those which bear fruits). Art. 633 (payment in arrears, rather than in advance)
- default of rent payment (for buildings or installations): If the amount of rent in arrears reaches two installments' worth of periodic rent payment, the lessor is entitled to terminate the lease and repossess the buildings or installations. Art. 640.
- if lessee was replaced with lessor's approval, the new lessee's default of rent must amount to the required sum. 2008Da3022. If the lessee was replaced without lessor's approval, then the previous lessee's default shall be counted as well. (99Da17142; the case was about superficies but lease should be no different in this respect)
- if lease of land was to own a building or installation thereupon, and the building or

installation is securing a debt, the lessor must notify the creditor whose credit is secured by the building or the installation (so as to allow the creditor to take necessary steps – to pay rent – to avoid demolition) Art. 642
    - If the lessor of a land, on the basis of a claim arising from the lease, attaches lessee's movables affixed or appurtenant to the land, the lessor shall have a lien over the attached movables. The same applies to fruits attached by the lessor. Art. 648
    - If the lessor of a building or installation, on the basis of a claim arising from the lease, attaches lessee's movables affixed to the building or installation, the lessor shall have a lien over the attached movables. Art. 650
    - If the lessor of a land, on the basis of his rent claim, attaches the lessee's building which is on the land, it shall have the effect of a hypothec, to the extent of the last two years' worth of rent. Art. 649
- **Duty of care**
    - Art. 374.
    - If lessee is aware of maintenance need or a third party claim over the object of lease, lessee has a duty to inform the lessor without delay. Art. 634
    - 2000Da57351: The lessee has the burden of proof that he diligently discharged his duty of care.
    - 99Da64384: A fire broke out and destroyed the leased building. If it is proven that the fire was due to the lessor's failure to maintain the building in good repair, then the lessee is not liable.
- **Duty to restore** the object of lease to its original condition.
    - Art. 654, 615
    - 2002Da38828: Even where the contract stipulated

that the lessee shall “restore the leased property to its original condition and return it”, the Supreme Court interpreted that as the lessee agreed to maintain the property (including tax payment) at lessee’s expenses, the parties’ true intent was that in return for the lessee’s waiver of reimbursement for **necessary** expenses, the lessor also relieved the lessee of the duty to restore (“임대차계약이 해제(이는 종료를 포함하는 의미로 보인다.)된 때에는 임차인은 자기의 비용으로 임차한 목적물을 원상복구하여 임대인에게 명도하여야 한다고 정하여져 있는 사실을 인정할 수 있으나, 위 임대차계약에서 임차인은 목적물 관리 및 유지·보존에 따른 관리비와 수리비, 조세공과금 등 일체의 유지비를 부담하기로 약정한 사실에 비추어 임차인은 시설비용이나 보수비용의 상환청구권을 포기하는 대신 원상복구의무도 부담하지 않기로 합의를 한 것이라고 볼 것”

- 2006Da39720: However, an agreement that the lessee shall not claim reimbursement for **improvement** would rather confirm the lessee’s duty to restore. The lessee’s agreement not to claim reimbursement for improvement shall not be interpreted as absolving the lessee’s duty to restore.
- 95Da12927: Where the parties explicitly agreed upon the lessee’s duty to restore the building to its original state, the court interpreted that there is an implied agreement that lessee shall not seek reimbursement for improvement of the object of lease. As the lessee must put back the building to its original condition, lessee may not seek reimbursement of expenses spent to ‘change’ the building.
- 2002Da42278: Even if the lease was terminated because of the lessor’s wrongful breach, the lessee is not absolved from the duty to restore the object of lease to its original condition.
- Does an agreement to waive the lessee’s duty to restore imply a lessor’s waiver of claims in respect of damage negligently caused by the lessee? Does the agreement not to seek restoration

mean that the lessee is relieved of the duty of care?

- 97Na15953 (affirmed; 98Da6497): Public bath was leased. Parties agreed that the lessee shall undertake all repair works at his own expenses. The court interpreted that this implies an agreement to waive the duty to restore in exchange for lessee's undertaking to bear the maintenance expenses. But the court held that the lessee's duty of care remains unaffected. The lessee negligently caused damage and was ordered to compensate.

In short:

- If the lessee undertook to meet the maintenance expenses, lessor may not demand restoration (lessee has no duty to restore). 2002Da38828
- Lessee's undertaking not to claim reimbursement in respect of the improvement expenses does not absolve the lessee from the duty to restore. 2006Da39720
- If duty to restore is explicitly agreed, no reimbursement for improvement expenses. 95Da12927
- In the absence of an explicit agreement, the lessee's duty to restore would prevail (the lessee would not be able to claim for reimbursement in respect of 'improvement' of the object of lease).
- Agreement relieving the lessee's **duty to restore** does not mean that the lessee is relieved of the **duty of care**. Any damage caused intentionally or negligently must be compensated by the lessee.
- See, □□□, SOFA □4□□ □□□□, □□□□, □26□ (2004) pp. 48-58

  Art. 4(1) and Art. 4(2) of SOFA between ROK and US

  1. The Government of the United States is not obliged, when it returns facilities and areas to the Government of the Republic of Korea on the expiration of this Agreement or at an earlier date, to restore the

facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate the Government of the Republic of Korea in lieu of such restoration.
2. The Government of the Republic of Korea is not obliged to make any compensation to the Government of the United States for any improvements made in facilities and areas or for the buildings and structures left thereon on the expiration of this Agreement or the earlier return of the facilities and areas.

4. Fixtures introduced by lessee (Art 646)

- Fixtures: an object, neither inseparable nor detached, which enhances the amenities of the object of lease in an 'objective' manner (regardless of particular uses of the object of lease
- Fixtures introduced by lessee upon lessor's approval, or purchased by lessee from the lessor: at the end of the lease, lessee may exercise a put option.
- Unauthorized fixtures introduced by lessee: duty to restore (no right to claim reimbursement)
- If an an object is inseparable (economically impracticable to separate), it becomes part of the main object?
    - Art. 256 provides that if, in the absence of a contract, A introduced something and that became one with the thing owned by B, B may not demand A to remove it (as it would lead to wasteful operation). B will have to pay an amount (for the unjust enrichment) to A in respect of the inseparable portion which increases the value of B's thing.
    - The proviso of Art 256 stipulates: "However, this does not apply to fixtures (□□□ □) introduced upon

another person’s title (legal ground to introduce the fixtures).”

- But if the introduced fixtures are impossible to detach (i.e., they cannot have an independent use, cannot be detached without being destroyed), then the result must be concluded as one thing even if the addition was on the ground of a title. 대법원 1975. 4. 8 선고 74다1743 판결. (민법 제256조 단서의 규정은 타인이 그 권원에 의하여 부속시킨 물건이라 할지라도 그 부속된 물건이 분리하여 경제적 가치가 있는 경우에 한하여 부속시킨 타인의 권리에 영향이 없다는 취지이지 분리하여도 경제적 가치가 없는 경우에는 원래의 부동산소유자의 소유에 귀속되는 것이고 경제적 가치의 판단은 부속시킨 물건에 대한 일반 사회통념상의 경제적 효용의 독립성 유무를 그 기준으로 하여야 한다.) But, (where the lessee has a duty to restore) the lessor may demand the lessee to restore the object of lease (by removing the introduced, inseparable fixtures).
- 부동산에 부합된 물건이 사실상 분리복구가 불가능하여 거래상 독립한 권리의 객체성을 상실하고 그 부동산과 일체를 이루는 부동산의 구성부분이 된 경우에는 타인이 권원에 의하여 이를 부합시켰더라도 그 물건의 소유권은 부동산의 소유자에게 귀속된다 (대법원 1985. 12. 24. 선고 84다카2428 판결, 대법원 2008. 5. 8. 선고 2007다36933, 36940 판결 등 참조).
- Fact specific assessments:
    - An oil tank buried under the ground of a petrol station is found to have become one with the land. (unclear whether the burial of the tank was authorised by the land owner. 94Da6345. As long as it became one with the land, i.e., inseparable, then accession occurs). In that case, it is not a fixture. The tank is owned by the land owner. The question of lessee’s duty to restore/right to seek reimbursement may be at issue. If the lessor authorised the introduction of an inseparable object, can it be interpretedd that the lessor has waived the right to demand restoration?
    - But, depending on the particular

circumstances, the underground oil tank may be ruled as not acceded to the land and, as such, will be treated as a “fixture” (□□□) and also appurtenance (□□) which is owned by the person who introduced it (it remains as the lessee’s property). If it was introduced upon lessor’s authorisation, then the lessee may demand the lessor to purchase it as a fixture under Art 646. In 2009Da76546, the court concluded that, in this particular case, the buried oil tank did not become ‘inseparable’ and therefore did not become one with the land.

- Detached object is not a fixture even if its purpose is to enhance the amenities of the object of lease. Lessee need not seek lessor’s approval for introducing such an object.
- 93Da25738: A leased building was refurbished by the lessee as a restaurant. Lessee fitted the heating installation, electricity, door frames, interior decoration and painting. It was held that these do not increase ‘objective’ value of the building as the refurbishment was only for the lessee’s line of business. Lessee’s claim of reimbursement of expenses for improvement failed. The annexed objects are not fixtures either.
- 94Da20389: Shop signs do not result in ‘objective’ increase of the building’s value.
- If the lease was terminated because of lessee’s breach, lessee shall not have the put option.
- If the lessee notifies the exercise of put option, lessee may refuse to deliver the fixture (and the object of lease, to the extent necessary to preserve the lessee’s right to refuse delivery of the fixture) until the receipt of the price (amount to be determined by the court if the parties could not agree upon the price).
- 95Da12927: Where lease was lawfully transferred to a new

lessee, the new lessee may have the put option (against the current lessor) unless the parties agreed otherwise.

5. Buildings, installations and trees on a leased land (Art. 643)

- Upon termination of the lease, the owner of buildings, etc. may exercise put option to the lessor of the land (even if construction was not authorized by the lessor, lessee is entitled to a put option **provided** that the building is not against the purpose of the lease of the land and if the building is not unusually expensive; 93Da34589) What about the lessee's duty to restore?
- Even if the building is subject to a hypothec, the value of the building must be assessed without taking into account of the amount of debt secured with the hypothec. But the lessor may withhold payment to the lessee in respect of the amount secured by the hypothec until the hypothec is cancelled. 2007Da4356
- 93Da42634: If part of the building is on a land which is not leased by the lessor, lessee's put option is permissible only when the portion which is on the leased land is capable of being owned as a separate property. Lessor shall not be forced to buy the portion which does not lie on the land he leased.

6. Lease Desposit v. Shop Premium

- Upon termination of lease, lessor must return it to lessee after deducting any sum the lessee owed to the lessor.
- During the course of the lease, lessor may decide whether to deduct any sum owed to the lessor which has fallen due and in arrears. During the course of the lease, lessee may not demand that rent be set off against the deposit.
- 2002Da52657: Lessor who is entitled to demand restoration, but chooses not the exercise it, may not

deduct the cost of restoration from the lease deposit. (But lessor may freely benefit from it as the lessor has no duty to demolish it. Lessor need not compensate (disgorge the 'benefit' to) the lessee who failed to fulfill the duty to restore.)

- If the object of lease is transferred to a new owner, and if the new owner is deemed to be the lessor (because the lessee's lease is protected), then the new owner/lessor is liable to return the deposit, with necessary deduction, of course, if any. The old lessor (who transferred the title to the new owner) is not liable to return the deposit. 96Da38216 (Lessee himself was the successful bidder and bought the house.) However, 2000Da69026 rules that the old lessor is still liable to return the deposit (unless the lessee releases him; probably the lease was not a protected lease).
- Shop premium: it represents the 'commercial value' of a lease contract; it is not part of the lease. Lessee pays the premium (either to the lessor or to the lessee who transfers the lease to the new lessee) in order to become the lessee. It is a price (paid to be a lessee), hence not returnable. Lessor/former lessee is not liable to return it as the counter-performance consists in allowing the lessee to be the lessee.
- In return for a payment of shop premium, the lessee acquires, unless otherwise agreed:
    - a guaranty to have the lease for an agreed period of time
    - a right to transfer the lease (or sub-lease) to a new lessee (who is acceptable to the lessor; lessor may not unreasonably withhold authorisation for transfer of lease or sub-lease)
    - an expectation that renewal of lease shall not be unreasonably refused?
- If the lessor violates these rights or expectations of the lessee, lessor is liable to return the shop premium (or a portion thereof). 2002Da25013 (where lessor

received the shop premium from the lessee), 2000Da4517

7. Assignment of lease, Sub-Lease

Assignment of lease

- In principle, assignment of lease requires lessor's approval. Art. 629
  - Unauthorized assignment constitutes lessee's breach. If it is material (when the assignee actually possesses the object), lessor may terminate the lease.
  - Under special circumstances, unauthorized assignment is permitted. 92Da45308: Assignee, who was lessee's wife, was already residing with the lessee at the time the lease contract was signed. After divorce and re-marriage with the same person, the lease was assigned to the wife. Unauthorized assignment is permitted as the relationship of trust between the lessor and lessee is not altered.
  - 92Da24950: Building together with the lease of land thereunder were subject to a hypothec. Creditor exercised the force sale. The purchaser acquired the title to the building. What about the lease of land thereunder? Art. 622(1) merely provides that if the registered owner of building has a lease of land thereunder, the purchaser of land shall be deemed to be the lessor (new owner of the land must accept the existing lease). In this case, however, the question was: can the new owner of the building claim the benefit of the lease against the existing land owner? No, but if the new owner of the building proves that the transfer of lease is not against the purpose of the lease, the land owner (lessor) may not terminate the lease merely because of the change of building ownership (change of the lessee).

- Upon authorized assignment, the assignor is no longer a party, no longer liable on contract of lease. But the existing liabilities remain with the assignor, unless otherwise agreed.
- Unless otherwise agreed, lease deposit must be returned to the assignor when the object of lease is delivered from the assignor to the assignee? Extremely unlikely in reality. When lease is assigned, the claim to receive deposit would also be assigned.
- 96Da17202: The case is special because lessee's claim to receive deposit was attached by a creditor before the assignment of lease.

Sub-lease

- Contract is between the lessee and the sub-lessee, but direct obligation arises between lessor and sub-lessee.
    - Sub-lessee has obligation to lessor (rent, safekeep, etc.) Art. 630
    - Lessor may not deny lease to sub-lessee on the basis of an agreed termination of the lease between lessor and lessee. Art. 631
- Lessee is not absolved of contractual obligations.

8. Protection of tenancy: Dwelling house / Commercial space

9. 'Rent free' lease