Mandate / Negotiorum Gestio

1. Mandate: Consensual contract

- Request+agreement: If, upon request of a party (mandator), the counterpart (mandatarius) agrees to carry out the affairs of the former, a contract of mandate is concluded.
- The mandatarius' obligation is 'to carry out' the mandator's affairs, not to bring about an agreed 'result'. No guarantee as to the 'success' of the operation.
- A relationship of trust; mandatarius' duty of care.
- Expenses of carrying out the affairs must be reimbursed. But 'fee arrangement' is not essential.
- No mandate as to one's own affairs.

2. Mandate and agency

- Creation of agency (granting the power of attorney) is not an essential element of a contract of mandate.
- Mandator's request may consist of any lawful manner of carrying out the mandator's affairs (factual, legal, economic, non-economic).
- 93Da4472: Police requested a hospital to treat a victim of an accident. The hospital treated the patient following the police's request. No mandate. Whose 'affair' was it?

3. Mandate and partnership contract

- A partner who carries out the partnership business owes a duty of care to the partnership, rather than to the other partner or to any particular partner. 2004Da30682
- Article 681 (mandatarius' duty of care) applies mutatis mutandis to a partner when he carries out partnership business (Article 707).
- But this does not mean that a partner is a mandatarius

of another partner or a mandate is automatically created or exists between partners.

- A partner cannot be a mandatarius of the partnership business (because the partnership business is his own affairs as a partner).

4. Mandatarius' duty of care

- Even if no fee is agreed, mandatarius who freely accepted to carry out the mandated business must do so with the level of care expected of a good manager (*bonus paterfamilias*)
- 2000Da55775: Sales agent (mandatarius) of a manufacturer of heavy plant (mandator) has the duty to scrutinize the creditworthiness of buyers and obtain adequate security to ensure payment of price.
- 96Da22365: Estate management company (mandatarius) held liable for failure to inform the residents' governing body (mandator) of the newly available choice in electricity supply contract for the apartments complex. The residents thus remained with the existing electricity supply contract which was less favourable than the newly available supply contract.
- Even if mandator made a 'specific' request, the mandatarius (especially, the ones with professional expertise) must offer competent advice as to the consequences of the requested course of action:
    - 2000Da61671: A notary was asked to cancel the existing hypothec (which was in the name of mandator's wife) and register a new hypothec in the name of the mandator. At the time of the request, however, the property was attached by another creditor (after the hypothec had been registered). The notary had a duty to explain that the existing hypothec could have been 'assigned' to the mandator without losing the priority over the attachment. Hypothec which is registered after

the attachment has no priority over the creditor who attached it.

    - 2005Da38294: An importer of rye seed requested a customs broker to apply for the 0 rate customs for the seed indicating that the seed would qualify for exemption of customs duty. The customs broker followed the request and no duty was paid. The customs authority concluded that the rye seed is subject to customs duty and the importer was ordered to pay a penalty rate of customs duty.
- 2001Da71484: Estate agent who has not (yet) received the fee nevertheless has the duty of care. Mandator's breach (non-payment of the agreed fee) does not "automatically" terminate the mandate or relieve the mandatarius of his duty of care.
- 2004Da7354: A lawyer (mandatarius) retained for a case must provide advice for the client (mandator) **even after the conclusion** of the particular litigation where an unfavourable judgment was rendered (the prospect of successful appeal and steps to be taken to correct the obvious errors of the judgment)
- The same rule applies to a contractor:(Supreme Court case 2014Da31691) The owner instructed to use bricks to build a retaining wall which was quite high. The contractor carried out the work as instructed without explaining that using bricks is not appropriate when the retaining wall is high and that alternative methods should be used. After the work is completed, the retaining wall began to crack and to crumble down. The Supreme Court held that "regardless of the demand of the owner, the contractor, as a professional of civil engineering and construction, has the basic duty to make sound judgment to achieve the safety, durability and appropriateness of the retaining walls which are to be built on a slanted terrain." The contractor's defence that he merely complied with the owner's demand was rejected.

5. Mandatarius' duty to account, etc.

- Must give an account of the affairs upon mandator's request and at the end of the mandate. Art. 683
- Must hand over to the mandator what was received in the course of carrying out the mandator's affairs. Art 684
- Mandatarius may, only in unavoidable circumstances, entrust the mandated business to a sub-mandatarius. On the other hand, mandator may authorise mandatarius to do this. Sub-mandatarius owes the duty of care directly to the mandator as well as to the mandatarius. Art. 682

6. Mandator's obligations

- Must reimburse the mandatarius' expenses which were necessary to carry out the mandate. Interest begins to accrue from the moment the expenses have actually been spent. Art 688(1). Whether the expenses were 'necessary' shall be determined in light of the duty of care. Expenses negligently spent (wasted) may not be claimed. As long as the mandatarius was not negligent, even if the expenses subsequently turn out to be unnecessary, they will still have to be reimbursed so long as the mandatarius incurred the expenses upon a *reasonable* belief that they were necessary.
- If mandatarius obligated himself in the course of carrying out the mandate, mandator shall be required to discharge such obligation on behalf of the mandatarius (upon demand of mandatarius). Instead of demanding the mandator to discharge the obligation, mandatarius may demand mandator to provide adequate security (to ensure reimbursement). Art. 688(2)
- Mandatarius may demand an advance payment of necessary expenses. Art. 687 Any surplus which is left over must be returned to mandator. Art. 684(1). If mandatarius had to rely on a judgment to claim and receive an *advance payment*, and if it turns out that the estimated expenses turn out to be inaccurate (too much or too little), what

about *res judicata*?

- 93Da43873: First demand bank guarantee. If it is objectively manifest that the beneficiary's demand is abusive, the guarantor (mandatarius) has a contractual duty to refuse payment. If the guarantor nevertheless paid to the beneficiary under such circumstances, the debtor (mandator) may refuse to reimburse the guarantor's expenses as they were negligently 'wasted'. □□□, □□□□□ □□□□ □□□, □□□□ □29□ (2005) p. 97
- Must hold mandatarius harmless: If mandatarius, through no fault of his, sustained loss caused by a third party in the course of carrying out the mandate, the mandator must compensate (even if the mandatarius acquires a claim against the party who caused the loss). Art. 688(3). Upon compensation, the mandator may exercise the mandatarius' claim against the party who caused the loss (subrogation under Art. 481).

7. Termination at will; Art. 689

- Either party may terminate mandate provided that it was not at a moment which would adversely affect the counterpart. If, due to the timing of the termination, it caused loss to the counterpart, the loss must be compensated.
- 98Da64202: Even where a fee was agreed, mandator may terminate without having to compensate for the mandatarius' loss of the fee. Only the loss caused by the 'timing' of termination needs to be compensated. Where a fee was agreed to be paid 'upon completion of a task', the mandator may terminate before the completion of the task. In such a case, the mandatarius would lose the fee (because the task was not completed). Such termination is not necessarily a termination at a time which is disadvantageous to the mandatarius.
- 98Da47108: Mandatarius was being paid a salary and there was a covenant not to terminate the mandate for the

first two years. Mandate is in the interest of mandatrius as well as mandator. Although termination is still possible, if the mandator's termination was without justifiable ground, the resultant loss to the mandatarius must be compensated.

- If mandatarius has already incurred an obligation to a third party in order to carry out the mandate, mandator may not terminate with impunity. Termination, under such circumstances, is at a moment which would adversely affect the counterpart. Termination is possible but mandator must hold the mandatarius harmless. Incurring an obligation to a third party is already an "expense" of the mandatarius.

8. Termination by operation of law; Art. 690

- Death, bankruptcy of a party.
- Mandatarius' loss of full capacity.
- Emergency measures: Mandatarius' successor has a **duty**/right to take emergency measures until the mandator (in the case of mandator's death, his successor) can handle the business for himself. (Art 691)
- The party affected by death or bankruptcy must notify the counterpart of the termination. Until such notice is made, the counterpart may treat the mandate as valid. Art. 692 (vis-à-vis the counterpart). Also see Art. 129 (vis-à-vis third party)

9. Other relationships where mandatarius' duty of care is applicable *mutatis mutandis*

- Partner in the execution of a partnership business (Art. 707)
- Director in carrying out the company's business (Art. 382 of Commercial Code)
- Court appointed Manager of absentee's assets (Art. 24)
- Parent or guardian in managing the children's or ward's assets (Art. 919, Art. 956)

- Creditor who exercises the debtor's right via *action oblique*
- Assignor of a credit who received the payment from the debtor before the notice of assignment is served to the debtor (97Do666)
- Guarantor who provided a guarantee for a debtor upon the debtor's request. 93Da43873

10. Negotiorum Gestio

Contract for a completed piece of work

1. Consensual contract

- Where a party agrees to pay for a completed piece of work which is to be carried out by the other party (contractor).
- 94Da42976: If the contractor's own material is to be used and the completed item is 'generic' (not specifically catered for the principal), it is a contract of sale. If the completed item is specifically for the principal, then it is a contract for a completed piece of work. Contract to manufacture and supply waste water treatment facility (including evaporation tubes)
- 88Daka31866: Contract for the supply of axle housings which were to be manufactured with contractor's own material (steel shaft). Owner inspected but was unable to discover the defect. Owner sold it to a buyer, who discovered the defect and terminated the sale with a claim for damages. Owner now sues the contractor.
    - Art 667 applies. Art 580(1) does not apply

(irrelevant whether the plaintiff should, or could not, have known the defect.

- Owner has the ‘right’, not a ‘duty’ to inspect. Owner has the power to reject the work if the parties agreed that “the inspection of the owner is final.”
- But contributory negligence of the owner may be taken into account.
- 장준혁, 동산의 제작물 공급계약의 성질 결정, 민사판례연구 제35권, 439면

2. Sub-contracting: allowed in principle

- The manner of carrying out the work is for the contractor to decide. The owner, however, may give instructions – without impairing the contractor’s independence.
- Unless otherwise agreed or the nature of the contracted work does not allow, contractor may sub-contract the work, for which the contractor remains responsible. Contractor shall be liable for sub-contractor’s fault (Art. 391)
- 2001Da82545: Sub-contracting itself is not a breach.

3. Ownership of the completed piece of work

- Where the principal (project owner) provided the material, the completed item belongs to the principal. If, however, the value added by the contractor is “manifestly greater” than the cost of materials, then the contractor acquires the ownership (but has the contractual duty to hand over the completed item to the principal). Art. 259.
- 98Du16675:Building contractor who used his materials will acquire the ownership of the completed building –

unless otherwise agreed between the parties.

- 97Da8601: Where the planning permission was prepared in the principal's name and it is agreed that the completed building was to be registered under the principal's name, then the ownership of the completed building vests with the principal even if the contractor used his own building materials. The case, however, dealt with a situation where the contractor purchased the land from the land owners. The building permission was submitted in the name of the land owners and it was also agreed that the completed building would be registered under the land owners' name. But the Court interpreted that these arrangements were merely to "secure the payment of land purchase price". The registration, therefore, conveys the title of the building only to the extent necessary to secure the payment of land price. The contractor acquires the ownership of the building. As soon as the land price is paid, the contractor fully recovers the ownership.

4. Contractor's warranty liability

- Where the completed work (if the work is to be completed in stages, the completed stage) is defective, the principal may demand repair, and additionally, seek compensation for loss caused by the defect. Art. 667
- If the defect is not material AND if the cost for repair is excessive, damages only may be sought. Contractor shall not be compelled to repair in such a case (to avoid economic waste).
- Defence of simultaneous performance. Art. 667(3). In principle, the owner may withhold the enitirety of payment until the defect is repaired or damage is paid. But 91Da33056 reduces the scope of defence so that the owner may withhold only the "portion" of the payment corresponding to the defect. 2001Da9304 provides a more

detailed guidance for this rule: When the repair cost (or damage in lieu of repair) is relatively small compared to the owner's unpaid payment and when it is doubtful whether the owner would willingly pay even if the defect is repaired, then the contractor shall be entitled to receive the payment due minus the repair cost; the owner may not refuse payment of the entire amount due (even if the repair has not been done).

- 2001Da9304: Where payment was to be made in stages of completion, the principal may withhold payment regardless of whether the defect was in the stage of work corresponding to the payment obligation. Defect in a previous stage of work which was discovered after the payment for that stage was fully made, can be a ground to withhold payment for the current stage of work.
- Measure of damage: (Where repair may not be compelled) the difference between the market value of the completed (stage of) work without the defect and the market value of the present work with defect. The pain and suffering caused by the defective work is special damage (contractor's foreseeability must be proven). 96Da45436
- 95Da30345: Where the repair may be compelled, the principal may elect to seek compensation instead of the repair. The actual cost of repair may be claimed. If there is other loss, that may also be claimed.
- Where the principal elects to seek compensation, can the contractor "insist" upon repair? Probably not. The contractor can limit the amount of damage award to the actual cost of repair.
- Termination: if the defect of the completed (stage of) work defeats the purpose of the contract, the principal may terminate the contract. Art. 668.
- 93Da25080: If the completed stage of work is beneficial to the principal and if it is wasteful to order restoration of the completed stage of work, the termination may not have retroactive effect. the principal must make payment *pro rata* (contract price x

percentage of completion calculated in terms of the cost of carrying out the work). Also see 2000Da40995

- Where buildings and installations are “completed”, the principal may not terminate the contract even if the defect is serious enough to defeat the purpose of the contract. Art. 668. While the buildings or installations are not yet completed, the termination shall be governed by the general principle of ‘materiality’ of the breach. Still, however, the completed stage may not be affected by the termination. 94Da18584 and 93Da25080
- Limitation period:
    - Ground work and installations: 5 years
    - Stone, Concrete, Brick, metal or other durable structures: 10 years
    - Other works: 1 year.
    - Limitation period begins to run from the date of actual delivery or completion of work (where delivery is not necessary).
    - If the completed work is destroyed or damaged, claims must be brought within 1 year. (Art 671(2))
    - Any manner of ‘demand’ (including extra-judicial demand) is sufficient.

- Exclusion of warranty or reduction of limitation period is possible. However, exclusion or shortening of limitation period is ineffective with regard to defect known to the contractor (and unknown to the principal). Art 672

5. Payment for the completed work

- In cash or in kind. Payable upon completion of work and delivery, where delivery is necessary.
- Where an advance payment was agreed in order to enable the contractor to purchase materials and hire workmen, the amount shall be set off against the completed stage

of work corresponding to the percentage of the given stage's progress. The principal may not set off the entirety of the advance against any given stage of work. 2001Da1386. If, for example, 30% of the contract price was paid upfront as an advance and a stage of work representing 10% of the entire work is completed, then the principal needs to pay 7% of the contract price and the remaining 3% of the contract price can be set off against the advance payment (10% of the advance payment may be set off).

- Contractor's lien to secure payment for the completed work. Art. 320. If, however, the building was built with contractors' own materials and if there was no agreement to make it a property of the prinicipal, then on completion of the building the contractor becomes its owner. The contractor cannot have a lien over his own property. 91Da14116
- Contractor may 'demand' the owner of the completed building to set up a hypothec to secure payment due to the contractor. The hypothec will arise only when it is registered (and the contractor may compel the owner to register the hypothec). Art. 666.

6. Principal's duty to cooperate

- Depending on the nature of work, the principal may have a contractual duty to cooperate.
- 96Da14364: Where the principal's refusal made it impossible for the contractor to complete the work, the contractor is entitled to full payment of the contract price.
- Principal does not have a duty to inspect unless explicitly agreed otherwise. Even when the parties agree that the principal must inspect, this is often interpreted to empower the principal to reject the work upon inspection.

7. Risk

- As long as it is commercial reasonable to complete the work, the contractor must complete it even if completion is disrupted for any reason. The parties usually provide express terms to cope with force majeure and adopt a sensible solution for the contractor.
- Where the completed stage of work is preserved and only the future work is affected by unavoidable circumstances, the contractor would be entitled to the corresponding portion of the contract price.
- When the completed (stage of) work is destroyed before the delivery, or contractor's notification of completion of, the completed stage of work, contractor bears the risk (the principal is relieved of the obligation to pay the contract price)
- 91Da14116: Once the contractor informed the principal to accept the completed stage of work, subsequent demolition by a third party will not relieve the principal of the obligation to make the payment corresponding to the completed stage of work.
- When the work is completed and delivered, then the risk passes to the principal. When payment is made in respect of the completed stage of work, the risk also passes to the principal to that extent.

8. Principal's Termination at will (Art. 673)

- Principal may, at any time before the completion of the contracted work, may terminate the contract.
- Contractor's loss must be compensated. Contractor, however, must take reasonable steps to mitigate the loss.
- 2000Da37296: Upon termination by the principal, the contractor is entitled to damages (actual costs spent so far + the profit it would have enjoyed had the work been

completed). If the contractor could reasonably use the resources (which were freed by the termination) to alternative contracts, or could have sold the materials (no longer needed because of the termination), the profit he could have enjoyed must be deducted from the damages payable by the principal.
- Art 832 of Commercial Code (Termination of voyage charter)

9. Bankruptcy and termination at will

- In the event of the owner's bankruptcy, the contractor or the owner may terminate the contract and seek payment for work done. (Art 674) Neither of the parties may seek damage.
- Debtor rehabilitation and bankruptcy act, Arts. 119, 121 apply only when the contractor is bankrupt. (2001Da13624) If the contract was not completed, the trustee of the bankrupt estate of the contractor may choose whether to terminate or to continue with the contract. If the bankrupt estate of the contractor terminates the contract, the owner may claim damage.

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 ("□□□□□□ □□(□□ □□□ □□□□ □□□ □□□.)□ □□□ □□□

은 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 (부속된 것) 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 경

우에 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" (부속물) and also appurtenance (종물) 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

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 (□□□

상) 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. (금전채무의 전부 또는 일부의 이행을 명하는 판결(심판을 포함한다. 이하 같다)을 선고할 경우, 금전채무 불이행으로 인한 손해배상액 산정의 기준이 되는 법정이율)

- 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.

Hire Purchase

1. Seller remains the owner; the purchaser becomes the hirer.

- Inapplicable to immovables, motor vehicles or heavy plant: title belongs to the registered owner regardless of the parties' agreement. 2009Do5064
- Mainly for movables: Unless the third party purchaser in good faith can satisfy Art. 249 (in which case, the purchaser would acquire a clean title), the owner can recover the movables.
    - 99Da30534: Even if the third party had no knowledge that the title was reserved to the seller; even for sale of unascertained goods (steel, as building material).
    - 2009Da93671: Even if the purchase price was nearly paid…
    - 2009Da15602: Steel was sold with title reserved to the seller. Purchaser used the steel to build a building of a third party. Third party did not know that the title was reserved. The seller demanded unjust enrichment (in respect of the steel, which now forms part of the building) from the third party. Seller's claim against the third party failed.
    - Can the third party purchaser pay up the remainder of the original purchase price to the original seller and acquire title? (ie., can the purchaser transfer its 'conditional title' to the third party w/o seller's authorisation?)

2. Seller's right

- Repossession upon purchaser's default
- In the event of purchaser's bankruptcy, the seller can recover the thing as it does not belong to, and must be separated from, the bankruptcy estate.

- If the purchaser is subject to ‘official’ auction to discharge a judgment debt, the seller may file a claim to separate the thing from the debtor’s (purchaser’s) estate.
- Re-selling without assigning the credit?

3. Purchaser’s ‘right’

- Upon full payment of price, the purchaser acquires title.
- While the price has not been fully paid, the thing may be sold to a sub-purchaser with the knowledge of the hire purchase. The sub-purchaser becomes the owner upon full payment of the price.

4. Passing of risk

- Risk passes with possession

Sale and Repurchase

1. Sale and Repurchase v. Buyback Option

- Used as a security for a loan, a pressure (penalty) measure to ensure certain conditions (if the buyer fails to compy with certain conditions imposed by the seller, the seller may repurchase).
- Sale and Repurchase must be agreed as one transaction.
- Buyback option contract may be agreed at any time.
- Buyback Option may last longer than 3 years (movables) or 5 years (immovables). The right of repurchase must be exercised within these periods.
- (Immovables): Sale and Repurchase is registered as a sub-entry of the sale transaction. Buyback option is registered as a stand-alone entry.

- Notice of repurchase must be given to the present owner of the property (if the property was conveyed to a third party in the meantime).

2. Repurchase price

- Unless otherwise agreed, sale price + buyer's expenses (Art. 590)
- Often used as a security for a loan.

3. Seller's right

- Upon notification (of the exercise of the right of repurchase) and tender of the repurchase price to the buyer, the title reverts? Probably yes.
- Original sale terminated? or a new sale completed?
    - 2000Da27411: After the Sale and Repurchase was registered, a mortgage was registered. The seller exercised the right of repurchase (and tendered the price?). Subsequently, the mortgagee (the creditor) went bankrupt. The seller who had excercised the right of repurchaser may rely on retention of title claim to have the mortgage cancelled. The property does not form part of the bankruptcy estate.
    - 90Daka16914: Sale and Repurchase was registered. The seller notified the buyer that he intends to exercise the right of repurchase. The acquisition by repurchase, however, was not registered. A creditor of the buyer attached the property. The seller may not prevail against the creditor.
- Seller's right of repurchase is transferable. But the transfer must be registered (immovables) or notified to the buyer.
- Immovables: Assignee of a registered right of repurchase may rely on the registered amount of repurchase price (regardless of the actual repurchase price agreed upon by the seller and buyer).

4. Buyer's right (Art. 594(2))

- Applicable to the buyer or to the third party who acquired the property from the buyer.
- To recover necessary expenses
- To recover the value of improvement or the expenses to improve the value
- If the right of repurchase is exercised by seller's creditor (via *action oblique*), the buyer may use the difference between the court appointed surveyor's valuation of the property and the repurchase price to discharge the seller's debt and have the right of repurchase extinguished (any surplus must be returned to the seller). Art. 593

Exclusion of warranty

- For example, "no refund!"
- THERE IS NO WARRANTY FOR THE PROGRAM, TO THE EXTENT PERMITTED BY APPLICABLE LAW. EXCEPT WHEN OTHERWISE STATED IN WRITING THE COPYRIGHT HOLDERS AND/OR OTHER PARTIES PROVIDE THE PROGRAM "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE PROGRAM IS WITH YOU. SHOULD THE PROGRAM PROVE DEFECTIVE, YOU ASSUME THE COST OF ALL NECESSARY SERVICING, REPAIR OR CORRECTION.
- Art. 584: Seller may not exclude:
    - Liability arising from facts knowingly withheld by the seller
    - Liability arising from acts deliberately done by

the seller

- Also see Act for the Regulation of Consumer Contracts, Art 7
    1. [illegible]
    2. [illegible]
    3. [illegible]
    4. [illegible]

Breach of warranty, Breach of contract, rescission

Different goals

- Remedies in respect of breach of warranty: principally aim to ‘adjust the terms of the contract (price)’
- Remedies in respect of breach of contract aim to ‘ensure compliance with the agreed terms of the contract’

What do the parties agree in a sale of ‘specific’ property?

- specific property v. defectless property
    - Transfer of that ‘specific’ property? regardless

of the quality or quantity?
        - Transfer of ‘defectless’ property? Regardless of the fact that a ‘specific’ and ‘unique’ item was the object of sale?

- Even for a sale of ‘specific’ property, buyer probably wants and expects to buy defectless property unless explicitly waivered otherwise. And seller knows that this is what buyer would expect (and the price is negotiated on these assumptions). So it matters little whether the parties ‘actually agreed’ upon the defectlessness of the thing sold. Regardless of the agreement, the remedy is invariably given.
- Art 374: Seller’s duty of care. 그 물건을 인도하기까지 선량한 관리자의 주의로 보존
    - As long as the seller took proper care to avoid ‘new defect’ from supervening, the seller’s contractual obligations were discharged?
    - Does the seller have the contractual duty to ‘remove’ the defect which already existed at the time of the sale?

- Art 462: Seller’s obligation to deliver. 이행기의 현상대로 그 물건을 인도하여야 한다.

Breach of warranty: exclusive or sole remedies?

- Remedies in respect of a breach of warranty are available for a short period: 6 months or 1 year from the date of knowing the defect. After the lapse of this period, it is debatable whether the seller can have a remedy under breach of contract (in which case, the seller may have a defence of no fault).
    - If the same remedy (price reduction, performance

measure of damage) can be borught under the guise of breach of contract, the short limitation period for warranty liabilities would be pointless?
    - However, Art 374 and Art 462 may provide the seller with a ground for successful defence of “no fault” (which, in other cases, is in reality hardly ever successful).

- Different remedy (extended loss), which cannot be brought under the heading of warranty liability, must be brought as a breach of contract claim. This claim (as it is not grounded on seller’s warranty liability) is not subject to the short limitation period of warranty liability.
- If, however, there is an ‘express’ warranty, then extended loss may also be brought under the warranty clause (express clause). But this would be a breach of contract claim (violation of a contractual provision). 92Da38980 (“□ □□□□ □□ □□□ □□□ □□□□ □□□□□ □□” –> This contractual clause can support damage claim in respect of an extended loss from a defect.)
- 2001Da70337:
    - faulty workmanship leading to a defect in the completed storage tank for fish sauce ==> covered by warranty liability
    - damage to the fish sauce which has been stored in the storage tank ==> (as it is extended loss) covered by breach of contract claim
    - 99Da40302: In accordance with a statute allowing disposal of certain properties of the State or of local governments, a property was sold to a temple. The registration, however, was done in the name of the head monk of the temple because the sale contract erroneously drafted by the seller (the State) had designated him as the buyer. The property was subsequently sold to a number of

buyers. The temple reclaimed the property successfully. Purchasers need not exhaust remedy under breach of warranty clause before suing the State in respect of the officials' negligent drafting of the sale contract. Breach of warranty and tort claim may independently be pursued.

Rescission available as a separate, alternative remedy

- 2015Da78703: Rescission for mistake and termination for a material defect are separate, alternative remedies which are all available for the purchaser to choose from.
- 76Da268: Rescission for deception and termination under Articles 569, 570 are also separate, alternative remedies.

Sale by Description

- Implied **condition** that the goods shall correspond with the description.
- If the delivered goods fail to correspond with the description, it will be a breach of contract (rather than breach of warranty)
- Mainly for fungible, unascertained goods.
- If the buyer relies solely (no opportunity for buyer to inspect the thing sold) or principally (even with an opportunity to inspect the goods) on the seller's description, sale of 'specific' goods may also be regarded as sale by description?

- A thing sold as “nearly new” through correspondence or through internet.
- Displayed thing which is sold as “authentic property of Charles I”.
- Sale of seeds, mushroom germs “in stock”

Remedies

- Usual remedies for **breach of contract** available.
- Can the buyer demand replacement of the defective goods with goods corresponding with the description? Yes. Art. 581(2)
- Can the Seller **insist** on replacement when the Buyer demands refund/return ?
- Vehicle recall? After sales service? Even when the goods were sold to a third party? Customary law?

Defect of goods selected for delivery. Art. 581

- Art 580 (defect of specific good) applicable.
- Buyer may demand replacement (as replacement is possible). Art 581(2)
- Buyer’s remedy available for 6 months from learning the defect. Art. 582
- 94Da23920: Hiking shoes sold as per sample. Shoes were inspected and accepted. Upon acceptance, payment was made. Shoes turned out defective. Arts. 580 and 581 applicable. Failure to discover not-so-easily-discoverable defect does not constitute ‘contributory negligence’. Buyer’s “due diligence” is for the benefit of the buyer (in the sense that the buyer may refuse to conclude the contract or refuse to accept the delivered thing), not of the seller. In principle, however, buyer’s ‘contributory negligence’ must be taken into account in assessing the damage (even though the seller’s warranty liability is ‘strict liability’).

Seller’s liability in respect of defect of a ‘specific’ property

Defect

- Thing sold must have the quality or performance ordinarily expected given the nature of the sale and intent of the parties.
- Prevalent technology, reasonable economic expectations will also be taken into account.
- Seller’s representations & warranties (regarding the nature, quality, suitability of the thing sold) must be taken into account.
- Applicable only to ‘hidden’ defect (Art. 580(1)):
    - If the buyer had actual knowledge of the defect, then it must surely have been reflected in the price.
    - If the defect is patent enough that a reasonable buyer should have known it, then no need to protect the careless negotiator.
    - Seller has the burden of showing that the buyer knew or should have known the defect.
    - Suppose the seller knew the defect and the buyer negligently overlooked. What if the seller (i) kept quiet about the defect? (ii) deliberately misled the buyer?

- 98Da18506: A plot of land was sold as suitable for building dwelling houses. Buyer decided to build

apartments instead and applied for planning permission, which was refused. The court held that inability to obtain the planning permission for building dwelling houses (as the buyer intimated at the time of the sale) would have constituted ‘defect’ under Art. 580. In this case, however, the buyer changed the plan and applied for building apartments. The plot cannot be viewed as defective at the time of the contract.

- 84Daka2525: A taxi was sold as suitable for commercial operation. It turned out that the taxi was subject to an administrative order banning it from commercial operation for 150 days. Defect under Art. 580.

Remedies

- Unavailable if the sale was concluded in an ‘official’ auction. Art. 580(2) Caveat emptor!
- Reduction of price:
  - Art 575(1) only refers to ‘damage’. But it should be interpreted to mean ‘reduction of price’.
  - the difference between the market value of the defective thing (assuming that the defect is known) and the contract price (which was reached without knowledge of the defect)?
  - the ‘objective’ worth of the defect must be subtracted from the contract price: *quanto minoris essem empturus, si id ita esse scissem,* Dig.19.1.13pr. If the defect was known to the buyer, what the parties would have agreed as the contract price (reflecting their respective bargaining skills and bargaining power). “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)

        - [Doubtful!]The amount which would put the buyer in the same position as that in which he would have been if there was no defect: performance measure of damage?
        - The assumption is that the buyer would have paid less if the defect had been known to him (in the event, buyer paid more believing that there was no defect).

- Termination: If the defect is serious enough to defeat the purpose of the contract
- Regardless of whether warranty remedies are available or not, rescission on the ground of mistake is also available separately (assuming that the requirements for rescission are met). 2015Da78703
- **Available for 6 months** from learning the defect. Art. 582
    - 2003Da20190: Grains for shiitake mushroom were sold. The germination rate turned out to be very low (less than 1/100 of ordinary shiitake mushroom germs). Buyer may have remedies under Art. 580 for 6 months from the moment when the buyer learned that the unusually low rate of germination was due to the grains themselves, rather than some other reasons. (Can the buyer have NO remedy after 6 months? Is the seller in 'breach of contract'? Has the buyer not 'performed' as agreed (to deliver the 'specific' good)?)

- Commercial Code, Art 69: Where **both** parties are merchants,
    - the purchaser has an obligation to "immediately inspect and, if a defect is found, immediately notify the seller". So Article 582 of the Civil Code does not apply.
    - where the defect is not immediately discoverable,

the purchaser has 6 months to discover the defect.

- What about a defect which was not discovered and was not discoverable within 6 months and which only emerges after more than 6 months? (98Da1584 ruled “no remedy under the Commercial Code”. Confirmed by 2013Da522, where it is ruled that no warranty liability exists, but ruled that a breach of contract remedy is available)
- If parties agree upon a warranty period, the court interprets that Art 69 of CommCode is excluded by consent (2008Da3671).
- Regarding extended loss, the court rules that a breach of contract remedy is available. 2013Da522 (A plot of land was sold. The soil turned out to be contaminated. Buyer successfully claimed decontamination costs from the seller although the defect was discovered well after 6 months.)
- 86Daka2446: Packaging material supply contract. The court ruled that it is not a sale contract (as the design of the packaging is “tailered” to the purchaser. CommCode 69 not applied.

- Extended loss: not recoverable under Art. 580.
  - 2002Da35676: Air conditioner was fitted to a green house which was used for cultivating roses. The motor of the air conditioner (which was installed next to a fuel-operated boiler 유리온실 내 기름보일러 방면에서 첫 번째로 설치된 농업용 공기조화기(이하 ‘이 사건 공기조화기’라 한다)의 모터 과열로 그 권선의 절연이 파괴) overheated and caused fire. The entirety of the green house burned down. Seller found to be “not at fault”. (the fire damage was not caused by any fault in the delivery and fitting of the air conditioner. “화재가 이 사건 공기조화기의 인도 및 설치 그 자체의 잘못으로 인하여 발생하였다고 할 수 없으므로,…”)
  - 96Da39455: A burner stopped in the middle of a cold night in winter. The green house which was

used for cultivation of flowers was left without any heating for several hours. The flowers perished. The seller/manufacturer of the burner settled with the farmers. Seller of silicone coupling which was used in manufacturing the burner was sued by the manufacturer of burner as it turned out that the coupling became brittle in low temperature and failed to function properly. (But can the silicone coupling, in this case, be said to be ‘defective’?)

- In order to seek compensation for extended loss, buyer must allege breach of contract and prove breach, causation and foreseeability. The seller may plead ‘no fault’. Art. 390, 393.
    - 89Daka15298: Potato seed was found to have been defective. The harvest was very poor. Damage (for breach of contract) must be calculated by working out the difference between the expected income from normal harvest and the actual income from the poor harvest caused by the defective potato seeds.

- 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. It is available even after 6 months of discovering the ‘defect’. Extended loss. The costs of removal and decontamination (which exceeded the sale price) were awarded as damage.

Acceptance of goods & buyer’s due

diligence

- Seoul Appellate Court: (2014Na2007931): “due diligence is the purchaser’s right. It is not an obligation. As it has to be conducted only during a limited period, on the basis of limited materials and about matters whose scope is limited, there is no ground to impose on the purchaser a duty to uncover the true circumstances. Also, if we are to deny the purchaser’s claim for damage against the seller by attributing knowledge or negligence to the purchaser merely because an extremely small amount of materials relevant to the seller’s representations and warranties were included in the vast amount of disclosure materials offered for due diligence, then due diligence would actually be disadvantageous for the purchaser. This would lead to a strange conclusion that a reasonable purchaser would rather forego due diligence because he would be better off without it.”

[Questions]

1. Seller sold a company with a warranty that the company’s financial statements are accurate. Buyer calculated the acquisition price on the basis of the company’s financial statements, applying EV/EBITDA multiple. After the closing, the financial statements turned out to be inaccurate (inflating the earnings by 10%).
2. Specific pieces of timber to be used in building houses were sold. It turned out that the timber was weakened by termites. The house collapsed as a result.
3. A sold to B a used notebook computer to be at 100USD. Unknown to A and B, wifi card was already damaged at the time of the sale. After the notebook computer was delivered, B spilt coffee over the keyboard. As a result, Ctrl and Alt keys on the right-hand side are not

working.