8. Sale of receivables. Art. 579

- If the receivable turns out to be non-existent or the security is non-existent, seller liable to buyer under Art. 570 or Art 575
- If seller of a receivable (which is already due) warranted the debtor's solvency, it will (in the absence of a clear language) be interpreted that the seller warranted the debtor's solvency at the time of the sale of receivable, rather than at the time the receivable is collected.
- If the seller's warranty of debtor's solvency is given before the receivable is due, it will (in the absence of a clear language) be interpreted that the seller warranted the debtor's solvency as of the receivable's due date.
- Buyer may claim damage (in respect of the breach of warranty) from seller.

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7. Protecting (the seller/creditor and) the buyer in an 'official' auction (Art. 578)

- Applicable only to 'official' auction (= court supervised auction) initiated by a judgment creditor

(so-called “compulsory auction”) or a secured creditor (so-called “voluntary auction”).

- Who is the seller? The creditor ‘applies’ for the sale to take place, but he is not the seller.
- Applicable also to ‘public sale’ initiated by tax authority. 2007Gahap3334
- Inapplicable to private auction initiated solely by the owner.
- If a guarantor’s property was auctioned, the guarantor (being the ‘seller’) shall be liable to the buyer under Art. 578. (87Daka2641)
- Since the sale (‘official’ auction) is initiated by an application of a creditor and for the benefit of other creditors, creditors may also be held liable to buyer (only to the extent of the amount distributed to the creditor in question).
- Inapplicable in respect of ‘physical’ defects of the thing sold. Art. 580(2)
- Inapplicable when the official auction turns out to be invalid in the first place.

Remedies

- Buyer may terminate the contract by giving a notice to the ‘seller’, i.e.,
    - (1) to the debtor (if the property was sold as the debtor’s assets); or
    - (2) to the guarantor/owner of the property (if the guarantor’s assets were put on auction)

- Buyer may affirm the sale and demand price reduction (Art 578(1)).
- If the ‘seller’ is insolvent, buyer may demand full/partial refund from the creditor(s) (to the extent of the amount distributed to the creditor in question). (Art 578(2))

- Art 578(3): If the ‘seller’ knew of the defective title and kept silent, or if the creditor knew the defective title and applied for the auction, buyer may claim damage from either of them. Performance measure of damage claimable. Special, statutory remedy applicable in respect of fraudulent debtor/creditor.
- Price reduction (partial refund) claim (Art 578(1)) and damage claim (Art 578(3)) are distinguished. Moreover, Art 578(3) damage claim is different from the ‘usual’ damage claim (which is available regardless of whether the seller’s ‘knowledge’ of the defect).

Cases

- 91Da21640: Creditor applied for ‘official’ auction on the basis of a forged notarial attestation of a promissory note. Buyer paid in the price and the property was conveyed to the buyer. Conveyance subsequently judged to be null and void as the auction was initiated by a forged notarial attestation. Buyer may not resort to Art. 578. Buyer, however, may demand the creditor to return the amount distributed to the creditor through the auction (disgorgement of unjust enrichment). The sale (by court auction) was invalid in the first place.
- 92Da15574: Original building demolished and new building was built; creditor applied for auction of the new building on the basis of hypothec over the original building. Auction is null and void. Art. 578 inapplicable as the sale was invalid. Buyer will have a remedy under unjust enrichment.
- 96Ge(□)64: Property subject to a registered option was auctioned. Buyer paid in and became the owner of the property. The option was exercised subsequently and the buyer lost the title as a result. If the money is still held by the court and not yet been distributed to the

creditors, the buyer may seek to cancel the auction (Art. 96 of Act for the Enforcement of Civil Judgment) and demand the court to return of the money paid in by him. If the money is already distributed to the creditors, the buyer may not seek cancellation of the auction. Buyer needs to sue the debtor (or creditors if the debtor is insolvent) separately. (Art. 15 of Act regarding Registered Option stipulates that upon auction, the registered option shall lose effect when the property is auctioned. But this provision applies when the option holder exercises the security right under the Act.)

- 2003Da59259: Debtor's property was auctioned. It turned out that the registration of the debtor's title was invalid from the beginning. The property was claimed by the owner. Buyer lost title. Art. 578 inapplicable (probably because the initial registration itself was invalid). But this judgment is criticised. See 양창수, "채무자 소유 아닌 부동산에 대한 경매와 담보책임(대법원 2004년 6월 24일 판결 2003다59259사건(법원공보 2004년 하, 1205면)", 법률신문 2004-09-06. But the validity of the security right was already being contested at the time of the court auction.
- 86Na2563: Property subject to a preliminary injunction prohibiting transfer of title. The property was nevertheless auctioned. The judgment creditor prevailed and claimed the property from the buyer arguing that the auction was in violation of the preliminary injunction. Buyer may seek remedies under 578. As the buyer had the knowledge of the attachment, damages may not be claimed. Absolute time limit (1 year or 6 months) does not apply.
- 2002Da70075: Lender A had a hypothec which had priority over a registered lease of B. The property was auctioned by application of C, a judgment creditor. After the auction is concluded and before the price was paid in, the debtor (upon B's request) repaid the debt to A in order to preserve B's registered lease. This cancelled A's hypothec and as a result, B's registered lease

survived. Without knowing this, the successful bidder paid in the price (which was set with the assumption that the registered lease would be cancelled as a result of the hypothec). The debtor who repaid the debt to A (knowing that his repayment would make B's registered lease to survive) is liable to pay damage to the buyer (successful bidder who acquired the property) under Art. 578(3).

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6. Property subject to Mortgage, Jeon Se Gwon (registered lease/loan with a right of foreclosure) Art. 576

Art 576 applies when, due to hypothec, Jeon Se Gwon, registered option, or (preliminary) attachment:

- buyer is unable to acquire the property, or
- loses the property entirely (through foreclosure auction), or
- has to pay to extinguish the hypothec, etc. in order to keep the property he bought..

This is essentially a breach of contract remedy (1 year limitation period inapplicable). The seller fails to discharge his contractual duty to purge the hypothec or registered lease.

- Inapplicable if buyer assumed the debt secured by the

property. 2002Da11151: In such a case, buyer deemed to have waived the right to seek remedies under Art 576.

- Applicable when the seller breaches the agreement to discharge the debt and, as a result, (1) property is subject to foreclosure auction; or (2) buyer discharged the debt to prevent the foreclosure auction (Art. 576(2)).
- Applicable also to sale of superficies or Jeon Se Gwon on which a creditor registered hypothec. Seller of superficies or Jeon Se Gwon shall be liable under Art. 576 if the superficies or Jeon Se Gwon becomes subject to foreclosure auction upon the creditor's exercise of hypothec. Art. 577
- 92Da21784: Creditor has registered option to buy the property in the event of borrower's default. The borrower sold and conveyed the property to the buyer. Borrower/seller subsequently failed to repay the debt to the creditor. The creditor exercised the option which destroyed the buyer's title. Buyer can resort to Art 576 to terminate the sale or to seek damage.
- 2007Gahap3334: Property subject to preliminary attachment registered in favour of a creditor. If the property is subsequently sold and the creditor eventually prevails, then the buyer will have to surrender the property to the creditor. The buyer may resort to Art. 576 to seek remedies from the seller.

Remedies:

- Upon losing title of the property as a result of foreclosure auction, buyer may terminate the sale contract. (If, however, the buyer has been enjoying the property in the meantime, there is little point in terminating the contract. the buyer may simply seek damage (damages in lieu of performance) resulting from the loss of the property – without terminating the contract.

- If buyer discharged the debt to prevent foreclosure auction, buyer may claim reimbursement from seller.
- Buyer may claim damage, if any (Art 576(3)).
- Remedies exercisable as and when foreclosure/discharge happens.
- The seller is in breach of contract.

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5. ‘Hidden’ charges and encumbrances (Art 575)

- Where the property is subject to a third party’s superficies, right of way (servitude), registered lease, gage, lien, etc.
- Inapplicable to ‘known’ charges and incumbrances which have been assumed by the buyer (reflected in the contract price)
- Applicable also to known charges and incumbrances which have **not** been assumed by the buyer (as the seller agreed to remove it)? Probably not. Will constitute breach of contract. See Art 576 for the buyer’s remedy in the event the buyer loses the property or had to repay the debt to purge the charges from the property.
- Applicable also to a property sold together with a right of way on another’s property when it turns out that the right of way does not exist. Art. 575(2)

Remedies

- Buyer may claim ‘damage’ (it probably means ‘reduction of price’ and ‘damage if there is loss which is not cured by reduction of price’)
- If the purpose of the contract cannot be fulfilled due

to the charges and incumbrances, buyer may terminate the contract.
- Available for 1 year after the buyer became aware of the charges. Art. 575(3)

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4. Shortage of quantity, partial destruction at the time of the contract (Art. 574)

- Applicable to sale of a **specific** property.
- Contract of sale for an **agreed quantity** of the property: (1) quantity must be of importance; (2) contract price negotiated and determined on the basis of the quantity.
    - 2002Da65189: In preparing for an auction, the court designated the location (address) of the property, the size in square metres and the minimum price per square metre. The description is merely to identify the property and the global price. The contract is for the sale of the property itself. It is not a contract for an agreed quantity of the property. Compare 99Da47396 In an 'initial' sale of apartments, the portion of land (corresponding to each unit of apartment) turned out to be smaller than agreed. Shortage of quantity. After the 1 year limitation, price reduction is no longer claimable; the buyer may not claim "unjust enrichment" either. Art 390 damages claim would not be available if the goal is to achieve "price reduction".

    - 2001Da12256: If the unit price (price per square metre) was the basis for negotiating the contract price of the property and if the parties had known that the size of the property was different they would have reached a different contract price, then it is a contract for an agreed quantity (even though the contract itself does not specify the size of the property). “It was difficult to see and ascertain the precise extent and size of the land in question 육안으로 보아서는 매매목적 토지의 경계와 면적을 명확히 알기 어려운 상황이었다고 보아야 할 것이다”
    - 98Da13914: Even if the unit price was used in the calculation of the contract price, where the parties considered the property as a whole (and the physical extent of the property is easily recognisable) and came to the contract price, then the contract is for the entirety of the property, not for an agreed quantity of the property. “Considering that the plaintiff (buyer) surveyed the land in question twice before the conclusion of contract, the contract was for the sale of the land delimited by the boundaries, rather than a sale of an agreed quantity. 원고가 이 사건 매매계약을 체결하기 전 이 사건 토지를 2차례 현장답사하여 현황을 확인하였던 점 등에 비추어 이 사건 토지 매매는 ‘수량을 지정한 매매’라고 볼 수 없고, 구획된 경계에 따라 특정하여 매매한 것”
- Applicable only when the shortage/destruction **already** occurred at the time of the contract (unbeknownst to the parties).
- 94Da56098: Shortage occurred after the contract, due to the seller’s decision to convey a portion of the property to a third party. Art. 574 inapplicable, but the seller must be held responsible for a breach of contract. The validity of a waiver clause “Where, due to the finalisation of the land register, the size of the jointly owned land turns out to be greater or smaller than the agreed size, neither parties shall demand price adjustment. 공유대지에 대한 공부 정리 결과 공유대지의 증가나 감소가 있을 경우 이에 대한

상당 금액을 서로 청구하지 않기로 한다”? Held to be inapplicable where the seller was negligent (at fault).

- Buyer’s remedy: reduction of price (divisible contract), termination (indivisible contract), seller may not terminate. Seller’s no fault not a defence. Available for 1 year from the moment buyer is made aware of the shortage.
- If buyer knew of the shortage at the time of the contract, no remedy available for the buyer.
- 99Da47396: Buyer may not seek reduction or compensation alleging unjust enrichment or Art. 535 (culpa in contrahendo). Art. 574 is the exhaustive remedy for shortage/destruction which already occurred at the time of the contract. 분양대금은 평당 단가(총대지가액과 건축비용 등 총공사비와 이윤을 합한 금액을 총건축평수로 나누어 산출한다)에 분양될 건물의 평수를 곱하여 산정된 것
- If the quantity turns out to be materially greater than the quantity assumed by the parties, the seller can rescind the contract on the ground of mistake.
- If the quantity turns out to be materially smaller than assumed, the buyer may resort to rescission on the ground of a mistake? (Yes). But, can the **seller** rescind the contract on the ground of a mistake? Where the buyer is claiming a remedy under the seller’s warranty liability, the **seller** may not rescind the contract on the ground of a mistake. 서울고등법원 1980. 10. 31. 선고 80나2589 판결
- 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.

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3. Partial failure of consideration (Art. 572)

Art 572 applies:

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

Remedies:

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

Absolute time limit (statute of repose)

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

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

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

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

Termination

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

Damages v Price Reduction

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

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

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

Seller may not terminate

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

Defence of simultaneous performance

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

mutatis mutandis application

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

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

1. Arts 570 and 571 apply

- Where a third party's property is sold but
  - the seller fails to perform (because the seller is unable to acquire the property from the third party); or
  - after the thing sold is delivered, the buyer is subsequently evicted (by a third party who prevailed over the buyer)
- Applicable only to a sale contract which was concluded by a seller who did not have the authority to dispose of the thing sold.

- 72Da982: If the seller concluded the sale contract with the owner’s authorisation, then the seller had the authority to dispose of the thing sold. If such a seller fails to perform, then it is merely a breach of contract. Purchaser may claim damage even if he knew (at the time of the contract) that the thing sold did not belong to seller. Proviso of Art 570 does not apply. Seller may not avoid damage payment unless seller proves that he was not at fault (which is difficult in practice.): Seller bought the land from the owner. Without completing the title transfer, the seller sold the land to the purchaser. Before the purchaser completes the title transfer, the original seller (who is still the owner) set up a hypothec on the land to secure a debt. When the debt was not repaid, the lender foreclosed. The seller must pay damages to the buyer even if the buyer knew that the seller was not the owner of the thing sold at the time of the contract. The Supreme Court clearly assumed that the damage claim must be based on Art 390 of the Civil Code.
- 81Da528: In a sub-sale gone wrong, if the sub-buyer (unwisely) relies on Art 570, sub-buyer’s damage claim will fail due to the proviso of Art 570. (This case does not rule whether damage under Art 390 is available. Sub-buyer should, in such a case, have relied on Art 390.
- 95Da55245 expressly re-affirmed 72Da982: Buyer of a property sold the property in a sub-sale. Title transfer was to be done directly from the original seller to sub-buyer (plaintiff). While the title remained with the original seller, a mortgage was set up before the sub-sale. Upon original seller’s failure to repay the loan secured by the mortgage, the creditor put the apartment on auction. The sub-buyer repaid the loan together with the interest and sought reimbursement from the seller (defendant). As the seller had already the power (contractually acquired power) to sell the original seller’s property, Art 569 or Art 570 does not apply.

The sub-buyer argued that it was not claiming damage under Art. 390, but claiming “reimbursement” under Art 576(2) of the costs expended to preserve the title to the apartment.

2. Buyer’s remedies

- Buyer may terminate the contract (because the seller’s inability to deliver is a material breach of the sale contract). Upon termination,
    - Restitutio in integrum: Buyer must return the thing sold to seller. See 92Da25946 below.
    - If buyer is already evicted by the owner, buyer need not return the thing to seller. Buyer need not return the ‘value’ of the thing either (Art 747(1) does not apply). See 2016Da240 below.
    - Buyer must disgorge the benefit of using the property in the interim to the seller (the buyer will not be required to disgorge the benefit to the owner because, vis-à-vis the owner, the buyer will be a possessor in good faith. Art. 201(1)).
    - Seller must return the price together with interest (Art. 548(2)) and pay damage, if any.
    - In addition to termination, ‘innocent’ buyer may claim damage.
- When buyer is evicted by the true owner, buyer may choose to affirm the sale contract with the seller and claim damages in lieu of performance. Whether the sale contract is terminated or not, there is no practical difference. Performance measure of damage (with termination) or damages in lieu of performance (without termination) should be available for the buyer.
- Buyer’s remedies **not** subject to 1 year limitation period.
- Seller must compensate so that buyer can enjoy the benefit of the contract as if the contract is fully performed(□□□□ □□□ □□□ □□□ □□ □□□ □□□ □□□ □□□□ □□).

3. Reference date for assessing the quantum of damage

- In principle, the calculation of damage must be done as at the close of legal proceedings.
- However, where performance is rendered impossible, quantum must be assessed at the market value of the thing at the time of the impossibility.
- But, 66Da2618 dealt with a case where the seller’s performance was not impossible, but the seller was unwilling to perform and the purchaser chose to terminate the sale contract upon the seller’s material breach. In that case, the date of termination must be used.
    - Where damage in lieu of performance (전보배상) is sought upon termination of the contract [on the ground of the seller’s material breach], the calculation of damage must be done by referring to the market value of the thing sold at the time of termination because the buyer only lost the claim for the original performance as a result of the termination. (손해액의 산정은 일반 채무불이행으로 인한 손해배상액의 확정시기와 마찬가지로 원칙으로 매매의 목적이 된 권리를 취득하여 이전함이 불능하게 된 때의 싯가를 표준으로 하여 결정할 것이고 본건에 있어서 원고가 피고의 매매계약 이행의사 없음이 명백함을 전제로 하는 본건 매매계약 해제를 전제로 이행에 대신하는 전보배상을 청구하는 본건에 있어 매도인이 본건 토지의 소유권을 취득하여 매수인에게 이전하지 못하므로 매매계약이 해제된 경우에는 매수인은 해제시까지는 목적물의 급여청구권을 가지며 해제에 의하여 비로소 이 청구권이 상실되므로 특별한 사정이 없는 한 매수인이 받을 이행에 대신하는 손해배상액은 해제 당시의 목적물의 싯가를 표준으로 하여 결정할 것) The use of “전보배상” is inappropriate here (because the contract is terminated). The Court probably meant that the “performance measure of damage” must be calculated on the basis of the market value of the thing at the date of termination.
- When seller repudiates to perform, the date of seller’s repudiation must be used (rather than the date of buyer’s termination). see 2005Da63337 below.
    - 2005Da63337 (seller’s repudiation). “이행지체에 의한 전보배상

에 있어서의 손해액 산정은 본래의 의무이행을 최고한 후 상당한 기간이 경과한 당시의 시가를 표준으로 하고, 이행불능으로 인한 전보배상액은 이행불능 당시의 시가 상당액을 표준으로 할 것인바, 채무자의 이행거절로 인한 채무불이행에서의 손해액 산정은, 채무자가 이행거절의 의사를 명백히 표시하여 최고 없이 계약의 해제나 손해배상을 청구할 수 있는 경우에는 이행거절 당시의 급부목적물의 시가를 표준으로 해야 한다.” Also see Chang Soo Yang, “Anticipatory Breach as an independent type of non-performance of obligation”, Beob Jo, vol. 700 (2015), pp. 37-38

    - This is to prevent the buyer’s opportunistic behaviour of biding his time to choose a favourable moment for termination.

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

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

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

[93Da37328]

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

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

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

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

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

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

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

- If it is due entirely to the buyer that the title to the thing sold could not be transferred to the buyer, then

buyer may not claim damage. (79Da564. Seller handed over to the buyer all necessary documents for conveyancing. Buyer delayed and the property was acquired by a third party. Buyer may not claim damage.)

- If buyer **should have known** that the property belonged to a third party, then the buyer's comparative negligence must be taken into account in assessing the amount of damage. 71Da218. A local government (경기도) bought a plot of land from the central government. The land had previously been deemed to have been acquired by the central government by virtue of the Agricultural Land Reform Act whereby land which is not owned by cultivator is deemed to have been acquired by the state. But, in fact, the land in question was not 'agricultural land'. The original owner successfully claimed the land back from the purchaser (local government). Purchaser terminated the contract and sued for damage. Purchaser's negligence to be taken into account in assessing damage. The land was located in 경기도 and the local gov should have known that the land did not belong to the State.
- Comparative negligence rule could be 'applied' even for the warranty liability (which does not require the seller's negligence) 94Da23920 (담보책임이 민법의 지도이념인 공평의 원칙에 입각한 것인 이상 하자 발생 및 그 확대에 가공한 매수인의 잘못을 참작하여 손해배상의 범위를 정함이 상당하다.)
- 80Da2750: Having been sued by the true owner, buyer concluded a settlement with the owner and bought the land from the owner. Buyer is not at fault. Seller must pay damage. (Can seller terminate the contract and demand restitution in integrum?)

5. 'Innocent' Seller's right to terminate.

- If seller did not know that the thing sold belonged to a third party, seller may also terminate the contract but seller has to pay damage to buyer. (Art 571(1))
- Why allow the 'innocent' seller to terminate? (why

deprive equally innocent buyer the choice to affirm the contract and claim damage in lieu of performance?)
- Ultimately, the seller's termination is of no 'practical' importance as the seller must pay damage.

92Da25946

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

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

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

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

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

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

Breach of warranty v. Breach of contract

- Strict liability v fault based liability
- Art 390 (not liable to pay damage if the breach of contract was without fault)
- But, in reality, the Court almost always recognises fault except in *force majeure* situation) : IMF crisis is not a force majeure… The contractor liable for delay of performance. 2001Da1386

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(1) Deposit (Arrhes)

- voluntary payment largely governed by trade practice
- around 10% of the contract price
- contract binding even without a deposit unless the trade practice suggests otherwise

1. Interpretation

- evidence of the contract
- reservation of the right to terminate at will: exercisable until a party begins to perform. Art. 565
- the right to terminate at will becomes available only upon ‘full’ and actual payment of the agreed deposit amount (But the Supreme Court’s jurisprudence is undergoing a change).
- (Only when the parties expressly agree to treat it as liquidated damage) liquidated damage; cf. Art. 398
- (Only when the parties explicitly agree to treat it as penalty) penalty: in such a case, proven damage may be recoverable separately

2. Cases

- 92Da23209: In the absence of an explicit intent to treat the deposit as liquidated damage, the deposit may **not** be so treated: P paid 41 million KRW to D as contract deposit. D gave a blank check to P in case the deposit needs to be returned. A dispute arose and P alleged D’s breach and attempted to cash the check to recover the deposit. D terminated the contract. P demanded return of the deposit. The court ruled that D may not keep the deposit. But D can claim damage to the extent the amount of D’s loss can be proven.
- Contract deposit shall ‘normally’ be interpreted as reserving the right to terminate at will before a party begins to perform. Art 565, 80Da2499
- 72Da2243: the seller must actually tender double the amount of deposit if the contract is to be terminated. Verbal offer to tender the amount is not enough. Brewery was sold with 5 million KRW contract deposit. Seller purported to terminate the contract tendering 5.5

million KRW. It was held that the contract was not terminated.

- 2004Da11599: A party may ‘begin’ the performance even before the agreed time. The due date is presumed to be for the benefit of the obligor, who may give it up. (Art. 153) If that happens, the deposit can no longer entitle a party to terminate the contract at will. After the sale contract for a plot of land was concluded, the height restriction affecting the area was lifted. Land price soared. Seller demanded the contract price to be increased. In response, buyer tendered the contract price earlier than the agreed date. The seller refused to accept the buyer’s performance and purported to terminate the contract offering double the amount of deposit. Early performance held to be valid and that the contract may no longer be terminated at will.
- However, once a party notifies the termination (even without the required full amount), the other party may not ‘begin’ to perform. In such a case, the ‘early’ performance is harmful to the obligee (Art. 153(2) proviso). The contract is terminated if and when the required amount of forfeiture (full amount of the agreed and paid deposit) is actually tendered.
    - 97Da9369 Land located in an area requiring permission for sale is sold with 220 million KRW contract deposit and a separate clause for 60.5 million liquidated damage payable by the seller in the event of failure to obtain permission to sell the land. Seller purported to terminate the contract, offering KRW280.5 million (220+60.5). Buyer disputed the validity of termination and purported to perform early (pay the balance). Seller refused to accept the payment. Buyer sued seller with a view to enforcing the sale contract. Seller subsequently terminated the contract tendering KRW440 million. Termination held to be valid when the correct amount was tendered.

Buyer’s lawsuit against seller shall not be viewed as ‘beginning’ of the performance. [Buyer unable to ‘begin’ performance while the permission to sell has not been granted? Contract becomes valid only upon the Minister’s permission.]

- 94Da17659: ‘to begin’ the performance ought to be distinguished from the tender of performance. (이행에 착수한다는 것은 객관적으로 외부에서 인식할 수 있는 정도로 채무의 이행행위의 일부를 행하거나 또는 이행을 하는데 필요한 전제행위를 하는 것을 말하는 것으로서 단순히 이행의 준비만으로는 부족하나, 반드시 계약내용에 들어 맞는 이행의 제공의 정도에 까지 이르러야 하는 것은 아니라 할 것) A house was sold with 0.3 million KRW deposit. Subsequently 2 million KRW was paid as a partial payment of purchase price and the seller delivered the possession. The parties agreed to treat 2.3 million as a ‘new’ contract deposit. The seller purported to terminate offering 4.6 million KRW. Termination invalid as **both** parties have already ‘begun’ to perform.
- 2007Da73611: An ‘agreement’ to pay the deposit is not enough to entitle a party to terminate the contract at will. The right to terminate at will accrues only upon ‘actual’ payment of the ‘full’ amount of the deposit. Apartment was sold with 60 million KRW agreed as the deposit, of which 3 million was paid and 57 million KRW to be paid the following day. The following day, before the buyer pays the balance of the deposit, the seller purported to terminate the contract. Termination invalid. The seller may demand the payment of the balance of the deposit but may not terminate at will while the full amount of the deposit is not yet paid. If the balance of the deposit is not paid, the seller may terminate the deposit agreement and, if the sale contract would not have been concluded without full payment of the deposit, the sale contract itself may be terminated on the ground of the buyer’s material breach of the contract.

- 대법원 2015. 4. 23. 선고 2014다231378 판결: Agreed contract deposit was 110 million KRW, of which 10 million KRW was paid promptly and the balance was to be paid the following day. On the following day, however, seller purported to terminate the contract and closed the bank account so that buyer could not pay the balance of the agreed deposit. Seller's termination was invalid. The court ruled, "Even if the contract can be terminated as asserted by the [seller], the amount which entitles the termination must be 'the agreed deposit amount', rather than 'the actually paid deposit amount'."
- 지원림, 계약금 분할지급 약정의 효력 : 대상판결 : 대법원 2015. 4. 23. 선고 2014다231378 판결, 민사법학 2015-09 :85-113
- 99Da48160: Apartment sale. Buyer did not have money available on the day of contract. An IOU was issued, instead of actual payment of contract deposit. It was agreed that in the event of a breach, double the amount of IOU shall be paid. Court held that this is a valid agreement for liquidated damage in the event of a party's breach. Buyer was held to be in 'breach' because buyer was trying to re-negotiate the terms and refused to honour the contract.

3. Contract provisionally void

- 97Da9369: While the contract is provisionally void (due to the lack of approval for the sale of land which requires an approval), deposit may still be valid. See this.

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(2) Option contract

- A separate contract
- One or both parties may have the option to conclude the main contract.
- Notice of the exercise of the option is sufficient to conclude the main contract. No separate acceptance is required. The discussion regarding the ‘obligation to accept’ is meaningless.

1. Duration of the option (absolute time limit)

- Determined by the option contract. May not exceed 10 years **from the date when the option arises** if the parties did not stipulate the duration. The parties may freely agree upon a duration which is longer than 10 years.
    - 91Da44766 (28 July 1992): 10 years begins to run from the date the option contract was concluded. An option to purchase the land expires upon lapse of 10 years even if the land is delivered and has been in possession of the option holder. Absolute time limit absolutely expires. Unlike the statute of limitations, there cannot be any suspension, tolling or resetting the absolute time limit.
    - 94Da22682 (10 Nov. 1995) Parties agreed on 1 May 1980 that Plaintiff may have the option to purchase which is exercisable from 26 March 1985. Plaintiff excercised the option on 6 August 1992. *Ruled:* The option must be exercised before the end of 1 May 1990. Even if the parties agreed that the option may only be exercisable after a period, the option expires upon lapse of 10 years from the

date the option came into existence (□□□ □□□ □) regardless of when the option became exercisable.

- **97Da12488** (27 June 1997) ruled that the option to complete the accord and satisfaction in the event of the borrower's default would arise when the due date for the repayment has passed.
- 99Da18725 (13 Oct 2010) Shops in a 'department store' were leased for 10 years. Parties agreed that lessees shall have an option to purchase the shops after 10 years or more of lease. Is this option valid? Lower court accepted that the lessees validly exercised the option to purchase. Supreme Court overturned the decision pointing out that the lower court should have examined whether the option was exercised within 10 years since it was created. The court must examine this question *suo motu*.
- 2016□42077 (25 Jan 2017): parties explicitly agreed that the option shall be exercisable for 30 years. Supreme Court ruled that such an agreement is valid.

- However, **2019Da271661** (14 July 2022) ruled that a put option in a contract arising from an investment (which was done as a commercial activity) shall expire in 5 years from the date the option was excercisable.
- If the duration is not specified, the counterpart may propose a reasonable period within which the option must be exercised. Upon lapse of the period, the option expires. Art. 564(2)
- If an option contract is used as a security, the security disappears in 10 years. If, however, the loan repayment date is more than 10 years in the future, how to interpret the parties' intent? Option does not 'arise' until the due date arrives. (97Da12488)

2. Multiple parties

- Where several parties jointly hold an option, whether a party may separately exercise the option (in respect of his/her portion) must be determined by looking at the details of the option contract. 2010Da82530 overturning 83Daka2282 (which had ruled that the option must be jointly exercised without exception). Several buyers were to be co-owners upon exercise of the option. In the case, one buyer was allowed to exercise the option and acquire his portion of ownership. Each was treated as 'solely' holding the option for his/her portion of the ownership (thus, not a 'jointly held' option.)
- But the principle is that jointly held option can only be exercised jointly because a person who does not want to exercise the option should not be forced to become bound by the main contract. The main contract as agreed by the option contract cannot be completed if the option is not jointly exercised. Whether to conclude the main contract with the 'willing' option holders is a matter of negotiating a new contract.
- Where a jointly held option (to purchase real estate) is registered, the party seeking cancellation of the registration may bring a lawsuit against some (not all) of the joint holders of the option. 2000Da26425

3. Option contract to secure a debt

- Art. 607 Option contract to convey title of an asset in the event a loan is not repaid. If the asset's value (at the time of the option contract) exceeds the principal and interest (until due date), the option contract is invalid (Art. 608). However, the contract may instead be interpreted as creating a 'security right' for the creditor (80Da998). See also 91Da11223 below.

- Art. 607 inapplicable to option contract to secure a debt other than an obligation to repay a loan. 65Da1302, 68Da1468
- Court is willing to interpret the main contract to convey the title as creating a ‘security right’ for the creditor. The creditor is thus required to return the surplus (in excess of the principal and interest) to the debtor.
- 91Da11223. It was agreed that A shall convey the property worth 55 million KRW in satisfaction of an existing debt amounting to 42 million. It was also agreed that A shall have a buyback option within 3 years at a price equivalent to the principal and interest at the time of A’s exercise of the buyback option. After the lapse of 3 years, A offered to repay the debt with interest and demanded the property back. Court interpreted the parties’ agreement either i) as an agreement to provide a security for the repayment of debt (rather than an accord and satisfaction); or ii) as an “option contract to carry out accord and satisfaction” in the future when the debtor can no longer reclaim the property upon lapse of three years (rather than an accord and satisfaction with immediate effect). The court held that A can recover the property either because the agreement was merely a security agreement or because the option to complete the accord and satisfaction is invalid because the property at the time of the option contract is worth more than the amount of debt (principal plus aggregate interest at the time three years have completed). B shall be required to return the property to A when A offers the principal and interest (even after the expriry of 3 year buyback option).

4. Registration of an option

- Applicable to an option to effect conveyance of real estate (as accord and satisfaction of an existing debt)
- Act Regarding Registration of Option to Secure Debts 1983
- Creditor must give a “two month” notice of settlement to the debtor after the repayment date. The notice must set out (Art. 3 of the 1983 Act):
    - the credit amount (including the amount of secured credit owed to other creditors who have priority)
    - the valuation amount of the property
    - the balance (if any)

- Secured creditors having an inferior claim must also be notified. They may demand auction of the property before the balance (if any) is paid out to the debtor or before the expiry of the 2 month-settlement period (when there is no balance to be paid to the debtor). Art. 12(2) of the 1983 Act
- Debtor or the guarantor/owner of the property may repay the debt before receiving the “correct amount” of the balance (i.e., the creditor’s calculation of the balance may be challenged). Until the settlement amount which is calculated in a justifiable manner is paid to the debtor/collateral provider, the debtor/collateral provider may resist the conveyancing and resist the transfer of possession” and that “the debtor/collateral provider is entitled to receive the justifiably assessed settlement amount“. See 96Da6974 (30 July 1996) and 2005Da36618 (11 April 2008), for example. The debtor may tender the full repayment of the debt and the interest and demand cancellation of the registered option(94Da3087) or the title transfer (if the title transfer had already taken place at the time of loan) shall be cancelled. In the latter case, the right of

recovery must be excercised before the lapse of 10 years from the repayment date and before the property is conveyed to a third party in good faith. Art. 11 of 1983 Act.
- Special rules for a forfeited pledge agreement: as long as the method of disposal was compliant with the contract, unjustness of the price is not a ground to invalidate the disposal. 2018Da304007

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(3) Seller’s obligations

Transfer of ‘proprietary right’ (Art. 563)

- title and possession need to be transferred (warranty against eviction)
- compare Art. 563 and Art. 568. Transfer of title alone will not be sufficient.
- 2000Da8533: If the property is subject to attachment, the seller must have it cancelled so that the buyer is not in danger of being evicted from the property.
- 87Daka1029: The buyer may withhold the payment of the amount secured by hypothec until the hypothec is cancelled.

Seller’s obligation to maintain and preserve the thing sold until delivery

(Art 374)

- Buyer's *mora creditoris* and seller's reduced duty of care (Art 401)
- Fruit from the thing sold, interest on purchase price (Art 587): Unless the parties agreed otherwise, the seller may keep the fruit even when he is in delay of performance as long as the purchaser has not paid the price (just as the purchaser did not pay delay interest even while it is in delay of performance – as long as the seller has not delivered the thing sold).

(Art 587 of KCC; 96Da14190): "even where the purchaser fails to make timely payment of the purchase price, the purchaser need not pay interest on the purchase price until the thing sold is delivered."

- Increased costs for the safekeep of the thing sold due to the buyer's *mora creditoris*: Does Art 403 apply to sale contract?

80Da211 (Even when the Purchaser is in breach of its own obligation, Seller still has the duty to maintain and preserve the thing sold until delivery anyway. Art 374.)

- Whether the seller may claim payment of purchase price even where the thing sold can no longer be delivered? (Art 538 stipulates, yes, if the seller's impossibility was caused by the buyer)
- 2010Da11323 (where the obligor sold off the property to a third party and therefore is no longer in a position to transfer the property to the obligee)
- A group of companies were sold to an investor. But the investor asserted that the seller committed a breach of

warranty and refused to close. Past the agreed closing date, the seller sold one of the company to a third party (in order to reduce the financing costs for holding those companies).

- A company was sold to an investor. A portion of the seller's shares were pledged to a lender. On the day of closing the purchaser agreed to repay the debt and the seller agreed to deliver the unburdened shares. The company was subsequently sued by a third party for patent infringement. The buyer asserted that the seller committed a breach of warranty and refused to close. The seller could not repay the debt and the lender exercised the pledge and sold the seller's pledged shares to a third party. The buyer terminates the contract on the ground of the seller's impossibility of performance.

Buyer's obligation to take delivery?

Seller's obligation to transfer title of a 'specific' property

- Seller unable to deliver the thing sold, or buyer evicted (Arts. 570, 571)
- Partial failure of consideration (Where, unbeknownst to the buyer, a portion of the title of the property belongs to a third party) Art. 572
- Shortage of quantity, partial destruction at the time of the contract (Art. 574)
- 'Hidden' charges and incumbrances
- Property subject to Mortgage, Jeon Se Gwon (registered lease/loan with a right of foreclosure) Art. 576
- Protecting (the seller/creditor and) the buyer in an 'official' auction (Art. 578)

- Sale of receivables. Art. 579

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

Sale by Description

Breach of warranty v. Breach of contract

Exclusion of warranty