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Undertaking contractual liabilities

1. Providing additional security

- Creditor may agree to have additional debtors, who will jointly and severally be liable to perform the identical obligation.
- If, however, it is against the wish of the original debtor, a third party who has no interest to protect may not undertake to perform. Art. 453(2)
- Performance by a third party who has no interest to

protect will extinguish the original debtor's obligation only when it is not against the wish of the original debtor. Art. 469(2)

2. Replacing the debtor (novatio)

- Replacement of the debtor may not be done without the creditor's consent. Art 453(1), Art 454.
 - Once the creditor has given the consent, the replacement becomes irrevocable. Art 456.
 - Security, surety and guarantees of a third party securing the original debtor's obligation shall extinguish **unless** providers of such security agree otherwise (agree to the replacement of the debtor). Art 459
 - Security which was provided by the original debtor shall not extinguish. 96Da27476
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Assignment of a claim

1. Assignability of a contractual claim

- In principle, claims are assignable
- By nature, some claims are unassignable: claims from employment contract, mandate
- By statute, some claims are unassignable: child support claims, pension claims, accident compensation claims, wage 87Daka2803 (assignable, but not claimable?)
- By agreement, the parties may agree not to assign a contractual claim (however, assignees in good faith are protected) 99Da67482

2. Assignment notice

- Assignment notice must be given by the assigner to the

debtor

- Once the notice is given, it may not be revoked without the consent of the assignee, Art. 452(2)
- Once the notice is given, the debtor's payment in good faith to the assignee will discharge the claim (even if the assignment was somehow ineffectual), Art. 452(1)
- Acquiescence by the debtor:
 - If the debtor acknowledges the assignment, assignment notice is unnecessary (provided that there is no other assignee)
 - If the debtor acknowledges the assignment in an unqualified manner, the debtor may not subsequently refuse to perform on the grounds which existed at the time of the unqualified acquiescence.

3. Priority among assignees and competing claimants

- competing claimants: several assignees of an identical claim; an assignee and a pledgee; an assignee and attachment creditor(s)
- the priority among competing claimants shall be determined by the priority of the date certified notice of assignment. Art 450(2), 93Da24223
- 71Da2048 (when none of the assignees could produce a date certified notice)

Agency

1. Agent's power

- to carry out a transaction in the name of the principal
- to attribute the legal effect of the transaction to the principal

2. Creation of agency

- By law or by appointment of the court
 - parent, guardian, husband and wife
 - court-appointed manager of an absentee, court-appointed receiver
- By contract (mandate, employment, partnership, etc. Art. 709: presumption of agency)
 - mandate may be terminated at any moment
 - termination of a mandate does not have retroactive effect on transactions entered into before the mandate is terminated
 - agent may resign at any moment
 - cf. Art. 689
 - death of the principal or the agent (exc. commercial contracts, legal representative, emergency, Art. 691)

3. Ostensible authority

- Art. 125
 - Principal's representation to the counterpart
 - handing over the documents showing the power of attorney to the 'agent' may also qualify as principal's representation (indirect representation) to the counterpart. 2000Da2566 (principal told the creditor that he would be the guarantor; but later realised that the debt was too much and told the debtor that he cannot be the guarantor; the debtor, however, acted as the 'agent' of the principal to conclude the guaranty contract using the principal's seal certificate and other documents)
 - principal will be bound by the transaction of the 'agent' as long as it falls within the 'represented' power
 - If the principal does not wish to be bound by the transaction, the burden of proof lies with the

principal to show the counterpart's knowledge (of the lack of power of attorney) or negligence

- Art. 126

- When agent's transaction falls outside his power of attorney
- the 'power of attorney' for this purpose would include the 'ostensible power of attorney' as well; 69Da2149 (former agent overstepping his power)
- power of attorney created by law (parent, guardian, lawful wife and husband, etc.) would also provide a basis for this purpose. 81Da524 (mistress purporting to represent her lover in borrowing money and offering security)
- If the counterpart wishes to compel the principal to perform, the burden of proof lies with the counterpart to show that there was "justifiable ground" to believe that the transaction was within the agent's power of attorney.
- 98Da18988 (Daehan Guarantee Insurance; wife purporting to represent husband to guarantee her brother's debt)

- Art. 129

- Where the power of attorney has expired, the principal may be bound by the agent's transaction which was made after the expiry.
- If the principal does not wish to be bound, the burden of proof lies with the principal to show the counterpart's knowledge (of the expiry of the power of attorney) or negligence.
- 97Da55317 (Land Development Corp; KEB, who was the agent, appointed sub-agent after the death of the principal)

4. Liabilities of an "agent" who cannot prove power of attorney (Art. 135)

- Where the principal denies the validity of the transaction on the ground of a lack of power of attorney, the counterpart may:
 - seek to compel the principal's performance on the ground of the ostensible authority under Arts. 125, 126 and 129
 - sue the 'agent' under Art. 135
 - the 'agent' may be compelled to perform the contract instead of the principal (in this case, the 'agent' may, while not a party to the contract, avail himself of the contractual rights as if a party to the contract), or
 - the 'agent' may be asked to pay damages (performance measure)
 - the 'agent' may avoid liabilities by showing
 - that the counterpart should have known that the 'agent' had no power of attorney, or
 - the 'agent' was not of full capacity, or
 - the agent had the power of attorney
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Action oblique, setting aside collusive dispositions

1. Action oblique (creditor's derivative action)

- A creditor may exercise debtor's rights, if the debtor does not diligently pursue them and if their exercise is necessary to ensure satisfaction of the creditor's claim. Art 404
- Art. 1166 of French Civil Code: Les créanciers peuvent exercer tous les droits et actions de leur débiteur, à l'exception de ceux qui sont exclusivement attachés à la personne.

When?

- The debtor must be “insolvent”, or,
- the creditor’s claim must be closely connected to the debtor’s right which is to be exercised by the creditor.
- un-assignable rights of the debtor are not to be exercised by the creditor

Features

- The creditor may not exercise rights which the debtor himself cannot exercise
- The creditor may exercise the debtor’s rights against the wishes of the debtor.
- If, however, the debtor already exercises his rights, the creditor may not intervene.
- The creditor’s right must exist and become due. (however, see Art 404(2))
- 67Da2440 (If the chain of real estate transaction collapses, the buyer at the end of the chain may claim damage from the seller at the beginning of the chain, on behalf of intervening parties), 83Gahap4501 (Assignee of the claim for key money may bring an eviction suit against the tenant), 79Da1928 (Purchaser of unregistered building may bring an eviction suit against squatters on behalf of the building owner)
- Res judicata, 74Da1664 (if debtor knew about the suit between his creditor and his debtor, the debtor shall be bound by the judgment of that suit.)
- Negotiorum gestio, Art 743 ff.

2. Setting aside collusive dispositions

- Transactions entered into by the debtor
 - after the creditor acquired the claim
 - which renders the debtor insolvent
 - (if the debtor is already insolvent) prefers only one or a few of the creditors above the others

- any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court
 - debtor's intent to prejudice creditors must be proven; however, the intent will be inferred once the objective nature of the transaction is demonstrated. 97Da57320
 - the beneficiary is presumed to have the knowledge of the prejudicial nature of the transaction; but this is rebuttable presumption: the beneficiary of the debtor's disposition may resist the creditor's attempt to have the transaction set aside by demonstrating his good faith.
 - if the beneficiary knowingly transfers the goods to a third party in good faith, the beneficiary will be required to disgorge the benefit (the transaction between the debtor and the beneficiary will be set aside).
 - The creditor must bring a lawsuit against the beneficiary or the third party who, with the knowledge that it would prejudice creditors, received the goods from the beneficiary.
 - The lawsuit must be brought within a year from the date the creditor had the knowledge of the impeachable disposition (or, in any case, within 5 years from the transaction). Art. 406(2)
 - 99Da2515(Registering the option will be regarded as impeachable disposition)
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Damages

1. 'Difference' theory

Damages should correspond to the difference between the economic position in which the aggrieved party finds himself as a result of a breach (infringement) and the economic position in which the party would have been absent the breach (infringement).

2. 'Performance' measure v. Reliance measure

- The amount of damage aims to put the aggrieved party, as far as practicable, in a position where he would have been in if the contract had been duly performed ('performance' measure).
- 91Da33070 (conveyance effected by forged documents); cf. tort measure of damage
- Where contract is terminated on the ground of the other party's breach, performance measure of damage is normally claimable. But the plaintiff may instead elect to claim reliance measure of damage (אם כי "אם כי" אולי אולי לא). א"א 2002. 6. 11 א"א 2002־2539 א, א"א 2003. 10. 23 א"א 2001־75295 א"א (The costs incurred in reliance of the contract are claimable. The costs which are usually incurred for the purpose of concluding the contract and readying oneself for the performance of the contract are claimable regardless of whether the other party knew about such costs. Any costs over and above the usual costs are claimable only to the extent foreseeable by the other party. However, the amount claimable under the reliance measure of damage may not be more than the performance measure of damage.)

3. Damages must be real and measurable

- Hypothetical possibilities not to be compensated.
- Reasonable degree of certainty is enough: 2001Da22833
- However, difficulty of assessment is no bar to an award of damages
- 2000Da5817, 2004Da48508 (The court may determine the quantum “on the basis of the totality of all relevant facts emerged from the proofs and pleadings”)
- Chaplin v. Hicks [1911] 2 K.B. 786 (a candidate in a beauty competition was, in breach of contract, not allowed to compete in a later stage of the competition)

4. Loss which must be compensated

- causation: deals with “what loss” must be compensated
- ordinary loss/special loss: deals with “how much” of the loss must be compensated
- ordinary loss, Art 393(1):
 - the loss which would obviously arise in the ordinary course of things viewed from an objective standpoint.
 - the defendant may not plead that the loss was not foreseeable for him (for it was objectively foreseeable)
 - 2004Gahap9444 (dairy cow meat)
 - 95Da11344 (a lorry hitting an electricity pole, causing the power cut which lasted for more than 12 hours. Farmers sustained loss from the frosting of flowers which were being grown in the nearby green houses. Held, the loss was not foreseeable.)
 - damnum emergens + lucrum cessans
 - Art. 51(2) of Sale of Goods Act 1979 of UK (Damages for non-delivery) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract.
 - Art. 53(2) of Sale of Goods Act 1979 of UK

(Damages for breach of warranty) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

- special loss, Art 393(2):
 - the loss which occurred because of the special circumstances
 - Special loss needs to be compensated only when it was foreseeable (at the time of the contract (Art 74 of CISG)? or at the time of the breach?)
 - 84Daka1532 (Daewoo)
 - 91Da29972 (cotton T-shirts)
 - Art. 54(1) of Sale of Goods Act 1979 of UK: Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

5. The 'time' for assessing damage

- General principle: at the close of hearing (□□□□ □□) □□□ 1115□.
- However, special rules apply:
 - Buyer's loss in the event of repudiation/impossibility of the seller's performance: loss assessed at the time of the breach. Subsequent increase of the market price can only be a "special loss" (claimable only when foreseeable by the seller), subsequent decrease of the market value is irrelevant (because it is not

the buyer's property, therefore buyer has no reason to bear the loss from the downward fluctuation) 94Da61359

- Buyer's loss in the event of seller's delay of performance: loss must be assessed after the lapse of a reasonable period after the buyer's demand for performance was not complied with. (97Da24542)
- Seller's loss in the event of buyer's repudiation:
 - If the seller terminated the contract and subsequently sold the thing to a third party at a lower price (assuming that it is not 'unusually low'): the difference between the two prices plus interest between the original due date and the date on which the lower price was received (2004Da3543).
 - If the seller terminated the contract but did not sell the thing: the difference between the contract price and the market value of the thing at the close of hearing (because that is the "economic benefit which remains with the seller in the case of termination").
 - If the seller terminated and subsequently sold the thing at a higher price than the economic benefit the seller would have obtained if the original contract had been properly performed on time by both parties (contract price+interest from the original due date), then no loss. Hence no damage.
 - If the seller terminated and chose to retain the thing: the difference between the "economic benefit the seller would have obtained if the original contract had been properly performed" (original contract price plus interest from the original due date) and the market value of the thing at the close of hearing. If the price drop in the meantime was unforeseeable by the buyer,

seller may not claim. The seller may not disregard the appreciation of the market value in the meantime (whether foreseen or unforeseen by the buyer). Benefit does not need to be foreseeable. It is only the loss which needs to be foreseeable if the compensation is to be ordered.

- If the seller does not terminate the contract in spite of the buyer's repudiation, then the seller shall be entitled only to a delay damage (if the thing sold was already delivered) plus specific performance. Seller cannot normally claim delay interest on the purchase price if the seller does not surrender possession of the thing sold and enjoys the possession of the thing sold.

6. Liquidated damages, Art. 398(1)

- Agreement as to the amount of loss, in advance of a breach
- Actual amount of loss is irrelevant. No need to prove, nor is it possible to disprove the amount of loss.
- Excessive amount of liquidated damages would justify court's intervention
- The court can, even if the party does not claim a reduction, reduce the amount of damage. §§ 2009. 2. 26
§§ 2007-19051
- Penalty v. liquidated damages
- In common law, penalty clause is invalid

7. Comparative negligence, duty to mitigate

comparative negligence: Articles 396, 763

'duty to mitigate' 2003Da22912

§§ 2007-19051 §§ 2009. 2. 26, §§ 2007-19051

한국 법원은 손해액의 산정에 있어 피해자의 이익 상실액과 피해자의 지출액 중 큰 금액을 손해액으로 인정한다. 이는 피해자의 이익 상실액이 지출액보다 클 경우, 피해자의 이익 상실액이 손해액으로 인정되고, 지출액이 이익 상실액보다 클 경우, 지출액이 손해액으로 인정된다. 이는 피해자의 이익 상실액과 지출액 중 큰 금액을 손해액으로 인정하는 원칙을 반영하고 있다. 이는 피해자의 이익 상실액과 지출액 중 큰 금액을 손해액으로 인정하는 원칙을 반영하고 있다. 이는 피해자의 이익 상실액과 지출액 중 큰 금액을 손해액으로 인정하는 원칙을 반영하고 있다.

comparative analysis

Keechang Kim, “Measure of Damages under Korean Contract Law”,
2 Asian Business Lawyer (2008)

Damage v Cost or expenses: 99Da9646

Art 74, CISG

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

FIDIC Standard Conditions of Contract (for Construction, EPC/Turnkey Projects, Plant and Design Build) template clause:

Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract...

Croudace Construction Ltd v Cawoods Concrete Products Ltd [1978] 2 Lloyd's Rep. 55 at 62. ('consequential' does not cover any loss which directly and naturally results in the ordinary course of events from late delivery)

Ferryways NV v Associated British Ports [2008] 1 C.L.C. 117 at 138

Koufos v C. Czarnikow Ltd. [1969] 1 A.C. 350 at 385 (Sugar price falling, delivery of sugar delayed for 9 or 10 days. Loss of profit must be compensated. Forseeable loss = directly and naturally caused loss?): “The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract [...]”

□□□, “□□□ □□ □□ □□□ □□” □□ □□ □□□ □□- □□ □□□ □□ □□ □□ □ □□□ – □□□□, □28□ □2□(2021)

Enforcement of a claim

1. Art 389 (Compulsory performance, as a default remedy)

- If an obligation is not voluntarily performed, the claimant can ask the court to compel performance unless the nature of the obligation does not permit compulsory performance.
- Compelling the performance is the primary remedy for a breach of contract. (Cf. In tort, monetary damages is the default remedy.)
- Compulsory sale of debtor’s assets, delivery of movables or immovables by bailiffs
- Application to have performance done by a substitute (the costs to be reimbursed by the promisor). Art. 389(3)

2. Prohibitory Injunction (restraining order)

- if Defendant has breached a contractual obligation to refrain from engaging in a certain activity and Plaintiff proves that the Defendant is likely to engage in that activity in the future, the court may grant a permanent injunction restraining the Defendant from engaging in the activity in the future.
- 93Da40614 ('milk war' case)
 - Tort remedy.
 - "Apology" cannot be compelled. Such an order is unconstitutional (89□□160).
 - Where the likelihood of repeat occurrence is proven, the court may issue prohibitory injunction together with a penalty in the event the injunction is not complied with.
- No injunction may be sought whether as an interim remedy or as an ultimate remedy with regard to 'preparation for a breach' or 'likelihood of a (first time) breach'.

3. 'Personal' performance

- If the nature of the act does not permit performance by a substitute
- Compulsory performance not available if it is against public policy to compel the act
- The court may order a payment of penalty, calculated usually on daily basis until the act is performed. The court who decides the substantive entitlement is also capable of ordering payment of penalty (i.e., enforcement order) in the event of the non-compliance. 2020Da248124
- 99Ma6107: a corporation was ordered by the court to admit the claimants into its premises during normal office hours for 20 days excluding public holidays and to provide certain documents so that the claimants can inspect and photocopy them. The order came with a daily penalty payable for the period of non-compliance.

'Material' breach

1. Breach

- Non-performance of contractual obligation, or a performance which is not in accordance with the contract, would constitute an instance of breach.

Wrongfulness of a breach

- 2000Da47361 (dated 27 December 2002; an agreement to donate concluded under duress was not performed; non-performance was held to be *prima facie* 'wrongful'): Breach of contract is in itself assessed to be 'wrongful'. Only in exceptional, extraordinary circumstances, it may be possible that the breach can be found to be 'justified'. (re-affirmed in 2011Da85352; land owners challenging the housing re-development project and – erroneously – refused to convey the lands. The refusal was held to be *wrongful* and the land owners judged to be 'at fault')
- 2011Du2477: A pension fund withheld some portion of pension payments to some of the retired public servants in accordance with a statutory provision which required withholding of a portion of pension payments if the retiree has other incomes (Public Servants Pension Act, Article 47). But the statutory provision was later declared unconstitutional by the Constitutional Court. The retirees brought lawsuits to claim withheld portions together with delay damages. The Supreme Court held that since the relevant provision is retroactively invalidated, the pension fund who withheld the portion of payments must, in principle, be found to be in

wrongful breach of the pension contract (even if it only did what the statute required it to do at the relevant time). The Supreme Court, however, ruled that the delay damage (delay interest) need only be paid after the date the statute was declared unconstitutional as the breach was exceptionally “not wrongful” because i) the unconstitutionality of the provision was not self-evident; ii) the pension fund was required by law to abide by the statutory provision while it was not struck down; and iii) the pension fund had no power to influence the legislative process.

Fault

- [illegible]

- Contract to treat a patient: if the physician applied procedures which are within the bounds of acceptable practice, fault is not recognised. It is not even clear whether a 'breach' can be recognised in the first place.
- For the purpose of termination, fault is mostly irrelevant. (Cass, "Les obligations de résultat", Cass, 2003)
 - Fault is relevant only when the breaching party proves that the performance was rendered impossible by causes attributable to the other party or to none of the parties. (Art 546, 537, 538)

2. Effect of a breach

- The aggrieved party may compel the performance in so far as it is possible to do so (Article 389 of KCC);
- Alternatively, the aggrieved party may, if the breach is material, terminate the contract, usually with retroactive effect (Articles 543-553);
- Additionally, the party may seek compensation for any foreseeable loss incurred as a result of the breach (Article 390 of KCC).
- The victim of a breach may choose between a reliance measure of damages and a performance measure of damages. Supreme Court Judgment 2002Da2539, dated 11 June 2002; Supreme Court Judgment 2001Da75295, dated 23 October 2003.

3. Materiality of a breach

- Supreme Court Judgment 2005Da53705, dated 25 November 2005
- In order to terminate a contract, the breach must be about an obligation which is indispensable to achieve

the purpose of the contract. A breach of an incidental obligation which has little importance would not be a 'material breach'. In order to be 'material', the breach must be about an obligation which is important enough so that without its proper performance the purpose of the contract cannot be achieved and the parties would not have entered into the contract.

- This is a question of fact which must be assessed in light of the parties' intention which was expressed or reasonably inferred from objective circumstances existing at the time of entering into the contract.
- While a particular obligation may not, in itself, be of great value, if its discharge is of critical importance to the parties, the breach thereof will be judged to be a material breach.
- The content and the purpose of the contract, the consequences of non-performance of the obligation in question should all be taken into account in this assessment.

Further reading:

- 謝登, “國際 貿易 契約 之 目的 (1994.12.22 日, 93年2766 號)”, 國際 貿易 契約, 國際 貿易 契約 1994年 日 (日 22日) 176- (國際 貿易 契約 契約 契約 契約 契約 契約)
- 2005Da53705 (painting booth)

[國際 貿易 契約-5.2-契約_0Download](#)

Defence of simultaneous

performance

1. Simultaneous performance

- Unless the parties agree otherwise, obligations arising from a synallagmatic contract ought to be performed simultaneously
- Obligations to restore the thing sold and money received must also be performed simultaneously. Art. 549
- Where it is fair and equitable to require simultaneous performance:
 - 95Da1521 (construction of a three-storey house, top floor and 1/3 ownership of the land to be conveyed to the builder as a payment in kind for the construction work. Owner refused to convey arguing that the builder owes him money which was advanced by the owner to the builder)
 - 2001Da27784 (payment withheld until attachment is canceled)
 - 98Da13754: If the thing sold is attached (or an injunction banning its disposal is issued), the purchaser is entitled to refuse (=postpone) payment of the purchase price (until the attachment is cancelled or the injunction is discharged).
 - 2010Da11323: 買賣契約中 買主 交付 價金 前 賣主 已 將 該 物 附 屬 權利 讓與 第三 人 時 買主 得 拒絕 交付 價金 之 義務 至 該 權利 讓與 關係 消滅 時 止 ([最高法院 1993. 8. 24. 台 上 92 56490 號 判決](#), [最高法院 1995. 3. 14. 台 上 94 26646 號 判決](#)), 買主 得 拒絕 交付 價金 之 義務 至 該 權利 讓與 關係 消滅 時 止 ([最高法院 2000. 2. 25. 台 上 97 30066 號 判決](#)) .

2. “Defence”

- If the facts (that the counterpart has not tendered the

performance) are presented, the court may not ignore them. The party shall not be held liable for late performance.

- 97Da54604 (Donga Construction): Donga (Construction company) appointed an agent (K) to negotiate land acquisition. K concluded the contract on behalf of Donga but the price was 1.5 times higher than authorised by Donga. Moreover, K received money from Donga and embezzled, rather than deliver it to the seller. Seller sues Donga and demand payment of purchase price plus delay interest on the partial payment. Donga denies liability and argues that the sale contract is not binding upon Donga. The court ruled that the sale contract is valid and binding. But Donga's liability for late payment damage in respect of the partial payment (which must be performed before the closing) shall only be payable until the closing date (when both parties' performances begin to be subject to the defence of simultaneous performance). From the closing date onward, no late payment damage is claimable. (This rule concerns the question of "substantive" entitlement of delay interest. "How much" the buyer is obligated to pay...)
- But where the defendant does not plead the defence of simultaneous performance, the court will order D's performance without mentioning the counter-performance. 90Daka25222

3. No right

- The defence, if successful, would allow the party to delay the performance without incurring liability for late performance.
- It does not create a right to enjoy the thing which is in possession of the party who has to return it. 89Daka4298
- Art 536, Para. 2 (Defence of feared risk of counter-performance)

- 2011Da93025: The “manifest circumstances which make it difficult for the other party to perform” refer to a situation where there is a change of circumstances after the contract is concluded such as deterioration of the obligee’s creditworthiness, level of wealth or other circumstances which render the obligee’s counter-performance unlikely and, as a result, it is against fairness and against good faith to require the obligor to perform its obligation as originally agreed. Whether or not there are such circumstances must be assessed taking account of all attendant circumstances of the two parties in a comprehensive manner. The circumstances which give rise to the [obligor’s] defence of feared risk of counter-performance need not be limited to the occurrence of an event which has the objective or general nature such as deterioration of the obligee’s creditworthiness or level of wealth. The requisite circumstances need not be interpreted in a restrictive manner.

4. Comparative perspective

Concurrent condition: when the parties undertake to perform simultaneously, neither performance becomes due unless one is ready and willing to perform one’s own obligation.

Delivery and payment are concurrent conditions: Sale of Goods Act 1979, s 28

Mutuality of remedy: The court will not compel a defendant to perform his obligations specifically if it cannot at the same time ensure that any unperformed obligations of the plaintiff will be specifically performed. If, however, damages can be adequate remedy for plaintiff’s default, plaintiff may seek specific performance while he has not himself performed. Price v Strange [1978] Ch. 337 at 367-368.

Delay

1. Time of performance

- Where 'uncertain' time is specified
 - performance is due when the promisor knows that the time has come. Art. 387(1)
- Where the time is not specified at all
 - Performance is due upon demand (on the day the demand is made)
 - a "reasonable time" is allowed when a demand is made for repayment of a loan of money or fungibles. Art. 603(2)
- Where the time of performance is specified
 - If the time is of the essence, delay would lead to impossibility of performance, damage in lieu of performance, termination (in addition to delay damage, if any)
 - If the time is not of the essence, delay would only lead to delay damage, if and to the extent the loss caused by the delay is proven. In order to seek termination, damage in lieu of performance, further and additional demand (providing a reasonable extension) must be made (and no performance is done). While the obligee does not decline to accept the performance, the obligor is entitled to delayed performance (as it must be accepted, with a delay damage).

2. The effect of a delay

- The party in delay shall be held liable for all losses regardless of fault (Art. 392)
- If, however, the loss would have occurred even if timely performance had been made, the party in delay will only need to compensate for the delay.
- What if, while the obligor repudiates and the obligee does not accept the repudiation, the performance becomes impossible for reasons inattributable to the parties (force majeure)?
- Where time is of the essence, delay of performance would result in impossibility of performance (Art 545 is based on such an assumption). The obligee may decline (irrevocably) to accept the performance and seek damage in lieu of performance (Art 395).
- Can the obligee compel the performance where the delayed performance is of no benefit?
- Can the obligor insist that the obligee accept the delayed performance?

3. Termination on the ground of delay

- Not allowed in principle, unless time is of the essence (Art. 545).
- Termination is possible when a reasonable extension for the performance is provided and yet no performance is made. (Art. 544)
- If the obligor repudiates *in advance (of the due date, or after the due date?)*, the obligee may terminate forthwith without providing an extension. (Art. 544, proviso seem to be interpreted by the court to refer only to repudiation while the obligor is already in delay.)
- Replacement damage (damage in lieu of performance) is available if (and only if) the delayed performance is

pointless or no performance was done after the obligee demanded performance providing a reasonable extension. In order to seek replacement damage, the obligee MUST decline (irrevocably) to accept the performance. Art 395 of the KCC.

- If the obligor repudiates its own obligation while he fails to accept performance of the other party (thus in *mora creditoris*), the obligee may terminate forthwith. (93Da11821)
- 94Da35930: Even where a reasonable extension was not explicitly granted, the termination is valid when it was done after the lapse of a reasonable period of time after the performance was demanded. A termination notice (invalid because no extension had been given) can still be regarded as a demand for performance. Termination becomes valid after the lapse of a reasonable period from such a notice. 89Da11685
- 79Da1859: In a sale of real estate, the payment of balance was due on 20 April. Buyer did not pay. On 24 April, seller tendered all necessary documents needed for completion and demanded buyer's payment by 26 April. Seller terminated the contract on 27 April. Termination valid.

4. Delay interest in a sale contract

- ... *The purchaser shall pay interest on the purchase price from the date the thing sold was delivered. However, this does not apply if there is a due date for the payment of the purchase price. (Art. 587)*
- Purchaser not required to pay interest until the thing sold is actually delivered (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.”

- However, if partial payment is delayed, interest is payable only on the partial payment until the closing date. §§ 1991. 3. 27 §§ 90-19930 §§
- Where the parties agreed upon the due date for the simultaneous performance of the delivery and the payment, if neither party performs on the due date, the respective obligations of the parties shall become obligations ‘without a due date’. See Supreme Court Decision 73Ma969, dated 11 December 1974.

5. Where delay is ‘exceptionally’ not wrongful

- 2011Du2477,2484 dated 27 November 2014 (a provision of the Public Servants Pension Act which stipulated a reduced entitlement for pension payment for those who have additional income was declared unconstitutional with retroactive effect). The Supreme Court held that the delay of payment (to the extent which had been statutorily prohibited to be paid) is “not wrongful” and the delay interest need only be paid after the statute was declared unconstitutional.

5. *Mora creditoris* in a sale contract

- The party in *mora creditoris* is normally responsible for the obligor’s added costs of safekeep of the object and the added costs of performance. Art 403
- However, in a sale contract, the purchaser is not responsible for the seller’s costs of maintenance and preservation of the thing sold until it is delivered (even if the purchaser is in *mora creditoris*). 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.)