

# Accord and satisfaction

## 1. Manner of discharge

86Daka1755

Parties agreed that in lieu of money payment, the debtor shall convey a property. They registered the agreement to convey the property. The debtor subsequently paid money. The registered agreement to convey the property is null and void.

## 2. Accord executed is satisfaction

- Only when there is an accord that the substitute performance is in lieu of the original obligation, will the substitute performance fully discharge the original obligation.
- If the substitute performance is towards satisfaction of the original obligation, any shortfall after the substitute performance still remains.

## 3. Accord without satisfaction is

- of no effect to the creditor
- debtor may discharge the debt either by providing the performance as originally agreed (ignoring the according the alter the manner of performance) or by providing the altered performnace as agreed by the accord to provide the alternative performance in lieu of the original performance.

## 4. Interpretation

- accord
- novation
- Agreement to provide a security

Art 607:

- 91Da25574: If the debt has already fallen due, when the accord was made, then the accord and satisfaction between the debtor and the creditor is not regulated by Art. 607

Act Regarding Registered Option to Secure a Debt

97Da43543

Building contractor had a money claim against the owner. The contractor and the owner agreed that the owner's property shall be transferred to the contractor in lieu of the payment of the money. The contractor's creditor attached the contractor's money claim. The validity of the attachment? (accord or novatio). If the agreement between the owner and the contractor was an accord which was not yet satisfied, the owner may not perform to the contractor (as the debt was attached). The owner has a defence against the contractor's creditor (owner may rely on the validity of the accord) and the owner can insist on handing over the property, rather than the money. If the agreement was novation, the attachment is void (as it is in respect of a claim which no longer existed.)

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## Power to receive performance

### 1. Who has the 'power' to receive?

- creditor, his agent, receiver (when the creditor is in bankruptcy)
- pledgee (where credit is offered as a pledge)
- (apparent or true) possessor of a negotiable instrument,

documentary credit

- possessor of a receipt issued by the creditor: Art. 471
- those who have the appearance of an agent (distinct from ostensible authority)
- appearance of an assignee
- invalid collection order or assignment order
  - 96Da44747 (assignment order)
  - 94Da59868 (Yonhap Comm.)
  - [□□□ □□□□□□ □□ □□□ □□](#)

## 2. Protecting the debtor

- Article 470: good faith + absence of negligence
- 98Da61593 (survivors of a car accident received the insurance payment and then received an additional payment from the aggressor)(The insurer sues the survivors claiming tort or, alternatively, unjust enrichment):
  - For the Insurer's claim to be successful, the Insurer must prove that 1) the survivors were at fault (either deliberately received the money knowing that they were not entitled or negligently received the money believing that they were entitled) and 2) the aggressor's payment was in good faith (not negligent), i.e., the aggressor did not know about the insurance payment or erroneously believed that the payment was insufficient.
  - If the Insurer fails to prove the validity of the aggressor's payment, the Insurer's claim against the Insured will fail. (for the Insurer sustained no loss because its claim against the aggressor remains valid). The insurance company failed to discharge the burden of proof. The insurance company should have sued the aggressor (rather than the survivors who received the payment).
- 2000Da23006: The debtor who paid negligently (upon

erroneous advice of lawyers) successfully claimed (alleging its own negligence) return of the payment from the recipient.

### 3. Protecting the creditor

- creditor may sue *either* the party who received the performance *or* the debtor who made the payment (which is invalid).
- the debtor who paid in good faith will be discharged as long as he was not negligent
- 98Da61593 (suing the “recipient” in tort)
  - debtor who paid in good faith is absolved; hence, may not demand return of the payment.
  - Creditor who suffered loss may sue the “recipient” of the payment to claim unjust enrichment (or in tort).
  - If, however, the debtor was negligent, the payment does not discharge the debt.
  - The payer must have paid in good faith and without negligence. The recipient (the ‘tortfeasor’) must have been negligent or deliberately received the payment.
- 87Daka546 (suing the “debtor” in tort)
  - A and B are competing creditors who have claims against C.
  - C has 5.8 million KRW credit claimable from D.
  - A attached C’s claim against D. B also attached C’s same claim.
  - B applied for and got an assignment order which transferred C’s claim (against D) to B. B sued D and D did not contest the validity of the assignment order. Upon judgment in favour of B, D promptly paid to B, purporting to discharge its debt to C.
  - A sued D for payment of the debt (relying on an assignment order, which turned out to be equally

invalid). When it emerged that the assignment order was invalid, A modified the claim and sued D in tort to seek damage (resulting from the loss incurred by D's collusive discharge of debt).

- The court allowed A's tort damage claim. In theory, however, if D was negligent in discharging its debt or if D was bad faith, D's payment would not have the effect of extinguishing D's debt and thus it cannot be said that A suffered any 'loss'. A could have freshly attached the claim and applied for a collection order (authorising A to claim against D) and bring a claim against D. But the court apparently ignored these theoretical niceties and allowed A's tort claim against D probably on the weight of the evidence showing collusion between B and D.
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# Tender

## 1. Requirements

- Exact compliance is required with regard to time, place and mode of performance
- Actual tender is required; verbal communication of readiness and willingness is not enough
- Tender of partial performance is not enough:

*84Daka781: The plaintiff owes to the Defendant an outstanding balance of KRW1,213,809. On 1 July 1983, the Plaintiff tendered an amount of payment but the Defendant refused to accept the payment. The Plaintiff paid into the court KRW510,000. Lower court held that the debt was partially*

*repaid to the extent of the the amount paid into the court. Supreme Court overturned the decision, holding that given that it is not established how much was tendered, the payment into the court cannot have an effect of (even a partial) repayment of the debt.*

## **2. Non-acceptance of the tender (*mora creditoris*)**

- Art. 400, Art 403
- Interest stops to accrue
- Relaxed duty of care (obligor is liable for intentional breach or gross negligence only) 2010Da11323: in an exchange contract, party A tendered the performance (offered to transfer the title of a property to B, as agreed) and party B failed to accept it. B was therefore in *mora creditoris*. A subsequently disposed of the property to a third party. Supreme Court held that A shall be liable for the non-performance.
- Increased costs of performance due to *mora creditoris* must be compensated by the obligee.
- **Inapplicable** to a sale contract.
  - Art 587: Purchaser not required to pay interest until **delivery** (or deposit into court) of the thing sold. 95Da14190
  - Art 374: Seller must bear the costs of maintaining and preserving the thing sold until it is delivered (even while the buyer is in *mora creditoris* and in delay, or in repudiatory breach of its obligation to pay the purchase price). 80Da211

## **3. Tender in a sale contract where the parties agreed upon simultaneous performance**

- One party's tender will put the other party in breach (if the other party does not perform its obligation)
- However, the breach will not continue unless the tender continues. 94Da26646, 2010Da11323
- In a sale contract, the purchaser need not pay delay interest, need not bear the seller's costs of safekeep or the increased costs of performance until the delivery of the thing sold (See Art. 587. N.B. Art 403 inapplicable). 96Da14190, 80Da211. This is because the seller not only has an obligation to maintain and to preserve the thing sold until it is delivered (Art. 374) but, more importantly, the seller (unlike a lessee who has to return the object of lease) may fully benefit from the undelivered thing while it remains undelivered and also because the seller is entitled to keep the fruit from the thing while it remains undelivered.
- The seller could, if it so chooses, deposit the thing sold into court (= equivalent to the delivery to the purchaser). From then on, the seller shall be entitled to delay damage in respect of unpaid purchase price.

#### **4. Does non-acceptance constitute a breach (a repudiatory breach) of contract?**

- May the debtor terminate the contract?
  - Indefinitely bound by the contract?
  - Payment into Court
  - Refusal to accept v. Refusal to perform
  - (cf.) English law: Sale of Goods Act 1979, section 37 (Buyer's neglect to take delivery may hold him liable to compensate for the seller's loss. Seller is discharged.)
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# Sham transaction

## 1. Art. 108

- Contract and its uses
- Hidden purpose
- Contravention

## 2. The 'true' intent?

- [Sham transaction – a comparative approach](#), ICC/KCAB/KOCIA Conference on “EAST ASIA and INTERNATIONAL COMMERCIAL ARBITRATION”, 2006.10.26

## 3. Null and Void

- Protection of third party in good faith
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# Lack of intention to create legal obligation

## 1. Non-genuine representation

- Binding
- Not binding if the counterpart ought to have been aware that it was non-genuine

## 2. Null and void

- No need to rescind
- free from the limitation period affecting rescission

## 3. Wide (perhaps too wide) ranging application

- 92Da3670 (Busan Fish Market)



- 92Da41528 (Forced donation)
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# Fundamental Unfairness

## 1. Fundamental unfairness

- laesio enormis
- usury (Regulation of Interest Act)
- Consumer Contract
- Art. 339
- Arts. 607, 608
- Art. 652

## 2. Art. 104

- unfairness of the bargain
  - imbalance of exchange
  - At the time of the contract
  - But, see 65Da610: Contract upheld if it is not unfair at the time of performance (The case was about an accord and satisfaction. Court ruled that unfairness must be determined not at the time of the accord, but at the time of the satisfaction)
- circumstances affecting the party
  - dire circumstances
  - rashness
  - inexperience

## 3. Causal connection and intention

- Intention to use the circumstances affecting the party as a leverage.

## 4. Null and void

- Restitution
- Ob turpem, iniustam causam?

## 5. Cases

- 94Da34432 (Art 104)(Kukche Group)  
(In a case where a borrower company's shares were sold by the shareholders themselves at the nominal price of 1 KRW per share to the purchaser who is designated by the lender, the Supreme Court ruled that the price may not be viewed as excessively low and that the transaction was not "manifestly unfair" under Article 104 of the Korean Civil Code. In making the ruling, the Supreme Court referred to, among others, the fact that the company's total liabilities exceeded its assets and thus the net worth of the company was in the negative. The case was not about a pledgee's disposal of the pledged property. It was the shareholders themselves who decided to sell their own shares when the company was on the verge of bankruptcy and the trading of the company's shares was suspended by the Korea Stock Exchange and the government was announcing drastic measures aimed at corporate restructuring of the group of companies in question.)

The case was about whether the sale contract voluntarily concluded by the shareholders themselves should be declared null and void on the ground of "manifest unfairness" under Article 104 of the Korean Civil Code, which is based on the Roman legal rule of *laesio enormis*.)

- 93Da49482 (Duress)(Shinhan Investment Financing, owned by a son-in-law of KukChe Group's Mr. Yang)
- A pledgee has a duty of care in the disposal of the collateral. If, however, the pledge agreement stipulates a method of disposal, then there is no 'general' duty to sell the collateral at a reasonable price. As long as

the pledge agreement is abided by, the reasonableness of the disposal price is not an issue (2007Da11996) or unreasonableness of the price alone is not a ground to invalidate the exercise of the pledge right (2018Da304007).

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## 2009년 1학기 기말

시험 (문제)

시험 문제 [2009.5.21.출제]

답변서 제출/접수 [2009.6.4. 까지]

답변서 [2009.6.18 까지]

시험 A4 용지 2장 이내로 작성하여 제출한다. 시험 문제  
<http://lawlec.korea.ac.kr/essay> 에서 시험 문제를 다운받는다. 시험 문제  
답변서 제출/접수 [http://lawlec.korea.ac.kr/keechang\\_kim.crt](http://lawlec.korea.ac.kr/keechang_kim.crt) 에서 다운받는다.

### Law of obligations 1 (Law School)

Discuss the legal effect of a contract tainted with “Illegality”. [by 21 May]

Defence of simultaneous performance [by 4 June]

Measure of damages under Korean contract law [18 June]

Your written works should not exceed 2 A4 size sheets.  
Completed works should be uploaded direct at  
<http://lawlec.korea.ac.kr/essay>

(You must FIRST install my server certificate, which you can  
download from [http://lawlec.korea.ac.kr/keechang\\_kim.crt](http://lawlec.korea.ac.kr/keechang_kim.crt))

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# Deception

## 1. Deceitful conduct

- active deception (telling a lie): knowingly misleading statement, giving a knowingly wrong answer to a specific question
- passive deception (concealment): deliberate failure to discharge a duty to disclose
- refusal to answer when requested to provide an answer?

good faith duty to disclose (2013Da97076, 2011Da59247) :

*In a commercial transaction, where it is clear from rules of experience that if one party to the contract had disclosed particular circumstances which could have an impact on the validity of the contract or pose a risk to the other party's entitlement, the other party would not have entered into the contract or at least not under the same terms or conditions of the contract, then the former has a good faith duty to disclose such circumstances beforehand. However, if the other party is already aware of those circumstances or has a duty to investigate or, in view of the relevant trade practice, is expected to be aware of them as a matter of course, etc., then a non-disclosure of such circumstances may not be viewed as violating the duty to disclose.*

Examples of acceptable commercial practice

2002. 9. 4. 2000[54406, 54413

한국은행은 한국은행법 제41조 제1항에 따라, 한국은행의 업무에 관하여 필요한 사항을 통지할 수 있다. 한국은행은 한국은행법 제41조 제1항에 따라, 한국은행의 업무에 관하여 필요한 사항을 통지할 수 있다. 한국은행은 한국은행법 제41조 제1항에 따라, 한국은행의 업무에 관하여 필요한 사항을 통지할 수 있다.

2001. 5. 29. 99□55601, 55618 Exaggeration in advertisement

68Da1749

The plaintiff (“well experienced entrepreneur”) intended to offer his property to secure a loan which he thought was to be made freshly to his acquaintance. He asked a branch manager of the defendant, a high street bank, whether his property was to secure a new loan to his acquaintance. The branch manager answered that it was the case. The branch manager knew that his answer was inaccurate because he intended to use the plaintiff’s property to secure an outstanding loan in the same amount which was already made to the plaintiff’s acquaintance. The contract of hypothec was rescinded. The Supreme Court upheld the rescission, ruling:

*It is clear from the lower court’s judgment that rescission of the [contract in question] was allowed not because the defendant failed to fulfill its duty to disclose the start date of the loan. The branch manager of the defendant deceived the plaintiff into believing that upon concluding the contract, a loan of at least 20 million Korean Won would be made and this is how the contract in question was entered into. The lower court ruled that the contract was induced by deception and that the rescission was valid. The decision of the lower court was that rescission on the ground of deception can be done regardless of whether there was a mistake as to material elements of a contract. This is correct.*

Intention to defraud (i.e. to gain profit) is not required (cf. 94DA44620). Commentaries to Civil Code, General Part (II), Park Jun Seo, ed., 3rd edn. (1999) p. 751.

2013Da97076: The case arose from a project debt transaction where a bank (the seller) sold the project debt collectable

from a project company (who was pursuing a housing development project in the Philippines on a leased land) to a project financing company (the buyer). The buyer of the project debt purported to rescind the transaction arguing that the seller failed to disclose that there was a risk of an early termination of the land lease due to a prolonged delay of the housing development. But the Supreme Court ruled that if the seller did provide all relevant documents which are needed for the buyer to be apprised of the attendant risk, the seller would have fulfilled its duty to disclose because the seller has no further 'duty to investigate' into the detailed circumstances about the land lease.

## **2. Causation (Inducement)**

Whether the victim was induced by deception must be determined by looking at the subjective decision-making mechanism of 'that party' or 'the party' rather than a 'reasonable person'. If the deceitful conduct impacted the objective which was essential to *the party in question* (i.e. of subjective importance), then the causality will have been established.

If a party specifically requested a piece of information in the course of the negotiation, that piece of information will normally be regarded as having a sufficient causal connection with the party's subjective decision to enter into the contract.

Claimant's negligence is irrelevant: 2005Da5812 (Cemetery case)

*Once the duty to disclose is thus recognised, one is not – except in the rare cases where the party had the duty to inform itself, or where the relevant trade practice is such that the other party should obviously have had the knowledge – relieved of the duty to inform the other party even if the party was negligent in not knowing the fact.*

*Where the other party had the knowledge, there is no room for*

*discussing the duty to disclose. But if the other party did not know, his negligence can only have a bearing on the assessment of damages, rather than obviating the duty to disclose.*

Dishonesty itself may sometimes be sufficiently material.  
2006Do1813

A company's financial statements were "puffed up" to hide a net loss. The bank provided a loan on the basis of the financial statements. But the bank has often extended loans to companies with a net loss. The Supreme Court held:

*If the bank had known that the company tried to conceal its net loss by submitting improperly prepared financial statements, it would have considered the company to be less reliable. [The reputational factor must also be taken into account in assessing whether the deceitful conduct induced the other party to enter into the contract. The Court held that the bank would not have made the loan had it known that the company attempted to deceive it.]*

### **3. Wrongfulness**

Deception and inducement cast a strong presumption that the conduct is wrongful. It is incumbent on the deceiving party to rebut this presumption.

2005Da38355: A bank issued a statement showing the client's account transactions, deliberately omitting certain outstanding loans. The statement was intended to be presented to Credit Guarantee Fund. The client, however, presented the statement to a private party who relied on the defective statement and became a tenant of the client paying a substantial lease deposit to the client. When the client went bankrupt, the client's debts turned out to be much greater than the amount indicated in the statement and the tenant could not recover the lease deposit. The tenant sued the bank in tort. The Court held:

*if the bank deliberately or negligently issued a statement showing inaccurate account transactions, the conduct is in itself wrongful, regardless of the uses to which the statement was to be put.*

## 4. Remedies

## Rescission

## Restitution

- The party in good faith may keep the fruit (while good faith lasted) when returning the thing. Art .201. This applies to the seller as well, in returning the money. □ □ 1993.5.14, □□, 92□45025, □□
- Termination of a contract has a different rule: □□□ 2014. 3. 13. □□ 2013□34143 □□ (Regardless of good faith or bad faith, full return required.)

## Damages

2004DA48515.

A seller of an apartment who failed to inform the buyer that a landfill site was to be built in the vicinity was held responsible for fraud (a tort), with the sale contract voidable:

Alternatively, the buyer may keep the contract and sue for damage on the ground of the seller's breach of contract.

Claimant may elect to seek damage in respect of breach of warranty. The buyer is entitled to performance measure damage (in respect of the 'defect') without terminating the contract.

Seller's failure to disclose (before concluding the contract) can also be regarded as a "breach of contract" 2006Da79742



# Software Reverse Engineering

作者: 张三 日期: 2009.4.30

版本: 1.0 (2009.4.30)

## I. 前言

## II. Software 类型

1. SW 类型

2. Source Code

3. Object Code

## III. Reverse Engineering 类型

1. Reverse Engineering 类型

2. 类型

3. Reverse Engineering 类型

4. Reverse Engineering 类型

## IV. Reverse Engineering 类型

1. Reverse Engineering 类型

2. Reverse Engineering 类型

## V. Reverse Engineering 类型

1. 类型

2. Reverse Engineering 类型

3. *Fair Use Doctrine*

4. *EU*

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## VI. License Reverse Engineering

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3. *EU*

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## VII.

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Jeffrey A. Andrews. REVERSING COPYRIGHT MISUSE: ENFORCING CONTRACTUAL PROHIBITIONS ON SOFTWARE REVERSE ENGINEERING

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