

Law of obligations I End Term Exam (2011)

Law of Obligations I

18/19 June 2011

- This is 24 hour 'take home' examination beginning from 5:00 pm on Saturday 18 June 2011.
- During the course of the examination, candidates may not discuss the examination questions with anyone.
- On each Answer sheet, candidates must write their student number only. Please do not write your name or major subject of study.
- All candidates must attempt ALL Questions.
- Answers must be hand-written and must be submitted by 5:00pm on Sunday 19 June 2011 at Room 334 of the Law Faculty Building (New Wing).

[1] Question 1

Joy Trading, Co. ("Joy"), a fruit wholesaler, bought 1 ton of water melons from Lucky Agricultural Cooperative ("Lucky") at a price of 15 million KRW. Joy sold the water melons to various supermarket chains and fruit shops and received the total of 20 million KRW from its purchasers.

A small proportion (less than 5%) of the water melons supplied by Lucky were found to be infected with lethal virus which had so far been unknown. A number of consumers who ate the infected water melons fell seriously ill and hospitalised. There was a generalised panic about the spread of plague and all supermarkets and fruit shops who bought the water melons from Lucky returned the entire remaining stock to Joy, demanding full refund plus compensation. Joy entered into a settlement with those supermarket chains and fruit shops and paid 30 million KRW as compensation (= refund of 20 million KRW + additional compensation of 10 million KRW).

Joy sued Lucky and sought damages. Lucky responded that only a tiny portion of water melons are infected and that Lucky is willing to offer 5% discount of the contract price. Since Lucky did not know or expect that any of the water melons were infected, Lucky argued that it had no obligation to compensate the extended damage resulting from the infection. In response, Joy argued that it is not at all difficult to see that when a person falls ill having consumed the water melon, the seller must compensate.

How should the dispute between Joy and Lucky be resolved?

[2] Question 2

Mr X bought a building from Mr Y at a price of 1 billion KRW. Mr X paid the contract deposit of 10 million KRW upon execution of the sale contract on 1 March 2009. It was further agreed that Mr X shall make 9 monthly payments of 100 million KRW each from 1 May 2009. The final payment of 90 million KRW shall be made on 1 February 2010. The ownership of the building will be transferred to Mr X at the same time as the final payment is fully made. Mr X intends to open a cafe using the building.

Mr Y stated that the building will have all regulatory permits necessary for it to be used as a cafe or as a restaurant as from 1 May 2009. The parties also agreed that Mr Y shall lease the building to Mr X beginning from 1 May 2009 until 1 February 2010. Regarding the payment of rent, it was agreed that the monthly payments Mr X shall make pursuant to the sale contract would also cover the rent. If, however, Mr X fails to make the monthly payment on time, it was agreed that Mr X shall pay late payment interest at the rate of 20 % p.a.

Mr X took possession of the building on 1 May 2009 and opened the cafe soon thereafter. But the business was slow and the building also had a problem of bad plumbing which filled the space with unpleasant smell. From 1 September 2009, Mr X was unable to pay the monthly payment. At about the same time, the

local government sewage service began inquiries as to the structural soundness and plumbing issues of the building.

When Mr Y demanded Mr X to make monthly payment in late 2009, Mr X responded that while the plumbing issues of the building are not resolved, no monthly payment can be made. Mr X also informed Mr Y that there may be a problem of noncompliance with building regulations. Mr Y's position, however, was that the lease agreement and sale contract are distinct and that there is no ground for Mr X to withhold the agreed monthly payments for the building purchase price. According to Mr Y, since Mr X is in arrears, Mr X must pay late payment interests as well.

Things have stayed in this manner until May 2011, when the local government revoked the building regulation compliance certificate on the ground that the building is discharging sewage in an unsafe manner. Mr Y terminated the sale contract alleging Mr X's failure to make payments on time. Mr Y also seeks damages including the late payment interest at the agreed rate of 20% p.a.

Mr X denies all liabilities and rescinds the sale contract alleging that the sale contract was entered into with a mistaken belief that he would have all necessary regulatory permits for opening a cafe. Now that the building regulation compliance certificate is revoked, it would mean that there was a material mistake as to the elements of the contract. Discuss how this dispute must be resolved.

[3] Question 3

Mr Kim, who lives in Seoul, has his ancestors buried in a small hill at his home town in Andong. The land is registered under Mr Kim's name but it in fact belongs to Mr Kim's clan. Various relatives of Mr Kim also have their ancestors buried there too.

Mr Lee, who is a remote relative of Mr Kim through marriage,

lives in Andong near the land. When Mr Kim visits his ancestral mountain, Mr Lee sometimes prepared food for Mr Kim's family, while Mr Kim's family members tended their ancestors' tombs and made ceremonial offerings.

A plan to build a marina and resort town near Andong was recently announced by the government and Mr Kim's land became the prime location for hotels. C Co. wanted to acquire the land and an employee of C Co., Mr Park approached Mr Lee to inquire about the land. Mr Lee forged his photo ID and pretended that he was Mr Kim. The forgery of the photo ID was done with a great deal of skill (Mr Lee had a number of previous criminal convictions) and it was practically impossible to discover that the photo ID was not genuine. Mr Lee acquired all other necessary documents through normal course using the forged photo ID.

C Co. thus bought the land from Mr Lee believing that he was Mr Kim. Mr Lee also agreed with C Co. that all tombs in the mountain would be removed and the remains would be burned and the ashes would be held in a private memorial. Mr Lee left the country soon after the purchase price was fully paid to him. When the land was being prepared for hotel construction, Mr Kim discovered the truth.

Mr Kim immediately applied for an injunction to stop the construction and demanded C Co. to move out of the land. C Co. responded that it has validly purchased the land from Mr Kim or from a person who represented Mr Kim. C Co also argued that there is ample ground for its employee (Mr Park) to believe that the party who acted as the seller had the power to sell the land and that C Co purchased the land in good faith. How should this dispute be resolved?

[End of questions. You must answer all three questions.]

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問題1

[問1]

ある企業が液晶（LCD）ディスプレイの生産を行っている。このディスプレイの生産には、材料、労務、設備などのコストがかかる。また、生産したディスプレイは、市場で販売される。このディスプレイの生産と販売に関するデータを以下に示す。

このディスプレイの生産量は、100,000個から50,000個まで減少した。この減少は、LCDディスプレイの生産コストが上昇したためである。また、このディスプレイの生産コストは、0.2%上昇した。この上昇は、材料、労務、設備などのコストが上昇したためである。また、このディスプレイの生産コストは、45%上昇した。この上昇は、材料、労務、設備などのコストが上昇したためである。また、このディスプレイの生産コストは、6%上昇した。この上昇は、材料、労務、設備などのコストが上昇したためである。

このディスプレイの生産量は、10%減少した。この減少は、LCDディスプレイの生産コストが上昇したためである。また、このディスプレイの生産コストは、0.2%上昇した。この上昇は、材料、労務、設備などのコストが上昇したためである。また、このディスプレイの生産コストは、45%上昇した。この上昇は、材料、労務、設備などのコストが上昇したためである。また、このディスプレイの生産コストは、6%上昇した。この上昇は、材料、労務、設備などのコストが上昇したためである。

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- ・設備のコストは、設備の耐用年数で表されるか?
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Illegality

2008Da75119 Real estate sale agency contract entered into by an unlicensed ‘agent’ – null and void

Good faith

2009Da103950: It is against good faith and abusive exercise of right for the State to advance a defence of the lapse of limitation period in a tort case (false imprisonment case)

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Unjust enrichment

Art 741.

A party who has no legal ground to retain the benefit from another's property or service must return the benefit to the latter if the latter sustained loss as the result.

2. Types of unjust enrichment

A. Benefit resulting from a party's discharge of a 'duty' where the duty turns out to be invalid:

- Disgorgement to be done only between the parties to the transaction (ie., discharge of the purported duty).
- 94Da54641: A property belonging to the state was leased by the plaintiff to the defendant. Defendant failed to pay rent and the plaintiff terminated the lease. Defendant alleged, but could not prove, that the property was reclaimed by the state or that the defendant was otherwise prevented from using the property. Plaintiff may seek (1) payment of unpaid rent for the duration of the lease; and (2) disgorgement of benefit, which is equal to the rent, for the period the defendant was in possession of the property (after the lease was terminated until the property is returned). [State may not seek disgorgement from the lessee.]
- If the plaintiff's property was actually being used by the defendant, D must disgorge the benefit of using it even though D need not return the property until P tenders the lease deposit (which must be returned to the defendant simultaneously with the return of the property). 80Da1495
- 99Da66564: A co-owner of a building contracted with a builder to refurbish the windows. The builder completed the work which resulted in substantial increase of the value of the building. The builder may not demand disgorgement of benefit from the co-owners of the building. [The builder must seek contractual remedies against the counterpart of the contract. If the latter becomes bankrupt, the risk must be borne by the builder. The co-owner who contracted the refurbishment may seek reimbursement from the other co-owners on the basis of negotiorum gestio or mandate, if the remaining co-owners had requested the refurbishment.]

- Claim need not be based on ownership. For example, X sold and delivered the property to Y and the sale turns out to be invalid. Then X can demand the return of the property even if X is not the owner.
- However, a good faith possessor may resort to Art. 201(1) and keep the fruit. To this extent, Art 748(1) (the party who received the benefit in good faith shall return the 'benefit that still remains') does not apply.

B. Benefit resulting from appropriation without legal ground or from infringement on other's entitlement.

- Claimant must show (1) his exclusive entitlement and that (2) the entitlement is infringed upon by the defendant.
- Defendant may put forward a defence showing that there is a legal ground for him to enjoy the benefit.
- 98Da2389: If a person owning a building on another person's land without an authority or a legal ground to use the land shall be, in the absence of special circumstances, deemed to have unjustly benefited from using the land in the amount equivalent to the rent and thereby causing corresponding loss to the land-owner.
- Exclusive entitlement needs to be shown. 2001Da8493: Plaintiff's land had already been used for passage of the public. P may not seek disgorgement of benefit from D who began to occupy the land. P may evict D.
- 2000Da57375: P's land had already been used for irrigation channels by a local government. P may not seek disgorgement of benefit merely because the irrigation channels were converted to a car park.
- 92Da51280: D completed the required period of possession to claim title on the basis of adverse possession. While D has not, however, registered his ownership, the owner claimed the property back and sought disgorgement of benefit (of using the property). D successfully claimed that he has a legal ground to enjoy the benefit. [If D

can show a valid contractual ground to enjoy the benefit, the owner would not have been able to claim disgorgement of benefit from D in the first place (even if D's possession did not amount to the required length.)

- 99Da32905: D secured property (or a receivable) on the basis of a judgment which was obtained through fraudulent means. But the judgment became final and the petition to quash it failed. D has a valid legal ground to retain the property (or the receivable) in view of res judicata.
- 2003Da8862: A embezzles B's money and used it to repay A's debt which is owed to C. C shall not be required to disgorge the benefit if C was merely negligent in not knowing A's embezzlement. C, in such a case, has a valid legal ground to retain the benefit (C has the right to demand, receive and retain the payment from A). If, however, C knew or grossly negligent in not knowing A's embezzlement, C may not plead that he had a legal ground to retain the benefit. [C is, in this case, viewed as appropriating B's money. The risk of A's bankruptcy is shifted to C.]

C. Benefit resulting from another's mistaken investment or efforts

- Embellishment of a property believing that it is one's own. Art. 203

3. Just/unjust benefit

- Where the party unjustly enjoying the benefit of an object (respondent) disposed of the object, the proceeds at the time of the disposal must be returned [with interests, presumably]. If the respondent generated profit using the object, he may keep the profit generated by his own operation. However, the profit which would have accrued ordinarily without the

respondent's particular intervention must be returned to the claimant (94Da25551). If the respondent suffered loss from operating the object, the loss must be borne by the respondent [just as the profit may be kept by the respondent] (96Da47568)

- The claimant seeking disgorgement of benefit from the respondent who has received the benefit in good faith, must prove that the respondent has unconsumed benefit (69Da2171). However, if the benefit received was money or monetary gain, the benefit is presumed to exist regardless of whether it was actually consumed or not (96Da32881)

4. Disputes arising from official auctions

- 97Da32680: If movables which do not belong to the debtor are sold in an official auction, the successful bidder would usually acquire the title as a good faith purchaser. The proceeds from sale, however do not belong to the debtor and, in that case, the creditor's receipt of the proceeds would not have the consequence of extinguishing the claims. The creditor must return the proceeds to the original owner of the movables who lost the title to the successful bidder.
- 2001Da3054: If a party who is entitled to participate in the distribution of proceeds could not in fact do so because of an erroneously finalised distribution schedule, the party may seek disgorgement [from the parties who received more than they ought to have].
- 99Da53230: If sales proceeds were erroneously distributed to those who have no right to participate in the distribution, the party who may claim disgorgement is the creditor who would have received more if the proceeds were not erroneously distributed to those who have no right. Only when there is no such creditor, may the debtor exercise the disgorgement claim.

Settlement Agreement

1. Definition

A settlement agreement becomes effective when the parties agree to terminate a specific existing dispute between them as to the existence, extent and nature of a party's legal rights or obligations. Art. 731.

What is the difference between price negotiation and settlement negotiation?

2. May not be unsettled on the basis of a mistake

- Settlement agreement may not be rescinded on the ground of a mistake. If, however, the mistake was about whether a party had the powers to settle or about matters other than the dispute which was settled, the settlement agreement may be rescinded on the ground of a material mistake. Art. 733
- "matters other than the dispute which was settled": matters which were not subject to mutual concession; matters which both parties accepted as 'given', undisputed and therefore formed the basis of the negotiation, matters which were not open to negotiation.
- Settlement agreements, like any agreement, may be rescinded on the ground of deception or duress (Art. 110).

3. Court's approaches

Allowing rescission:

95Da48414: Car accident victim settled with the aggressor on

the assumption that the accident occurred due to the victim's fault. The amount was much less than the loss sustained by the victim. When it emerged that the aggressor was also at fault, the court allowed rescission on the basis of a mistake. The aggressor's fault was not open to mutual concession, thus not part of the dispute which was settled.

2001Da49326: A doctor agreed with the survivors of a patient who died 2 hours after a metoclopramide injection was administered by the doctor. The doctor thought the death was not related to the shot but could not rule out the possibility that the death occurred as a result of the shot. The doctor accordingly agreed to pay a substantial amount in settlement of the dispute. It turned out that the death was unrelated to the injection. The court ruled that the settlement was made on the assumption of the doctor's liability and that the assumption was undisputed and was not open to concession. Thus doctor may rescind the settlement showing that he was mistaken as to his liability.

Narrowly construing the scope of settlement:

97Da423: A three year old child was hit by a car. Soon after the accident, the mother settled with a small amount of payment (about USD300). The injury, however, turned out to reduce the working capacity of the victim by 38% and the loss amounted to more than USD40,000. The court ruled that the settlement is valid only to the extent of claims reasonably foreseeable at the time of the settlement. If the terms of settlement are such that the victim, had he expected the true scope of injury, would not have agreed upon, then the claims which are beyond the damages expected by the victim are not covered by the settlement. 99Da63176

Unknown claims: 2001Da70337 (parties settled as to the 'leakage' (shortage) of the fish sauce, without realising that a substantially larger quantity of the fish sauce which was stored in the tank was 'rotting' due to infiltration of water)

- What was the 'scope' of the settlement? Regarding the 'loss' or the 'rotting' of the sauce.
 - Is it possible to rescind the settlement? Court suggested that the settlement was only to the extent of the 'loss' of the sauce.
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Partnership Agreement

1. Consensual contract

- Need to distinguish the contractual relationship from the entity (economic and business entity) which operates on the basis of the partnership agreement.
- Need to distinguish from the Partnership Company under the Commercial Code (which has a statutorily recognised legal personality separate from the partners)
- Partnership agreement under the Civil Code merely creates "contractual" obligations among partners.

2. 'Special' features of a partnership agreement

- A partner owes duties (including the duty to make contribution) to all partners, not to (a) particular partner(s).
- If a partner is unable to make the agreed contribution, only the particular partner is excluded from the partnership relationship, which is unaffected by the partner's inability to participate. Partnership is formed among the remaining partners, unless they agree otherwise.
- Warranty liability of a partner to the other partners? Probably not. Partners need to re-negotiate and re-define their relationship. 2005Da38263 (Partnership

agreement is not a contract with reciprocity of considerations, not a synallagmatic contract.)

- Usual rules about termination on the basis of a breach of contract do not apply.
- 94Da7157: In a partnership agreement such as a joint-undertaking of a business, a partner may seek dissolution, quit, or remove other partner(s). A partner may not terminate the partnership agreement and seek restoration from the counterpart [unless their agreement stipulates otherwise].

3. Similar entities or arrangements

- Mutual aid scheme (“□”): The organiser has a personal project. The obligations of payment and repayment exist between the organiser and the members of the scheme. Not a partnership. Where the scheme breaks down, no room for seeking ‘dissolution’ of a partnership. 93Da55465
- Contractors’ consortium: a partnership agreement.
- Apartment owners where each of them separately owns a distinct unit of one building. They are in a relationship of partnership.
- 2005Da5140: Joint-owners, in principle, are not in a partnership relationship merely because they are joint-owners. If, however, they have agreed upon the manner of acquisition and disposal of the property, their relationship may be viewed as a partnership.
- If one party agrees not to partake in the profit of the joint undertaking, it cannot be a partnership. 98Da44666
- As long as all parties partake in the profit, they are in a partnership even if it is agreed that some of them do not bear the loss.

4. Partner’s contributions and partnership assets

- Anything of value: skills, labour, good will, undertaking not to engage in a line of business.
- All partners must join hands in exercising the claim to

seek a partner's agreed contribution.

- An executive partner may, on behalf of all partners, seek the particular partner's performance of the contribution, which must go to all partners.
- In the absence of an executive partner, any partner may, on behalf of all partners, seek the performance from the defaulting partner. But this is not the former's personal claim to the latter.
- An individual partner may not seek 'his portion' of another partner's contribution to the partnership to be made out to the individual partner. Creditors of a partner may not attach or seek satisfaction from the partner's such claim (because the partner has no such claim in the first place). 97Da4401
- A partner who delays in making the contribution must pay damages and interests to all partners.
- Partnership assets: partners' contributions, assets acquired in the course of the partnership undertaking.
 - All partners join hands in the ownership of each of the assets; No notion of 'individually disposable share', thus distinct from co-ownership.
 - Distinct from individual partner's personal property. Individual partners may not dispose of their 'share' except by consent of all partners. Dividing up of partnership assets requires all partners' consent.
 - Disposal of partnership assets requires all partners' consent (Art. 272). But the 'business decision' for the disposal may be taken by a majority of executive partners, or by a majority of partners where there is no executive partner (Art. 706(2)). The partners who oppose such a decision may not withhold consent to the disposal. If individual partners wish to have such a veto

power, they should have explicitly reserved it in the partnership agreement.

- Creditors of a partner may attach a partner's 'share' of the partnership assets. But this is effective only to the dividends or to the distribution of assets upon dissolution. While the partnership exists, individual partner's 'share' may not be disposed of unless all partners agree.
- If a partner negligently handles the partnership business and incurs loss, other partner(s) may not seek compensation as individual claimant(s). The loss is caused to the partnership, not to individual partners. So all remaining partners must join hands in seeking compensation.

95Da35302, 98Da60484

- A partnership may be recognised even if it has no tangible assets.

5. Partnership liabilities

- All partners bear the partnership liabilities in proportion to their loss-sharing ratio.
- No insulation between a partner's 'share' of the partnership liabilities and the partner's personal assets. (Unlimited liability)
- A creditor of the partnership may either (i) seek satisfaction (for the entirety of the claim) from all partners in respect of the partnership assets themselves or (ii) seek satisfaction (for a portion) from individual partners in respect of their personal assets to the extent of the partner's loss bearing amount.
- If a creditor decides to pursue individual partners,
 - each of them is liable only up to his apportioned amount of liability (with all his personal assets; unlimited liability). However, if the credit arose from a "commercial transaction", each partner shall be jointly liable for the full amount of the

credit. Commercial Code 57(1). 92Da30405

- if the creditor does not know the loss bearing ratio among partners, the creditor may claim an equally divided amount from each partner. Art. 712
- if any of the partners is insolvent, creditor may claim insolvent partner's portion of liability from the remaining partners (with the amount equally divided up for each remaining partner)

6. Conduct of partnership business

- Partnership agreement may stipulate executive partner(s). Partners may, by consent of 2/3 of partners, appoint executive partner(s). Art. 706(1). Where executive partners are appointed, non-executive partners may not conduct partnership business. Art. 706(3)
- Partners (executive partners, where they exist) must act with the consent of the majority of partners (executive partners), unless otherwise agreed. Art. 706(2).
- Unless otherwise agreed, each partner (where no executive partner is appointed) or each executive partner is entitled to carry out the 'ordinary day-to-day operation of partnership business' on behalf of all partners (provided that other partners or executive partners do not oppose).
- A partner who conducts the partnership business (not necessarily an executive partner) owes a duty of care to remaining partners. Art. 707 (mandatarius' duty of care; Art 681)
- A partner who conducts the partnership business is presumed to have the power of attorney to act on behalf of all other partners in respect of the business he is carrying out. Art. 709
- 2000Da28506: Disposal or alteration of partnership property does not form part of 'ordinary day-to-day operation of partnership business.'

Executive partners

- May not resign without justifiable grounds, may not be de-commissioned without consent of all partners. Art. 708
- Owes the duty of care to other partners in carrying out the partnership business. Art. 707 (as well as non-executive partners when they do carry out the partnership business)

Authorisation among partners

- Counterpart concludes a contract with a partner who acts on behalf of (with the power of attorney to represent) all partners.
- If a partner concludes the contract in his own name and without indicating that it is on behalf of the partnership, the counterpart may not enforce it against other partners.

Loss caused to the partnership

- 98Da60484: An executive partner acted outside his authority and committed conducts which are against his duties. Partnership assets are squandered and it became impossible to achieve the purpose of the partnership. The loss is caused to the partnership. Individual partners may not seek damages in the personal capacity. Remaining partners must join hands in seeking compensation from the defaulting partner.
- Also see 95Da35302: A partner, in order to secure a loan for his personal purpose, offered the partnership property. Upon the partner's default, the property was subject to foreclosure and the partnership lost the property. Remaining partners must join hands in seeking compensation from the culpable partner. Partners may not, in their individual capacity, seek compensation for the loss of their respective 'share' of the partnership property.

7. Distribution of profit

- In the absence of agreement, the contribution ratio would also be interpreted as the ratio of profit distribution, and vice versa.
- 2005Da16959: Where a partner failed to perform his duty of contribution, the partnership may – in distributing the partnership profit – set off the damages. The partnership may not refuse to distribute the profit to the defaulting partner (defaulting partner is not automatically foreclosed from sharing the profit of the partnership) in the absence of an agreement to that effect.

8. Resignation and dissolution

Resignation

- If the duration of partnership is unspecified or to last for the lifetime of partners, a partner may resign at any time with a notice to all partners. However, if the resignation is to have adverse consequence for the partnership, the partner may resign only upon unavoidable grounds for resignation. Art. 716(1)
- If the partnership has a definite and limited duration, partners may resign only upon unavoidable grounds for resignation. Art. 716(2)
- Automatic 'resignation'
 - death, bankruptcy, diminution of capacity or expulsion by the partnership
 - 2003Da26020: Partnership agreement or a resolution by partners may not, in principle, validly stipulate that a partner can retain the partner status in spite of his bankruptcy. However, if the creditors of the bankrupt estate agree to the bankrupt partner's retention of partner status, it would be possible for the partner to continue as a partner.
 - 2004Da49693: If a partner 'resigns' from a partnership which was formed by two partners, the

partnership agreement comes to an end. But the 'partnership' is not dissolved, and thus there is no need for liquidation of the partnership assets. The remaining 'partner' shall own the partnership property. The remaining partner shall be liable for the partnership liabilities.

Dissolution

- When the partnership achieves its purpose, or is impossible to achieve its purpose, or when an event stipulated in the partnership agreement as the ground for dissolution of the partnership occurs, or when all partners agree to end the partnership relationship, then the partnership dissolves.
- In the event of unavoidable circumstances which make it impracticable to continue the partnership, a partner may demand dissolution of partnership. Art. 720. Deadlock, breakdown of the relationship of trust, serious depletion of the partnership assets, etc.
- 95Da4957: Bad performance, breakdown of trust. 90Daka26300: Even the partner who is responsible for the breakdown of the relationship may demand dissolution.
- 78Da1827: When one of the two partners who formed a partnership seeks dividing up of the partnership property, the demand may be interpreted to be a demand for dissolution of partnership.
- 94Da46268: One partner lodged a criminal complaint against the other partner alleging a breach of trust. The latter was convicted. The former sent a notice of termination of the partnership agreement. It can be interpreted as a demand for dissolution of the partnership.

9. Joint-venture partners setting up a joint-stock company

- The running of the company to be governed by Commercial Code as well as the contract between the JV partners.

- 2003Da22448: Civil Code provisions on partnership contract would also be applicable in addition to the Commercial Code provisions applicable to a joint-stock company.
- Joint-venture agreement or shareholders agreement does not disappear simply because the JV partners set up a joint-stock company.
- 台灣 最高法院 2 年 上字 第 1000 號 民事 判決 認為 兩 人 合夥 經營 事業， 嗣後 其中 一人 退出 經營 關係 而 轉讓 其 股份 予 第三人， 嗣後 該 股份 轉讓 行為 係 屬 合夥 關係 終止 之 事實。(台灣 2007. 6. 14 台 2005 上 5140 號)

台灣 2005.10.18, 台 2005 上 583, 台: “Dong-Up” contract may be interpreted as a partnership contract. The purported “termination” may be interpreted as resignation and demand for the return of contribution. Partners have a comprehensive duty to disclose. A partner’s failure to disclose material facts amounts to “unavoidable circumstances” for another partner to resign.

Negotiorum Gestio

1. Statutory obligations

Where a party carries out another’s affairs without having been requested to do so, certain obligations arise by operation of law to regulate the parties’ relationship

- to ensure proper handling of the affairs
- to strike a balance between the parties’ interests
- to ensure that the party who managed another’s affairs does not have to sustain loss, does not gain from the gestio.

2. Distinct from donation:

- gestor manages other's affairs with intent to seek reimbursement (no intent to offer the service at one's own expenses)
- ex.: Volunteers tidying up the polluted coast after the oil-spill. Can they seek reimbursement?

3. Awareness that the affairs managed are not one's own

- 97Da26326: A requested B to pay 20 million KRW on behalf of A in settlement with C. B agreed. A promissory note in B's name was accordingly issued to C. When C presented the notes to B and demanded payment, B declined. A requested D to pay 25 million to C. D agreed and paid. When A could not reimburse D, D demanded reimbursement from B arguing that D's payment was negotiorum gestio for the benefit of B. *Dismissed*. Intent to manage the affairs as the other's affairs is required. *The gestor's management must not be against the wishes of the principal* (B in this case, who declined to pay and obviously did not want others to pay on B's behalf).
- 94Da59943: P paid 30 million to D (vice president of a Transport company) believing that the money was for purchasing the scrap auto parts of buses sold by the Transport Company. P was led to believe so by a broker X who needed money for 2 scrap buses he previously purchased. D treated the money as the purchase price of scrap buses previously purchased by X. P sued D and sought reimbursement arguing the D failed to take due care as P's gestor. *Dismissed*. D was receiving the money, not as P's gestor, but as the seller of his own goods. If the affairs are not in fact other's affairs or if the gestor did not have the intent to manage other's affairs, no claim may arise out of the management of the affairs.
- As long as the gestor had the intent to manage affairs of "another", it does not matter whether the gestor was

mistaken as to the precise identity of the beneficiary.

- As long as the affair is another person's affair, it does not matter whether the gestor actually incurred an obligation in gestor's own name. The affair does not become gestor's own affair merely because the gestor incurred the obligation in gestor's name. Incurring the obligation was itself a part of *gestio*, which was done on behalf of the other (the principal).

4. Managing other's affairs believing that they are one's own, or believing that one has a duty to manage the affairs

- Distinct from donation
- Distinct from *negotiorum gestio*, which is spontaneous, voluntary management of other's affairs
- Unjust enrichment issues may arise
- Ex.: Carrying out 'contractual' duties without realising that the contract was void, already rescinded or terminated.

5. Managing other's affairs with intent to arrogate the benefit to himself

- Unjust enrichment
- Wrongful interference with other's affairs

6. Gestor's duties

- No contractual duty of care
- Statutory duty to act in the best interest of the principal. Art. 734(1)
- Statutory duty not to act against the (presumed) wishes of the principal: otherwise, wrongful interference with other's affairs, in which case any loss to the latter must be compensated (gestor's lack of fault is not a defence).
- If, however, gestor's management was in the interest of the public or to avoid imminent danger to the principal's life, person, reputation or property, no

liability arises except for gross negligence or bad faith. Arts. 734(2), 735

- Duty to account
- Duty to notify the principal
- Duty not to discontinue once commenced.

7. Scope of reimbursement

- Gestor's expenses (whether necessary or useful; whether or not they resulted in increase of value) must **all** be reimbursed provided that the gestor was not negligent.
- Gestor's loss sustained in the course of the management without any fault of the gestor, must be compensated. But the compensation may not exceed the benefit accrued to the principal as a result of the gestio. Art. 740
- If the gestor's management was against the wishes of the principal, no duty of reimbursement under Negotiorum Gestio. But unjust enrichment enjoyed by the principal must be disgorged.
- 97Da58507: Police sold perishable items (peanuts) seized from the suspect to avoid deterioration. The suspect was later found to be innocent. The police's management (sale of peanuts to avoid perishment) was against the wishes of the principal. But the police may nevertheless claim reimbursement of expenses (to effect the sale) to the extent they were beneficial to the principal.