Textbook
on
Civil Code

Volume 2

Compiled by
Working Group
of the Prospective Trainers
at Royal School for Judges and Prosecutors
of Royal Academy for Judicial Professions

Revised 1st Edition

Phnom Penh, April 2013

Preface

This book composes the series of "Civil Code" and this is the Volume 2 covering **basic of particular types of contracts, statutory obligation,** and **security**.

This book was developed by the members of the working group which consists of prospective trainers of the Royal School for Judges and Prosecutors (RSJP) with support by the Japan International Cooperation Agency (JICA) and the International Cooperation Department, Research and Training Institute, Ministry of Justice of Japan (ICD).

The working group members, whose manuscripts were compiled into the series of "Civil Code", are

Mr. **In Vanvivol**,
Mr. **You Bunna**,
Mr. **Taing Sunlay**,
Mr. **Chea Sokheng**,
Mr. **Ngyon Ratana**,
Ms. **Thlang Phanet**,
Mr. **Ket Socheat**,
Mr. **Ros Piseth**,
Mr. **Chhee Virak**,
Mr. **Chhun Channseyha**,
Ms. **Va Sakada**,
Ms. **Chaing Sinath**,
Mr. **Seng Neang**,
Mr. **Kong Tarachhath**,
Mr. **Hout Heang**,
Mr. **Nguon Vuthy**,
Ms. **Yet Molin**,
Mr. **Chan Rainsey**,
Mr. **Synn Sovannrath**,
Mr.**Y Thavarak**,
Mr. **Yoib Meta**,
and Mr. **Sam Rithyveasna**.
Ms. **Sem Sakola**,
Mr. **Plang Samnang**,
Mr. **Mong Monysophea**,
Mr. **Heng Sokna**,
Ms. **Sor Lynna**,
Ms. **Srun Chhnvoleak**,
Ms. **Kheiv Sokha**,
Mr. **Heng Chansyborin**,
Mr. **Keng Somarith**,
Mr. **Chhe Vivatanak**,

All of the working group members hope these series help readers study basics of current Civil Code.

NOTE: Content of this book was written by the working group members and doesn't reflect official view of any relevant authorities in the Kingdom of Cambodia.

The 1st Edition of this book was published in March, 2012.

The revised 1st edition doesn't add substantial change to the original content. But apparent mistakes and errors in the 1st edition were corrected. And order of some chapters was changed. In addition, for readers' convenience, the serious is reseparated into 3 volumes while the 1st edition was composed of 6 volumes.

This revised 1st edition was published in April 2013.

Ministry of Justice of the Kingdom of Cambodia / Japan International Cooperation Agency (JICA)
Legal and Judicial Development Project
Project Office: Ministry of Justice, SamdechSothearos Blvd., Phnom Penh Tel: 023-219421 Fax: 023-212225

To Whom It May Concern,

This book composes the series of Civil Code, and there are three volumes. The Volumes 1 covers the basic of **General Rules, Real Rights** and **Obligation**, Volume 2 covers the basic of **Particular Types of Contract, Statutory Obligation,** and **Security**, and Volume 3 covers the basic of **Relatives** and **Succession.**

This book was developed by the members of working group which consists of prospective trainers of the Royal School for Judges and Prosecutors (RSJP) of the Royal Academy for Judicial Professions (RAJP) with support by the Japan International Cooperation Agency (JICA) and the International Cooperation Department, Research and Training Institute, Ministry of Justice of Japan (ICD).

Taking this opportunity, we would like to express our deep appreciation to your successful cooperation between the working group members which consists of prospective trainers of the Royal School for Judges and Prosecutors of the Royal Academy for Judicial Profession with JICA.

We hope that these materials will lighten the understanding and research studying for the sake of development, practice, as well as the law legislating, and other legal provisions in the future.

Phnom Penh, 01st April 2013

Chief Legal Advisor
Legal and Judicial Development Project

Matsubara Sadao

President
Royal Academy for Judicial Professions

H.E. Chhorn Proloeung

Contents

Chapter 4 Particular Types of Contracts

Section 1 Sale Contract

1. Intention

According to Article 515 of the Civil Code, a sale contract is a contract whereby one party, called the "seller", is obligated to transfer ownership or other property rights to the other party, called the "buyer", and the buyer is obligated to pay the purchase price to the seller.

Based on this Article, we can see that the seller and the buyer have obligation toward each other, and the seller has not only obligation to transfer ownership, but also other property rights to the buyer, if any, such as perpetual lease (Article 252) and claim (Article 501) etc.

The sales contract is the contract for value, and a bilateral contract.

Provisions of sale contract shall apply mutatis mutandis to contracts for value, other than sales contracts, such as exchange contract, lease, contact for work, and employment contract, etc. (Article 523)

2. Requirements

(1) Agreement

In principle, as long as there are agreements between parties, a sales contract can be made and the parties may make notarial document or private document optionally; however, there are exceptions in special provisions in law. For instance, a sales contract of an immovable in Paragraph 2 of Article 336 states that a sale contract of immovable must be made in notarial document. Therefore, in the case of a sale contract of an immovable, agreement between parties does not make the effect until the parties make a notarial document.

(2) Fixed Amount of Sale Price

In sales contract, parties to the contact shall fix the amount of sale price or methods to determine the sale price in the contract. The amount of sale price shall be determined in according to the present or future market price of

certain merchandise or according to an appraisal by a chosen third party based on parties' option. In case that the appraisal by third party is made by mistake or the third-party's appraisal is against the principle of fairness, the contract party that would be harmed as a result may make an objection to this assessment (Article 521).

The sale price is the most important factor in the sales contract; as a result, the contract will not be created unless the sale price is determined. However, the contractual parties can fix sale price at a certain definite amount or based on indefinite or lifetime installment payment. For example, selling a land and let the buyer pay by portions until the seller is satisfied or the death of the seller or the buyer. In this case, the third party who is appointed by a method designated by the parties can determine the amount of price, but the sale price shall be fixed as a certain definite amount except where the parties have explicitly authorized the third party (Paragraph 3 of Article 521).

(3) Sales expenses

Unless otherwise agreed by the parties, the cost of preparing written instruments and other expenses incurred in connection with the execution of a contract of sales shall be borne equally by both parties (Article 522).For example, the fee to hire a lawyer to make a document for a sale contract is sales expenses.

Expenses for the necessary procedures enables a buyer to acquire rights truly as registration which is a perfection of transferring real rights are expenses to perform the obligation, but not the cost to create a contact; as a result, if there is no agreement between parties, this is an encumbrance of the seller (Article 446, Cost of Performance). A cost of performance is the cost to spend in order to perform the obligation.

The reason why sales expenses shall be borne equally by both party is that a sale contract is created to benefit for both of the parties.

3. Duties and rights of the Seller

In a sale contract, parties shall have obligations to each other since sales contract is a bilateral contract

3.1. General Duties of The Seller

3.1.1. General Duties

General duties of the seller are stated in Article 529 through 531 and from Article 549 through 553 of the Civil Code. Those obligations are as follows:

(1) Duty to transfer the right

The seller shall assume a duty to transfer the property right sold (Article 530). This transfer leads to changing an owner of a property.

Transfer of title is an essential obligation in the sales contract because the contract is created purposely to transfer the ownership from the seller to the buyer; hence, the seller has obligation to transfer the property right which is the subject matter of sale contract to the buyer (Paragraph 1 of Article 531). Transfer of the title in sale contract shall perform in accordance with the general principles which is stated in Article 133, 134, 135, 160, and 187 except the subject matter in sales contract is the property's right other than ownership, and those transfers shall perform in according to the general principles regarding to transfer of each right (Paragraph 1 of Article 528).

To conclude, the right sold shall be transferred as follows;

- A sale contract of the ownership of immovable: when the transfer of registration is made
- A sale contract of other than ownership of immovable: when there is an agreement.

(2) Duty to deliver the goods

Delivery of goods shall be made through many methods as follows (Article 550 former part, Article 229):

- Actual delivery
- Assignment of possession by agreement
- Summary delivery
- Assignment of possession by direction

Also, Article 550 latter part stipulates as follows;

- Special delivery of immovable: actual delivery of the keys to the structures comprising or residing on such immovable or of the documents evidencing title thereto

"The documents evidencing title" refers to the document which proves the right to justify using the thing. "Title" denotes that rights which legally justify the holding of a thing such as ownership or lease (Paragraph 1 of Article 241). For example, a certificate of title or a certificate of occupancy can be considered as a "the documents evidencing title".

(3) Duty to preserve goods

The seller shall have obligation to preserve goods which is the subject matter of sales contract with the care of a good manager until the goods is transferred to the buyer (Paragraph 1 of Article 552). In the case where the seller lose or damage the subject matter due to his negligence, the seller shall assume a responsibility for the compensation (Paragraph 2 of Article 552). On the other hand, if the damage is caused by force majeure, the seller shall not be liable.

(4) Obligations to deliver all instruments required to evidence proof of title

The seller has an obligation to deliver all instruments required to evidence proof of title (Article 530). "All instruments required to evidence proof of title" will be the documents evidencing title stated in Article 550, contract document or document which is required to register.

3.1.2 General Rights

(1) Claim to pay purchase price

If the buyer has not paid the seller, the seller has right to demand the payment of the purchase price.

(2) Defenses

a) Defense of simultaneous performance

The seller may refuse to transfer the right or to deliver the goods until the buyer tenders payment of the purchase price. However, this shall not apply where the buyer's obligation has not yet become due or where it is agreed that the obligation to transfer the right or to deliver the goods is to be performed prior to payment of the purchase price.

b) Defense of insecurity

Paragraph 2 of Article 551 provides more details of Article 387. The meaning of "where the seller has granted the buyer a grace period for the payment" is that the seller allows the buyer to pay after the delivery of the subject matter.

(3) Right to acquire fruits

Unless otherwise agreed, the seller may obtain the natural fruits or legal fruits before the delivery. This article keeps balance between Article 556 which provides that the buyer need not pay interest until he receives delivery of the goods.

3.2. Duty to Provide Explanation

The seller has an obligation to explain clearly about important information regarding the subject matter (Article 529). "The contents of the obligation to be assumed by the seller" refers to, for example, whether the seller warrants that for a certain period of time after deliver the goods will remain fit for their ordinary purpose (Paragraph 3 of Article 540), or the seller guarantees the accuracy of the actual of the indicated area (Proviso of Paragraph 3, Article 546), etc.

If the seller violates this duty and inflicts damage, the seller shall be liable to compensate. In the case where the seller told untrue fact or hides the true fact intentionally and the buyer declared his intention based on misunderstanding, the buyer can rescind the sale contract based on articles regarding defective declaration of intention.

3.3. Duty to Transfer The Right

The most important obligation of the seller is a duty to transfer the ownership or other property right to the buyer (Paragraph 1 of Article 531).

Even though the seller sold the subject matter which belongs to the third party, the sale contract itself shall take an effect because it is possible that the seller acquire the ownership and transfer it to the buyer.

For example, it is possible that X sells to Y a car which belongs to Z. In this case, X is obligated to acquire the title of the car from Z and transfer it to Y. If

X failed to transfer the title of the car, X shall assume a responsibility for non-performance.

4. Warranty Liability

☞ See Annex 4

4.1. General Overview of Warranty Liability

Warranty liability is a system to give the parties fair deal because a sale contract is the exchange of commodity and cash in equal value.

For example, in the case where the buyer found a defect of the subject matter after payment and delivery, it is not fair if the buyer cannot demand anything against the seller. The purchase price and the value of the subject matter of the sale contract shall be equal. Therefore, the Civil Code provides warranty liability to correct inequality.

4.2. Warranty Liability of Seller in Case Where The Property Right Sold Belongs to Another Person

4.2.1. In the Case that Whole Right Belongs to a Third Party

(1) What the buyer can demand if the seller cannot acquire such right is:

a) The buyer is entitled to terminate the contract: if the seller cannot perform his obligations to transfer the property right which is the object of the sale contract to the buyer. In addition, regardless of the awareness of the buyer at a time of concluding the contract that the seller is not the owner of the thing which is the subject matter of the sale contract, the buyer is still entitled to demand the termination of the contract (Former part of Paragraph 3 of Article 531).

b) Good faith buyer: the buyer can also demand damages by just showing that at the time he/she concludes the contract, he/she is not aware that the property right which is subject matter of the contract does not belong to the seller. Besides the right to terminate the contract, the buyer may demand compensation for damages (Latter part of Paragraph 3 of Article 531).

(2) What the good faith seller can do is:

a) The seller is obligated to acquire the property right which is the subject matter of the contract and transfer it to the buyer. However, if the seller cannot do so, the seller can terminate the contract in order to release from any obligation only in case that he/she is a "good faith seller". Thus, the good faith seller is entitled to:

- terminate the contract but compensates for the damages (Paragraph 1 of Article 532).
- terminate the contract without paying for any damages if the buyer is aware when the contract is concluded that the property right which is the subject matter of sale does not belong to the seller (Paragraph 2 of Article 532)

4.2.2. In the Case that Part of Right Sold Belongs to Another Person

If part of a right comprising of the object of a sale contract belongs to a third party and the seller cannot acquire such right to transfer to the buyer, it is a part of non-performance of the obligation by the seller. So, provisions of non-performance are applicable. However, if the buyer can achieve his purpose of the contract, it is not appropriate to acknowledge the whole termination of the contract. Therefore, the warranty liability for part of right sold belongs to another person is such as:

- The seller is obliged to acquire the remaining right and transfer to the buyer (Article 531).
- The buyer may demand reduction of the price proportionally to the remaining part if the seller cannot acquire such right and transfer it to the buyer (Paragraph 1 of Article 533).
- The good faith buyer may terminate the sale contract if it is judged that the buyer would not have purchased the right if the object of the sale comprised the remaining part only (Paragraph 2 of Article 533).
- The good faith buyer may demand compensation for damages (Paragraph 3 of Article 533).

The rights stipulated in Article 533 paragraphs 1, 2 and 3 must be executed within one year starting from the date the buyer is aware of the event if the

buyer is a good faith person, or within one year starting from the date of executing the contract if the buyer was aware that part of right belongs to a third party (Paragraph 4 of Article 533) as a basis for speedy dispute resolution process. In addition, Paragraph 4 of Article 533 determines as well the period, for the right to demand the reduction of price of object of sale contract, right to terminate the contract and right to demand compensation for damages, which is shorter than the normal period of the liability for non-performance of any party to the contract.

4.3. Warranty Liability Against Defect

4.3.1. General Provision

The seller has an obligation to deliver to the buyer goods that has no defect (Paragraph 1 of Article 539). The goods delivered to the buyer shall be deemed defective if it falls to any items listed in Article 539 Paragraph 2, except where the parties have agreed otherwise. In this case, *the buyer* is warranted by the seller for the defective goods. Furthermore, the buyer can demand compensation of damages if the seller has fault for damages based on Article 398 (requirements for damages) provided the non-performance of the obligation.

According to Article 540 through 547, the buyer may demand a complete performance against the seller such as:

- Delivery of substitute goods;
- Price reduction;
- repair the defect; and
- Termination of the contract, etc.

However, the seller shall not be responsible for warranty liability against defect if the buyer was aware of the existing of defect or was unaware of such defect with gross negligence (Paragraph 4 of Article 540). This means that the buyer shall examine the defect of goods which is easily found such as by sight so that it can be aware that the goods is defective or not. However, if the buyer did not check by him/herself, it is regarded that the buyer is unaware of such a defect with gross negligence and therefore may not be able to terminate the contract, so he/she may not demand the seller to be liable against defect.

(1) Intention of defect

Defect in the warranty liability against defect in general is referred to all items listed in paragraph 2 of Article 539. They cannot be reversed if all those items are acknowledged.[1] However, items in Paragraph 2 of Article 539 are just examples of "defect", therefore, it is possible that a nonconformity other than each item in this paragraph shall be acknowledged as "defect".

(2) Time of the occurrence of defect

Warranty liability against defect occurs in the event that the parties are not aware of any defect at the time of the transfer of the risk (normally at the time of delivery). For example, Y bought 10kg of rice from X but 5kg of them had been rotten when it was delivered. In this case, X shall assume warranty liability against defects in accordance with Article 540 even if he stored rice without any negligence.

The seller shall owe the warranty liability against defect in regard to any defect that occurs due to a breach of any of the seller's obligation even if such defect occurs after the transfer of risk (paragraph 2 of Article 540).

(3) Seller's right to remedy against defect

The seller may remedy defect if he/she has delivered goods before the date for delivery so long as the buyer's interests are not unfairly prejudiced (Paragraph 1 of Article 541). In this case, even the seller's right to remedy has been exercised, the buyer may still demand compensation for damages if there is any (Paragraph 1 proviso of Article 541).

In addition, the seller may remedy the defect at his/her own expense even after the date for delivery so long as the buyer's interests are not unfairly prejudiced (Paragraph 2 of Article 541). And in such case, the buyer shall be able to terminate the contract (Paragraph 1, item (c) of Article 408) and have the right to demand compensation for damages (Article 545) because it is assumed that it is the material breach of the contract and incomplete performance of the obligation at the date of delivery.

[1] For extra note, item c stipulates about "the seller" not "the buyer" in the original draft in Japanese. Therefore, this point will be amended by the law on the application of the Civil Code.

4.3.2. Contents of Liability

(1) Obligation to deliver substitute goods

In the event that the object of the contract is defective, the seller has an obligation to deliver the substitute goods without defect again to the buyer who acted in good faith without gross negligence. However, this shall not apply where supplying of goods of the same description would cause undue burden to the seller (Proviso of Article 542 Paragraph 2), but the seller shall owe an obligation to compensate damages for the buyer (Article 545). For example, in the case where Y bought a high-priced classic car which is one of only a few of remained type of car in the word, it is very difficult for X to obtain the same kind of substitute car. In this case, X shall not assume the duty to deliver substitute goods in general, but assume a duty to pay damages.

(2) Obligation to remedy

The seller has an obligation to remedy the defective goods against the buyer who acted in good faith without gross negligence in the event that the goods is defective. However, this shall not apply where remedying the goods would cause undue burden to the seller (Proviso of Article 542 Paragraph 3), but the seller shall have the obligation to compensate damages for the buyer (Article 545).

The choice of performance either obligations of the seller are based on the buyer whether he/she demands the delivery of substitute goods or remedy

(3) Termination of the contract

If the buyer cannot achieve the purpose of the contract because the delivered goods is defective, he/she may terminate the contract if he/she acted in good faith without gross negligence.

For example, Y bought a motor bike to ride from X's shop. If the brake was defective and that caused Y to not be able to ride it efficiently. It shall be considered that the motor bike doesn't meet his purpose, then the buyer may terminate the sale contract and Y may look for a new motor bike that meets his demand without spending time to repair it.

(4) Obligation of price reduction

In the event that the delivered goods is defective, the buyer who acted in good faith without gross negligence may demand price reduction proportional to the difference between the price of goods without defect at the time of delivery and goods actually delivered. For example, Y bought 100kg of rice for 100 dollars from X but 20kg of them was rotten at the time of delivery. In this case, Y can demand return of 20 dollars if he already paid the purchase price, or reduction of 20 dollars from the purchase price if he hasn't paid. However, in the event that the seller has remedied in accordance with Article 542, the price shall not be reduced. If the buyer denies the remedy against defect without reasonable ground, the price shall also not be reduced (Proviso of Article 544).

(5) Obligation to compensation for damages

The seller has an obligation to compensate the damages if the goods is defective. The buyer may demand compensation for damages in accordance with Article 398 through 406. The buyer may demand the damages independently or with other remedies stated in the Article 542 through 544. Article 545 does not stipulate whether the buyer need to act in good or bad faith or with negligence or without negligence regarding the defect. However, if the buyer was aware of the defect of the goods at the time of transfer, it is assumed that he/she accepts it as a performance which meets the purpose of the contract.

4.3.3. Special Provisions Regarding Excess or Deficiency in Area of Land

Article 546 provides special provisions of warranty liability against defect in case where the area of is excessive or deficient. Usually, a land sale is held for trading area at least. Moreover, if the parties specified the total area of the land and fixed price per unit area, it shall be easy to calculate the gap in value between actual area of land and indicated one. Therefore, in this case, if the actual area is less than the indicated area, the buyer can demand delivery of the deficient portion, a reduction in the purchase price, termination (only if the buyer can't achieve the purpose of the contract) and/or compensation for damages (Paragraph 1 of Article 546). On the other hand, if the actual area exceeds the indicated area, the seller in good faith without negligence can demand an increase in the purchase price reflecting the excess amount of land unless otherwise agreed (Paragraph 2 of Article 546).

On the contrary, if the party specified only the total area of the land and single price for the entire parcel, it shall be difficult to calculate the gap in value between actual area of land and indicated area. Therefore, the Code provides that the buyer cannot demand delivery of the short portion, a reduction in the purchase price, termination of the contract or compensation for damages even if the actual area is less than the indicated area (Paragraph 3 of Article 546).

However, the buyer can demand these remedies if

(a) the seller knew of the shortage of the actual area

(b) the seller guaranteed the accuracy of the indicated area, or

(c) the shortage exceeds over five percent of the indicated area (Proviso of Paragraph 3 of Article 546).

And in the case where the actual area exceeds the indicated area, the seller cannot demand an increase in the purchase price (Paragraph 4 of Article 546). However, only the seller in good faith without negligence can demand increase in the purchase price if the actual area exceeds over five percent of the indicated area (Proviso of Paragraph 4 of Article 546).

For example, if Y bought 100 square meters of land for 1,000 dollars from X but the actual area is 98 square meters. If both parties agreed that the price of this land is 10 dollars per square meter, Y can demand delivery of the short portion, a reduction for 20 dollars, termination of the contract only if Y cannot achieve the purpose of the contract and/or compensation for damages as long as Y acted in good faith without gross negligence. If both parties did not decide a fixed price per unit area, Y can demand these remedies only if X knew the shortage of the actual area, X guaranteed the accuracy of the indicated area.

4.3.4. Period for Exercise of Rights

The rights regarding warranty liability against defect must be exercised within one year (Paragraph 1 of Article 547). The period shall run from

(a) for the buyer, the date that the buyer knew or should have known of the existence of the defect and damage

(b) for the seller, the date of conclusion of the contract (Paragraph 2 of Article 547).

However, the right to demand damages which is stipulated in Paragraph 1 and 3 (second sentence) of Article546 shall be extinguished in accordance with Article 482 (extinctive prescriptive period for general claim). Therefore, the extinctive prescriptive period for the right to demand damages which is stipulated in Paragraph 1 and 3 (second sentence) of Article 546 is 5 years and it runs from the time when the seller can exercise his right (Article 481 and 482).

4.3.5. Special Agreement Regarding Discharge from or Limitation on Warranty **Liability Against Defect**

The parties can agree to discharge or limit the seller's warranty liability. However, the seller cannot be released from warranty liability with respect to any fact that the seller knew but did not disclose because of the principle of good faith (Article 548, 5).

4.4. In Case Where the Right Sold Is Limited by Law

Even if the seller is the owner of the subject matter, sometimes the right of use is limited by real rights. In these cases, it is necessary to correct imbalance.

4.4.1. Warranty Liability in the Case where Usufructuary Right, Etc. Exists

In case where the subject matter of the sale is encumbered with for the purpose of perpetual lease, usufruct, lease etc. and the usufructuary right holder has registered his right, the new owner can't use the subject matter completely. For example, in case where Y bought a land from X but X already leased the land to A and A obtained the perfection, Y cannot demand using the land as an owner against A (Paragraph 1 of Article 598).

4.4.2. In the Case Where Usufructuary Right, etc. Exists

In case where usufructuary right exists, the buyer in good faith can demand compensation of damages (Paragraph 1 of Article 534). The buyer in good faith can also terminate the contract if he cannot achieve his purpose of the contract due to the existence of the usufructuary right. The buyer must

exercise right to terminate and demand damages within one year from the date that the buyer found such fact (Paragraph 4 of Article 534).

4.4.3. In the Case Where Real Security Exists

The owner of immovable can sell it even if it is subject to a real security such as statutory lien or hypothec. However, in this case, the buyer bears risk to lose the ownership over the immovable due to execution of these real rights.

Therefore, the buyer can terminate the sale contract when he has lost ownership due to the exercise of such security real right (Paragraph 1 of Article 535). In addition, the buyer can terminate the contract even he knew the existence of such real right at the time of contract because the creditor of the seller does not necessarily execute his real security right. It is still reasonable that the buyer believes the seller pay off his debt and the real security will be extinguished after sale contract and thus the buyer is worth protection to some extent. The buyer can pay the price and make the hypothec extinguished at the request of the hypothee (= creditor, Article 864). For example, Y bought a land from X and the land was subject to the hypothec for A in security for 1,000 dollars. If A request to pay the price and Y paid 1,000 dollars, the hypothec shall be extinguished for benefit of Y.

In this case, Y can demand 1,000 dollars as reimbursement for preserving ownership (Paragraph 2 of Article 535). Y also can demand compensation for any damages (Paragraph 3 of Article 535).

If the buyer of the immovable which was subject to real security right in Paragraph 1 of Article 535 bought at the price which deduced the price of the claim which is secured, the buyer cannot demand reimbursement or compensation (Paragraph 4 of Article 535). For example, in above case, if the original price of the land was 5,000 dollars and X and Y agreed on the price 4,000 dollars with taking into account the existence of hypothec, Y cannot demand reimbursement or compensation even if he expensed 1,000 dollars upon request of A.

It doesn't matter whether the buyer acted in good faith or bad faith regarding warranty liability when real security exists. And there is no special limitation to execute of right of buyer and it shall be extinguished according to general rule of extinctive prescription (Article 482).

Case Study

What the buyer Y can demand X regarding warranty liability in following cases?

(1) X sold a car to Y but it belonged to A. X didn't explain Y the fact that the car belonged to A even though X knew it. Y found it after conclusion of the contract and demanded delivery the car at the due date. However, A had scrapped the car before the due date.

(2) X sold a land which was co-owned by X and B (the share was even) but X had not obtain B's consent. Y knew that the land was co-owned by X and B. After conclusion of the contract, X asked B to sale B's share to X but B refused firmly.

(3) Y bought a land to construct a factory. However, the land was a subject to a perpetual lease for C and C registered his perpetual lease right. C uses the whole land as a farm. Y didn't know that this land is subject to perpetual lease at the time of contract.

(4) Y bought a new car from a car dealer X and paid the purchase price in exchange of delivery of the car. However, the car's brake didn't work at all. Both X and Y didn't realize this defect without gross negligence.

(5) X and Y entered into a sale contract that X shall transfer the registration of his land with house on 1st March 2011 and deliver the land and house to X in exchange for the purchase price on 1st April. X transferred the registration on 1st March. However, before delivery of the land and house, the main pillar of the house has rotted due to X's fault to the extent that Y can't reside in the house unless the pillar is reinforced by concrete. Both X and Y didn't realize the defect until the time of delivery.

(6) Y bought 100-square-meter land from X to use as a farm. They agreed that the total price of this land is 10,000 dollars for 100 square meters and 100 dollars per square meter. Y already paid 10,000 dollars as the purchase price and X delivered the land. However, it is found that the actual area was only 90 square meters. Y didn't know the short fall at the time of contract.

(Conclusion and Grounds)

(1) Y can demand termination and compensation damage.

X has an obligation to acquire ownership from A and transfer it to Y (Paragraph 2 of Article 531). However, X cannot obtain the ownership anymore because A has scrapped the car.

Therefore, Y can terminate this contract and demand compensation because Y acted in good faith (Paragraph 3 of Article 531)

(2) Y can demand only reduction of the price.

In this case, X sold the land which belongs partly to B. Therefore, X shall assume to obtain B's share and transfer it to Y. But B refuses to transfer his share to X, so X's obligation to obtain B's share becomes impossible. However, in this case, Y knew that the land is co-owned by X and B. So Y cannot demand termination or compensation (Paragraph 2 and 3 of Article 533) but reduction of 50% from the purchase price (Paragraph 1 of Article 533).

(3) Y can demand termination and compensation of damage

In this case, the subject matter of sale contract was subject to a perpetual lease for C. Y can demand compensation (Paragraph 1 of Article 534) because Y didn't know the existence of the perpetual lease at the time of contract. And Y's purpose of the purchase of this land was to construct a factory but it is impossible because C uses the whole land as a farm. Therefore, Y can terminate this contract in accordance with Paragraph 2 of Article 534.

(4) Y can demand damages independently of or together with delivery of substitute goods, remedy termination or reduction of the purchase price.

Usually, if there is a defect with a brake of a car at the time of delivery, it shall be considered as a defective car because brake of a car is a vital function. Therefore, X shall assume duties to deliver substitutable goods, remedy, terminate or reduce the purchase price (Paragraph 1 of Article 540) and/or compensate (Article 545). Articles 542 through 545 stipulate the requisition.

First of all, Y can demand that X shall deliver substitutable goods. In this case, to provide a new car is not considered as a case "where supplying goods of the same description would cause undue burden to the seller (Proviso of Paragraph 2 of Article 542)" because X is a car dealer.

Next, Y can demand that X shall remedy the car (Paragraph 3 of Article 542). In this case, Y shall repair the brake by himself or ask repair shopper to fix it.

Regarding to termination, the problem is whether the buyer cannot achieve his purpose of the sale contract due to the defect. Mostly, it is very dangerous and the buyer has to give up driving if the brake doesn't work at all. Therefore, in this case, the buyer can terminate the contract.

And Y can demand reduction of the purchase price in accordance with Article 544. However, if X repaired the defect, Y cannot demand reduction.

If Y suffered from any damages, Y can demand compensation in accordance with articles regarding damages.

(5) Y can demand remedy, reduction of the purchase price, termination and/or damages.

In this case, at the time when X transferred the registration, the risk was also transferred (Item (a), Paragraph 2 of Article 416). In this case, article Paragraph 1 of Article 540 cannot apply because the defect didn't occur yet at the time of registration. However, the seller shall assume warranty liability after delivery in case where the defect has occurred due to the seller's fault (Paragraph 2 of Article 540).

The subject matter of this sale contract is a specific property. Y cannot demand delivery of the substitute goods because a specific property has no substitutability (Proviso of Paragraph 2 of Article 542). On the other hand, Y can demand remedy because it is possible to repair the pillar of the house (Paragraph 3 of Article 542).

Y can also demand termination because Y cannot reside in this house unless the pillar is reinforced.

And X shall assume an obligation to preserve the subject matter with the care of a good manager until it is delivered (Paragraph 1 of Article 522). In this case, the defect occurred due to X's fault, so X shall assume an obligation to pay damages.

(6) Y can demand delivery the deficient portion, reduction of the purchase price and/or damages

In this case, Paragraph 1 of Article 546 can apply because both party decided the total area of specified land and fixed price per unit area. Therefore, Y can demand delivery of the deficient portion, reduction in the purchase price or termination of the contract and/or compensation for damages in accordance with Article 542 through 545.

First, X shall assume an obligation to deliver the rest 10 square meters. For example, if the deficient portion belongs to the third party, X has to obtain the ownership from the third party and deliver it to Y. However, if it would cause undue burden to X, for example, the third party refused to transfer the ownership of the deficient area or the deficient area is government-owned, X doesn't assume this duty.

And Y can demand reduction for 1,000 dollars according to Article 544.

On the other hand, Y cannot demand termination because the purpose of the purchase of this land is using as a farm and Y can still use the land as a farm even if the area was 10% short.

If Y suffered from damages due to deficiency of the land, Y can demand damages.

5. Duty and Right of the Buyer

5.1. General Obligation of the Buyer

After concluding a sale contract, the buyer is obligated to pay the purchase price to the seller as stated in the contract, and to receive the goods that the buyer has purchased (Article 554).

5.1.1. Duty to Pay the Purchase Price

The buyer has duty to pay the monetary purchase price agreed upon in the contract at the time and place agreed upon in the contract (Article 555). The time and place to pay the price shall be decided on the agreement of parties in the contract.

If the buyer pays the price later than the agreed time, the buyer shall be responsible for delayed performance.

The buyer needs not pay interest of the purchase price or damages for the delayed performance until he receives delivery of the subject matter even the

due date has passed (Article 556). The buyer cannot obtain the fruits from the subject matter until delivery instead (Article 553).

For example, X concluded a sale contract of a car with Y at the amount of 20,000 dollars. The time to pay the purchase price of the car is January 1st 2010, and the place to pay purchase price is at X's house. Therefore, Y is under obligation to pay the car's purchase price in the amount of 20,000 dollars to X on January 1st 2010 at X's house as having been agreed in the contract.

If the sale contract of a movable provides only a time for the delivery of the subject matter, such time is presumed to apply also to the payment of the purchase price. Also, in the case where the sale contract of an immovable provides only a time for the acts required for the registration of the immovable, such time is presumed to apply to the payment of the purchase price (Paragraph 2 of Article 555).

Due to the above example, if X and Y have agreed to deliver the car on January 10th 2010 but have not set the time to pay the price, the time to pay the price of car from Y to X will be January 10th 2010.

In the case where the parties didn't decide neither a time for delivery of a movable or for acts required to register an immovable, the buyer is under obligation to pay the purchase price when the seller demands the payment (Paragraph 3 of Article 555).

In the case where the place to effect payment of the purchase price is not provided for in the contract, if the payment of purchase price is to be performed simultaneously with the delivery of the goods or acts required to register of the immovable subject to the contract,, the buyer shall pay the purchase price at the place where the seller shall deliver the movable or complete the acts required for the register of the immovable (Paragraph 4 of Article 555).

5.1.2. Duty to Pay Interest

If the buyer has received the subject matter of the contract from the seller already, the buyer must pay interest of the payment price until he pays the full of purchase price or pays damages for delayed performance (Article 556). However, where the buyer has not received the subject matter from the seller, the buyer does not have to pay the interest or damages for delayed payment.

Of course, the parties may make a special agreement which stipulates that the buyer shall responsible for paying the interest of the price of payment or paying damages for delayed payment after the due date, for example.

5.1.3. Duty to Receive Thing Purchased

The buyer is under obligation to receive the subject matter that the buyer has purchased (Article 554). If the seller has delivered the subject matter of the contract to the buyer but the buyer refuses to receive the delivered thing, the buyer shall assume responsibility for delayed receipt (Article 559). Therefore, if the buyer refuses to accept the tender of performance due to the buyer's fault, the seller may demand damages and the seller may also terminate this contract in the case where the seller's non-acceptance of a tender of performance constitutes a material breach of the contract (Paragraph 1 of Article 559).

In the case where the subject matter has been lost or damaged without the fault of the seller, it shall be a matter of "burden of risk". In this case, the buyer shall assume the risk of such destruction, loss or damage (Paragraph 2 of Article 559).

Also, if the buyer refuses to receive delivery of the goods even though the seller has tendered delivery thereof, the seller may deposit the goods with the official depository office or sell them in accordance the provisions of Article 457 and 458 (Paragraph 3 of Article 559).

5.2. General Rights of the Buyer

The buyer has the right to demand delivery of the subject matter.

After the buyer has paid the purchase price, the buyer can obtain the fruits (contrary interpretation of Article 553).

5.3. Right to Refuse Payment

In a sale contract, the buyer has duty to pay the purchase price to the seller (Article 555). However, in some cases, the buyer may refuse to pay the purchase price.

5.3.1. In the Case where the Third Party Claims Interest in the Subject Matter

If the buyer likely to lose all or part of the rights he purchased, due to the a third party who claims right such as ownership or perpetual lease right to the subject matter, the buyer may refuse to pay all purchase price or in proportion to the extent of such risk (Article 557). However, the buyer may not refuse payment of the purchase price if the seller provides appropriate security to the buyer.

The buyer can demand that the seller shall assume warranty liability (termination, reduction of the purchase price, remedy, delivery the substitute goods, damages) if the third party has rights such as ownership or perpetual lease over the subject matter. And whether the third party has such a right over the subject matter shall be decided by the court through legal procedures. However, if the buyer has to pay the purchase price before the determination of the right, it would impose unreasonable burden on the buyer because he has to demand the seller that he shall return the purchase price due to termination or reduction of the purchase price. Therefore, the Civil Code acknowledged the right to refuse payment in proportion to the extent of such a risk.

Requirement of right are:

a) The existence of risk that the buyer likely to lose right he purchased

b) The seller demands the payment

c) The seller has not provided appropriate security

"The extent of such Risk" refers to how much portion of the subject matter he would lose, not how risky he would lose the rights. For example, in the case where there is a third party who asserts the ownership over the half portion of the subject matter, the buyer can refuse all payment if it is acknowledged that the buyer would not have bought the subject matter when it consists only of the remaining portion (Paragraph 2 of Article 533).

Moreover, this right to refuse payment functions as a defense. Therefore, the buyer doesn't need to assert this right until the seller demands the payment of the purchase price.

5.3.2. Defense of Simultaneous Performance

The buyer may refuse to pay the purchase price until the seller tenders performance of his obligations (Article 558 Paragraph 1). However, this shall not apply when the seller's obligations has not yet become due or where it is agreed that the obligation to pay the purchase price shall be performed prior to the seller's performance.

5.3.3. Defense of Insecurity

Even where the buyer has granted the seller a grace period for performance, if there is a significant risk of the seller's non-performance, the buyer may refuse to pay the purchase price (Article 558 Paragraph 2). However, this shall not apply where the seller has provided the buyer with security or has otherwise taken a measure that extinguished such insecurity.

Case Study

X sold a television to Y and X delivered the television at Y's house on the due date. However, Y was absent on that date because Y forgot that X would deliver the television and Y went on a trip far away from the city. Then, X brought the television back and kept it at the warehouse rented from A. X paid 10 dollars to A as rental fee. What X can demand against Y?

(Conclusion and Grounds)

Based on the hypothetical case provided above, Y delayed to receive the television from X on the date as stated in the contract due to Y's fault. On the other hand, X had to pay the warehouse rental fee of 10 dollars to A. Therefore X may demand such as USD10 rental fee against Y for the delayed receipt of Y based on Article 559 Paragraph 1. However, Y's fault cannot be considered as a material breach of the contract (Article 408) because X needs to demand that Y receive the television by establishing a period of performance reasonable length to have Y commit a material breach of the contract (Item (a), Paragraph 1 of Article 408). Therefore, X can terminate this contract only if Y doesn't receive the television within the period.

Section 2 Gift

1. Intention of Gift

A gift is a contract which comes into effect when one party (=donor) declares the intention to give property to another party (=donee) gratuitously, and other party accepts it (Article 568).

➢ Gratuitous Contract

A gift is a contract of which the party gives, for example, his/her mobile phone to another party without demanding a counter value. This means that gift is a gratuitous contract.

➢ Unilateral Contract

A gift is a unilateral contract because only the donor has an obligation to grant a thing of gift to the donee. The donee is however not subject to any counter obligation but just shows the intention to accept the subject matter of gift.

➢ Provision of the Sale is not applicable

Provisions related to sale contract shall not apply mutatis mutandis because a gift is a gratuitous contract, not a contract for value.

2. Requirement

Principle: Agreement

A gift is a contract which requires agreement between the donor and the donee and it may be created by only the agreement between the parties.

However, in the case of gift contract of immovable, it shall come into effect only when the contract is made by notarial document (Article 569, Paragraph 2 of Article 336).

3. Obligation of the Donor

3.1. Obligation to Transfer Right

In Gift, a donor has an obligation to transfer property right of the subject matter of gift to a donee gratuitously (Article 568). For the gift of a property, the property right is transferred from donor to donee, and among those rights,

the important one is ownership. Therefore, if ownership is transferred through gift, Article 133, 134, 135, 160 and 187 of the Civil Code shall apply (Article 569).

For example, X donated a flat to Y and Y accepted the gift and therefore a contract of gift was created. After gift was created, X has an obligation to transfer ownership over the flat to Y. The transfer of ownership shall be done by registration.

On the other hand, the donee shall not assume any obligation except gift with burden (Article 576). Therefore, it can be said that a gift is an act of grace.

3.2. Alleviation of Warranty Liability

A donor shall not be liable for any defect or deficiency in the thing or right which forms the subject matter of the gift in general (Article 574). The contract of gift of which is a gratuitous contract is different from sale contract and other types of contract for value, even though the thing which is the subject matter of the gift has defect when the contract is concluded, it is not appropriate to hold the donor liable in addition to the obligation of granting the thing as the matter of fact.

However, if the donor knew the existence of defect or absence of thing or right but did not disclose, the donor cannot be acquitted from the liability (Proviso of Article 574). This is a kind of sign of the principle of good faith (Article 5). In this case, it can be considered that it is not adequate that the donor shall assume the same liability as the seller because a gift is gratuitous contract. In other words, it can be said that the liability of the donor who acted in bad faith shall be alleviated in comparison to the seller.

4. Rescission of Gift

4.1. In The Case of a Gift Not in Writing

Because the contract of gift requires only the agreement between the parties, it is not required any document, and in most occasions, it is created orally. If the party doesn't make any document regarding a gift, either party may revoke the contract by withdrawing his manifestation (Former part of Article 570). The effect of revocation shall be made unilaterally and there is no need to make an agreement. The aim of this article is to make revocation easy if the

donor gave his property thoughtlessly. In other words, if the intention of the donor is indicated in writing, that intention is the result of careful consideration of the donor and it may be written down in the document normally. Therefore, the donee may force the donor to execute the contract of gift if the parties made a contractual document.

However, the parties cannot withdraw his manifestation of the intention in respect of any portion of the gift for which performance has been completed (Latter part of Article 570). The reason why the Civil Code provides this rule is that if the donor has completed his performance, the donor's intention to give his property has become clear. Therefore, "the performance of the obligation has been completed" does not necessarily mean that the donor has completed all his performance, but only main obligation has been performed. Usually, transfer of movable or registration of immovable without transfer can be considered as "performance has been completed".

For example, X promised to give 10 books as unspecified property to Y but they didn't make any document regarding this gift. In the case where X specified 10 books from other books, X may revoke this contract because it cannot be said that he has not completed the main obligation. However, if X delivered 10 books to Y, X cannot revoke the contract anymore.

Article 570 uses the term "party" so it means that either donor or donee may revoke the contract of gift. The donee also has the right to revoke the gift by just withdrawing the intention to accept the gift.

4.2. In the Case of Breach of Trust, Etc.

Usually, a gift is done between parties who have a special relationship with each other such as parents and children, brothers or close acquaintance. Based on this idea, the donor shall be entitled to rescind the gift if the donee commits a serious breach of trust against the donor (Paragraph 1 of Article 571). "A serious breach" means an act of serious ingratitude, such as aggressive harassing behavior or default on the duty of support if his or her parents lack their ability to earn their living. For example, a father X promised to give a house to his son, Y. However, Y threw up his duty to take care of his parents and always provoked conflict with X. In this case, X may rescind the gift of that house.

In the case provided above, the donor may rescind the gift of which performance has been completed only within the period of 5 years, starting from the occurrence of the serious breach of trust if the obligation is already performed (paragraph 2 of Article 571).

For example, in above case, X is entitled to rescind the gift within 5 years starting from the time when Y threw up his obligation to take care of his parents. After rescission, X may demand Y to return the house by gift by provision of the return of unjust enrichment (Article 573).

4.3. In The Case of Poverty of The Donor

In the case where once the donor manifested his intention to gift and the donee accept it, the donor is obligated to complete his obligation because a gift is a contract and the Doctrine of Estoppel shall apply.

On the other hand, a gift is the gratuitous act in light of benevolence of intention and the donor may not expect a counter performance. Therefore, it is necessary to pave the way for rescission of the gift for the donor in the case where the donor falls into a state of extreme poverty even in the case where the made a document regarding a gift. So, if a change of circumstance exists after the gift, the donor may be entitled to demand the return of the gift based on Article 572. This emphasizes that the donor shall be entitled to rescind the gift in case where:

a) The donor is reduced to a state of extreme poverty after making a manifestation of intention to gift

AND

b) The degree of poverty reached where the donor is no longer to maintain the living of himself and persons whom he has obligation to provide with support after.

Persons whom the donor has obligation to provide with support after are typically stipulated in Article 1140.

The aim of this provision is that to avoid making the donor complete his obligation at the sacrifice of the life of the donor or persons whom the donor is obligated to support in the case where the donor is reduced to a state of extreme poverty.

Referred to above mentioned, donee may rescind the gift of which the performance has been completed within the period of five years in the following said performance according to the Paragraph 2 of Article 572.

If the donor has been reduced to a state of extreme poverty at the time of gift contract or before the contract, Paragraph 1 of Article 572 shall not apply.

4.4. Effect of Rescission of Gift

Rescission of a gift refers to the act of the donor who is entitled to demand return of the gift's property in accordance with the provision relating to the return of unjust enrichment (Article 573). And in the event of the rescission of the gift, it shall be subjected to Articles 571 and 572 of the Civil Code.

5. Special Types of Gifts

5.1. Periodical Gift

Periodical gift refers to the gift that a donor gave the property continuously. For example, a gift contract which stipulates that a father gives 200 dollars to his son every month. Most of this type of gift aims to support someone based on a special relationship such as parents and children.

A periodic gift shall lapse upon the death of either donor or the donee (Article 575). In general, a successor succeeds to all of the rights and obligations pertaining to the property of the decedent (Paragraph 1 of Article 1147). However, in the case of the periodic gift, it is appropriate that, no one shall succeed the right or the obligation regarding periodic gift if the one of the parties is dead. For example, in above case, if the father died, other successor such as his wife or siblings of the donee shall not succeed the obligation of the periodic gift. The reason is that a periodic gift is usually established on the special relationship between the donor and the donee as mentioned above, so it can be considered that losing effect of gift in the case of death of the donor or the donee shall meet the party's will.

5.2. Gift with Burden

Gift with burden refers to the gift that the donee is obliged to carry out a specified performance in order to receive the gift. A "burden" which the donee shall assume in a gift with burden doesn't have equal value as obligation of the donor because a gift with burden is a gratuitous contract. For example, in

the case where X and Y made an agreement that X shall give his house to Y in exchange for Y's allowance for X's son to live in the house, it shall be a gift with burden.

If the burden has equal value as obligation of the donor, it shall be a contract for value such as sale contract, etc.

On the other hand, in the case of the gift with burden, both parties assume the obligation to give performance thus both parties shall be entitled to rights and the responsibility similar to the provision in relation to the sale contract.

(1) Warranty liability (Paragraph 2 of Article 576)

In the case of a gift with burden, the donor shall assume the same warranty liability as a seller to the extent of the burden. For example, a father X made an agreement with his son Y that X shall give his land which is worth 10,000 dollars in exchange for Y shall give 3,000 dollar cash as X's living expenses. After that, it was revealed that the land was co-owned by X and his elder brother A, and X's share was a quarter (it means the price of X's share was only 2,500 dollars). In this case, the price of Y's burden exceeds the price of the subject matter of the gift with burden. Therefore, based on Paragraph 2 of Article 576, Y may refuse to perform to the extent of exceeded price if he has not performed his burden; thus Y may refuse to pay 500 dollars. If he has performed his burden already, he may demand return of 500 dollars against X as an unjust enrichment.

(2) Right to demand performance (Paragraph 3 of Article 576)

If one of the parties has performed, he shall be entitled to demand performance against the other party. In general gift, only the donor assumes an obligation and it is supposed that the donor can demand nothing against the donee. However, in the case of gift with burden, the donor can demand that the donee shall perform his obligation if the donor has performed his obligation already.

(3) Defense of simultaneous performance (Paragraph 4 of Article 576)

Defense of simultaneous performance is acknowledged in bilateral contract in general (Article 386). However, the parties of gift with burden have a defense of simultaneous performance because both parties owe duty to perform and it is similar to a bilateral contract.

(4) Right to termination of the donor (Paragraph 5 of Article 576)

In general, a right to termination derives from a nature of equivalent value of a bilateral contract. However, in the case where the donee doesn't perform his burden, the donor may terminate the gift contract in accordance with provisions regarding termination. In other words, the donor may terminate only if the donee's non-performance falls into "material breach of the contract". For example, a father X gave his land to his son Y on the condition that Y shall live together X, but Y refused it after registration. In this case, X may terminate the gift because Y's non-performance can be considered as "material breach of the contract".

5.3. Gift on Donor's Death

Gift on donor's death is referred to a gift which is required the donor's death as the requirement to effect the gift. The provisions relating to testamentary gift shall apply mutatis mutandis to the effect of a gift on donor's death (Paragraph 2 of Article 577).

Testamentary gift (Article 1199) is a gift that the testator gives the succession property by will. A will becomes effective upon the death of the testator (Paragraph 1 of Article 1194). Therefore, a gift on donor's death and a testamentary gift have a common feature that they become effective upon the death of the donor.

However, in the case of a gift on donor's death, an agreement between the donor and the donee is required to establish because it is a contract. On contrary, an agreement is not required in the case of a testamentary gift because it is a unilateral legal act. Moreover, provisions regarding renunciation (Article 1201) or acceptance (Article 1202 and 1203) shall not apply mutatis mutandis to gift on donor's death because there is no room to acknowledge them.

Case Study
Parents gave a plot of land to the son, and then the son built the house on that land. The transfer of the ownership has been registered. Later on, the parents demand the return of land back because they are angry with

their son. Can the parents rescind the gift?

(1) In case where the parent are angry with their son because he changes his job on after another.

(2) In case where the parents are angry with their son because the parents gave the land on the promise that the son would take care of his parents. But he refuses to support his parents.

(Conclusion and Grounds)

In principle, transfer of the ownership of immovable pursuant to a contract of gift shall be subject to Art.135 (Article 569). Therefore, transfer of ownership shall come into effect only when the transfer of ownership is registered. In this case, registration has been completed.

(1) The parents cannot rescind the gift.

In case (1), the parents are angry with their son just because he changes his job on after another. And there is no condition to give their land, so they cannot rescind the gift based on Article 571.

(2) The parents can rescind or terminate the gift.

In case (2), there are two possible way. If their son's act corresponds to Article 571, they can rescind the gift. As mentioned, to acknowledge 'serious breach', it is not enough that the donee rebel against donor's will but the donee commits serious ingratitude. In such case of (2), it can be considered that the parents expect to be supported by their son and the son knows it. Therefore, default on the duty of support his parents shall be serious breach of the parent's trust.

The other possible way of thinking is that the duty of support is the burden in gift with burden. If the donee doesn't perform his duty and it falls into material breach of contract, the parents can terminate the gift (Paragraph 5 of Article 576). In this case, the son promised to support his parents but he refused to perform his duty, and usually it shall be material breach of contract. Therefore, the parents can terminate the gift based on provisions regarding termination.

Section 3 Lease

1. Intention of Lease

1.1. Definition

A lease refers to a contract which a party allows another party to use and profit from a certain thing for consideration (Article 596). The lessor doesn't necessarily have an ownership, but right to use and benefit. For example, a perpetual lessee, usufruct right holder or lessee can sublease the subject matter under certain condition (Paragraph 2 of Article 252, Article 264, Paragraph 1 of Article 608).

1.2. Requirement

A lease shall be established only on the agreement between the parties. Making document is not required (Article 597).

Even though the party didn't decide the duration of the lease, the contract would still be valid. However, fixing up the amount of rent is required.

1.3. Perfection

A lessor has an ownership over the subject matter of lease, so the lessor can assign the subject matter of lease. A new owner shall obtain the ownership and can assert his ownership against all persons. On the other hand, lease is a contract on which lessee can assert his right to use and profit only against the lessor. Therefore, if a new owner demands that the lessee shall return the subject matter, the lessee has to return it in general.

However, it would put the lessee into disadvantageous position especially in case of lease of immovable. Therefore, the Code provides that in case of lease over immovable, the lessee can assert his right regarding lease contract against subsequent acquirer of any real right over the immovable by virtue of the fact that the lessee has occupied, and continuously used and profited from the leased immovable (Paragraph 1 of Article 598).

1.4. Lease Period

A lease period can be decided by contract. If no term is fixed for lease in the contract, it shall be deemed to be a lease without stipulation of period. And a

lease of an immovable not in writing shall be deemed to be a lease without stipulation of period (Paragraph 2 of Article 599).

2. Right and Duty of the Lessor

2.1. Duty to Make the Lessee Use and Profit in Accordance with Normal Method

The lessee has a right to use and profit in accordance with normal method (Paragraph 1 of Article 600). On the other hand, the lessor shall not interfere with the use and taking of profits by lessee in the normal manner. A duty to repair by the lessor (Article 602) derives from this concept.

2.2. Duty to Repair

The lessor is required to repair so that the lessee may use and profit from the leased property (Article 602). For example, in the case where a part of floor of a leased house was damaged, the lessor doesn't need to repair as far as the lessee can reside the house in normal manners. On the other hand, if the leased house is leaking from the ceiling, the lessor shall have a duty to repair even though it is just a part of the ceiling because usually it shall be obstacle to reside in the house.

In some cases, to determine whether the damage corresponds to "required for the use and profit" or not is difficult. For example, in the case where X leased a decrepit house to Y with very low rental, to impose burden of repairing all of the damages is too strict for the lessor. In such cases, whether the lessor shall assume a duty to repair shall be decided while taking into consideration facts that it is appropriate to hold responsible for repair.

The special agreement which stipulates that the lessee shall assume obligation to repair is valid because Article 602 is an optional provision.

Moreover, the lessee shall not obstruct any action by the lessor that is required to preserve the leased property (Article 603). The leased property belongs to the lessor and the lessor has a right to maintain it including repair. For example, in the case where the lessor repairs leaking ceiling in one room of the leased apartment, the lessee cannot refuse it even if he cannot use the room during repair. However, if the lessee cannot achieve his purpose of the lease contract due to repair, for example the apartment has only one room in

above case, he lessee can demand a reduction of the rental or can terminate the contract (Latter part of Paragraph 2 of Article 603).

2.3. Duty to Reimbursement of Expenditures

2.3.1. Duty to Reimburse Necessary Expenditure

Paragraph 1 of Article 604 provides that if the lessee outlays any necessary expenditure that should be borne by the lessor, the lessee can immediately demand reimbursement from the lessor. For example, the expenditure for repair leased property that the lessor shall bear is included in "necessary expenditure". And expenditure other than for repair can be included in necessary expenditure because the lessor is obligated to make the lessee use or profit from the leased property. For example, if the step in front of the leased room is broken, the lessor shall assume duty to repair it even it is not leased property itself. And if the lessee repaired it, the lessor shall assume duty to reimburse the fee as a necessary expenditure.

"Immediately" means at the same time of expenditure of necessary fee.

2.3.2. Duty to Reimburse Beneficial Expenses

Sometimes the lessee upgrades the leased property during lease. The lessee has an obligation to restore the leased property to its original condition and return it the lessor at the end of the lease (Paragraph 1 of Article 618). In other words, the lessee has to remove all of things which he attached to the leased property. However, removing all of things causes economic loss sometimes. On the other hand, if the lessor can obtain all of benefit due to upgrade, it will be against equality.

Therefore, Paragraph 2 of Article 604 provides that the lessee can demand reimbursement of the beneficial expenses

a) as long as the increase in value of the leased property remains and effect,

b) at the time of expiry of the lease,

c) at the discretion of the lessor of the amount actually disbursed by the lessee or the increase in value of the property.

For example, if the lessee had the built-in air conditioner for 1,000 dollars and the leased building's value increased to 500 dollars additionally at the time of termination of the lease, the lessor can pay 500 dollars and discharged from this duty in general by his option. On the other hand, if the leased building's value increased 1,200 dollars in the same case, the lessor can pay 1,000 dollars also by his option.

If the lessor bears the duty to reimburse beneficial expenditure, the lessee can assert right of retention (Article 774). However, sometimes the beneficial expenditure might be high, and the lessor cannot receive the leased property in such cases if the lessor cannot reimburse the expenditure immediately. Therefore, Proviso of Paragraph 2 of Article 604 provides that the court can grant a reasonable time for reimbursement upon application by the lessor. In other words, the lessor doesn't have to reimburse the benefit expenditure until the due date which the court acknowledged. In this case, the lessee cannot assert right of retention or defense of simultaneous performance.

Case Study

Y leased a building from X in purpose of opening a restaurant. The period of the lease contract is five years at the rental fee is 500 dollars per month. There is no any special agreement regarding to the repair or expenditure.

Is Y entitled to demand the reimbursement of expenditure from X? If yes, what kind of the expenditure can Y demand?

(1) After delivery of the building, the ceiling had leaked. So, Y bought some repairing materials for 10 dollars and repaired it by himself.

(2) Y has changed exhaust air duct because the previous one which was installed before the delivery was old and glitch. The new exhaust air duct costs 250 dollars, which was the standard price.

(3) Just before the termination of the contract, Y bought and installed a build-in refrigerator at 5,000 dollars which was imported from USA. Then, the lease was terminated.

(Conclusion and Grounds)

(1) Y may demand 10 dollars as necessary expenditure.

The expenditure that Y can demand is the necessary expenditure. In this case, Y cannot use or profit from the leased property due to leaking. Therefore, Y has expended the necessary costs of 10 dollar based on Paragraph 1 of Article 604.

(2) Y may demand 250 dollars as necessary expenditure.

Y leased the building to manage a restaurant. So the exhaust air duct is very important equipment to use or profit from the building. Therefore, the cost 250 dollars can be acknowledged as necessary expenditure.

(3) Y can demand reimbursement of beneficial expenditure.

Regarding Y's expenditure of 5,000 dollars on buying and installing the build-in refrigerator, X may not demand the reimbursement as the necessary expenditure. However, it can be said that to install a built –in refrigerator is an act to improvement value of the leased property. In this case, based on paragraph 2 of Article 604, when the contract is terminated, while the refrigerator is still remaining in value, Y may demand the expenditure. In this case, Y may demand reimbursement for the amount actually disbursed or the increase in value of the building in accordance with X's choice.

2.4. Warranty Liability of Lessor

2.4.1. In the Case Where the Leased Property Belongs to Another Party

In this case, it must focus on three principles.

Firstly, the original lease is still valid in the case where the leased property belongs to another party.

Secondly, the lessor is obligated to acquire an ownership or rent that the subject matter from the owner.

Thirdly, in the case where the lessor cannot perform his own obligations, Article 531 regarding obligations to transfer the right and warranty liability of the seller, Article 532 on right to termination of contract by seller who sells right of another person, and Article 533 on Warranty liability of seller when part of right sold belongs to another person shall be applied mutatis mutandis.

2.4.2. Warranty Liability against Defect

In the case where the subject matter of lease has defect, the lessor shall assume warranty liability against the defect because lease is a contract for value. Article 605 divides into two cases; in the case where the defect could have been easily found and in the case where the defect was hidden.

(1) In the case where the defect could have been easily found (Paragraph 1 of Article 605)

In the case where

(a) the lessee did not examine the leased property where it is suitable to the condition mentioned in the written contract at the time of delivery

AND

(b) the difference between the conditions stated in the written contract and the leased property could have been easily found,

the lessee cannot demand the lessor shall assume responsibility.

For example, in the lease contract of a room of an apartment, it is stated that three air conditioners shall be installed in written contract but only two air conditioners are installed in reality, the lessee cannot demand the lessor that the lessor shall install one more air conditioner if the lessee didn't examine the room.

(2) In the case where the defect was hidden (Paragraph 2 and 5 of Article 605)

If there is a hidden defect and the lessee was unaware at the time of delivery, the lessee may demand the repair of such defect or damages. Also, in this case, when the lessee cannot reach the purpose of the contract because of the defect, the lessee may terminate the contract (Paragraph 5 of Article 605).

(3) Contents of warranty liability against defect

In the case where leased property is defective, the lessor may repair the defect at the lessor's own expense as long as this doesn't unduly harm the lessee's interest (Paragraph 3 of Article 605).

Even if the lessor repaired the defect, the lessee may demand damages (Proviso of Paragraph 3, Article 605).

If the lessor assumes obligation to repair in accordance with Proviso of Paragraph 3 of Article 605, the lessee may demand reduction of the rental

commensurate with the defect retroactive to the time that the lessee received the delivery of the leased property (Paragraph 4 of Article 605).

Also, as mentioned, if the lessee cannot achieve the purpose of the contract due to the existence of the hidden defect, the lessee may terminate the lease contract.

Any demand regarding to warranty liability against defect must be made not later than one year from when the lessee became aware of or should have become aware of the fact the giving rise to such demand (Paragraph 6 of Article 605).

3. Right and Obligation of Lessee

3.1. Obligation to Pay the Rent

In principle, the lessee is obliged to pay the rental to the lessor of movable property and, house or building at the end of each month and in the case of land, it shall be paid at the end of each year (Article 610).

According to Article 610, the lessee assumes an obligation to pay the rental to the lessor according to the lease contract which determines the time to pay the rent. If in the lease contract, it does not specify the time of payment of rental, the obligation to pay the rent shall be in accordance with the provision of law such as paying the rent at the end of each month in the case of movables and buildings, and at the end of each year in the case of land; provided that if there is a harvest season, the rental shall be paid without delay upon the close of such season. In conclusion, the payment of rental shall be applied in two ways: 1) pay as stated in the contract or 2) pay as stated in the provision of the law.

The point here is that the obligation to deliver the leased property by the lessor and the obligation to pay the rent don't have correlation of simultaneous performance. The lessor has to complete his obligation to deliver leased property prior to the payment of the rent if there is no special agreement.

Both the lessee and lessor have another obligation in term of good faith after the lease is determined, the lessee shall deliver the leased property in the original condition to the lessor. If the lessee and the lessor renew the contract,

new obligation will established between the delivery of leased property and the payment of the rent.

3.2. Right and Obligation to Use and Profit in Accordance with Normal Method

The lessee has a right and a duty to use and profit from the leased property in accordance with normal methods (Article 600). The normal methods in Article 600 mean that the lessee shall have the right and obligation to use and profit from the leased property in a manner that is consistent to and specified in the contract, or in accordance with nature of the subject matter. The use consistent with the nature of the property refers to using in which the thing is intended to use in normal and general condition. If the lessee uses and profits in accordance with the normal method, the lessor shall not interfere in that use and taking of profits. For example, a lessee Y rented one room of an apartment from a lessor X to reside; it shall be against this duty if he renovates the room without consent of X and manages a restaurant.

If the lessee infringes the obligation to use and profit in accordance with the normal method, the lessor may terminate the contract (Paragraph 2 of Article 600). The termination of contract can be also complied with the general provision regarding non-performance and the breach of contract.

3.3. Lessee's Duty to Preserve the Leased Property with the Care of A Good Manager

The lessee possesses the property which belongs to the other party. Therefore, the lessee shall assume a duty to preserve the leased property with the care of a good manager (Article 601). However, the lessee doesn't need to assume liability of depreciation which arises from using the property in accordance with a normal method. For example, if the lessee leased a car from the lessor, the lessee doesn't need to compensate for tire wear in general.

If the lessee violates this duty, the lessor can terminate the lease in accordance with the general rule of termination. The lessor needs to demand that the lessee shall stop the act against this duty with establishing a reasonable period. And the lessor can terminate the lease if the lessee didn't stop the act within the period. However, in case where the lessee's act destroys the trust between the parties and further performance cannot be

expected anymore, the lessor can terminate the lease immediately (Item (d), Paragraph 1 of Article408).

3.4. Right of Lessee to Demand Reimbursement of Expenditures

As mentioned, the lessor has obligations to reimburse the necessary expenditure and beneficial expenses. Conversely, the lessee has rights to demand reimbursement of the necessary expenditure and beneficial expenses (Article 604).

3.5. Rights of Claim for Reduction of Rental or Termination

The parties can decide the amount of the rent by agreement as long as it is not against public order and good customs. However, in the case of a long-span contract such as a lease, the economic circumstance might be changed sometimes. Therefore, the Civil Code provides that the lessee can demand a reduction of the rent under certain conditions. On the other hand, the Civil Code doesn't stipulate the right to demand an increase of the rent of the lessor. The reason is that the lessor may make an agreement that the party shall consult with the lessee to revise the amount of the rent periodically or make a contract which stipulates a short-term period such as a 1 year or 2 year lease and set a new rental agreement.

The Civil Code provides two types of the rights of the claim for the reduction of the rent or the termination.

3.5.1. In The Case of Decreasing of Income

Paragraph 1 of Article 606 provides that the lessee can demand that the rent shall be reduced to the amount of difference between the rent and the actual profit

(a) In case where lessee leased land with a view to profit

AND

(b) The lessee received less profit than the amount of the rent by the reason of force majeure

For example, in the case where Y leased a land from X to grow rice for a 1,000 dollars rent per year but Y could receive only 600 dollars worth of harvest in a given year, Y can demand that X shall reduce the rent to 600 dollars.

To recognize this right, it is necessary that the lessee leased "land with a view to profit". It means the lessee leased the land with intention to obtain some profit from land itself. For example, if the lessee who leased land and built a restaurant manages it but he couldn't receive more earning than the amount of the rent. In this case, the lessee cannot demand reduction of the rent because it cannot be said that the lessee leases a land with a view to profit. The aim of this article protects tenant farmers.

If a lessee receives profit less than the amount of the rental for more than two years successively by reason of force majeure, the lessee may terminate the lease contract (Paragraph 2 of Article 606)

3.5.2. In Case of Partial Loss of Leased Property

If a part of the leased property is destroyed or lost by reason which is not the negligence of the lessee, he or she can demand deduction of the rent in the proportion to the lost or damaged part. If the lessee cannot achieve the purpose of the remaining lease contract, he or she may terminate the lease contract. (Paragraph 2 of Article 607)

For example, Y rents three rooms from X in the amount of 600 dollars. However, one of the rooms has been burned down without Y's negligence. In this case, Y can demand X that X shall decrease the rent of the third room. Therefore, Y shall pay only 400 dollars to X. However, if the remaining two rooms cannot achieve the purpose of Y, Y may terminate this lease contract.

3.6. Transfer of Lease Rights and Sublease

Except in the case of a perpetual lease (Paragraph 1 of Article 252), the lessee is not permitted to transfer his lease rights, or to sublease the leased property, without the permission of the lessor (Paragraph 1 of Article 608).

- Meaning of transfer of lease rights

The meaning of transfer of lease right is that the lessee transfers his position as the lessee to the third party.

- Meaning of sublease

The lessee subleases the leased property to a third party.

Article 608 stipulates that except in the case of a perpetual lease, the lessee is not permitted to transfer his lease rights, or to sublease the leased property, without the permission of the lessor.

If contrary to paragraph (1) the lessee allows a third party to use or profit from the leased property, the lessor may terminate the lease contract (Paragraph 2 of Article 608).

The reason why the lessee needs to obtain permission from the lessor in the case of transfer of the lease right or sublease is that it shall be very important for the lessor who is the lease right holder. In other words, the lessor believes the personality of the lessee, such as his monetary capacity or conscience and leases his property based on the trust. Also, if it is possible to transfer the lease right or the leased property to the to the third party without the lessor's permission, the lessor might suffer from unexpected damages because the obligation to pay the rent shall be transferred to the third party whose ability the lessor doesn't necessarily know in these cases.

If a lessee lawfully subleases the leased property, the sublessee shall assume the lease obligations directly vis-à-vis the lessor. An advance payment to the sublessor cannot be held up as payment of the sublease rental to the lessor (Paragraph 1 of Article 609).

The above provision shall not prevent the lessor from exercising his rights against the lessee (Paragraph 2 of Article 609).

For example, X had rented a house to Y, and Y subleased the house to Z with X's consent. In such a case, X is the lessor, Y is the lessee, and Z is the sublessee.

In the case where Z has paid the rent to Y already but Y does not pay the rent to X, X can demand the payment of the rent against Y or Z. As long as X demands the payment of the rent against Z, Z cannot refuse it in this case. Hence, Z is obligated to pay the rent to X and then can demand of payment of the rent against Y based on unjust enrichment.

Case study

X leased a room of an apartment to Y. Z is the friend of Y.

(1) Y made a sublease contract to sublease the room to Z without X's permission on April 10th 2011. Z is planning to move in the room on May 1st. Can X, who realized the existence of this contract on April 15th terminate the lease contract with Y?

(2) Y subleased the room to Z with X's permission and Z has moved into the room. After that, Z did not pay the rent to X. Z has paid the amount of one-year rent to Y. Can X demand the payment of rent against Z?

(3) Y subleased the room to Z with permission of X, and Z has moved into the room already. After that, the ceiling began to leak. Can Z demand X for repair?

(Conclusion and Grounds)

(1) X cannot terminate the contract.

According to Paragraph 2 of Article 608, the lessor can terminate the contract only if the lessee allows a third party to use or profit without the lessor's permission. The meaning or "use or profit" is that the lessee makes a third party use or obtain profit in actually. In this case, Y mad a contract with Z to sublease without X's permission, but Y has not made Z use or profit yet. Therefore, X cannot terminate this contract immediately.

(2) X can demand payment of the rent against Z.

If the lessee lawfully subleases the leased property, the sublessee shall assume the lease obligations directly to the lessor. And if the sublessee paid the rent to sublessor in advance, the sublessee cannot assert it against the lessor (latte part of Paragraph 1 of Article 609). Therefore, Z cannot assert an advanced payment against X. X can demand payment of the rent against Z.

(3) Z cannot demand repair against X.

Paragraph 1 of Article 609 stipulates that the sublessee shall assume the obligation directly to the lessor but it doesn't say anything about the sublessee's right to demand against the lessor. As a matter of fact, there is no contractual relationship between lessor and sublessee. Therefore, Z cannot demand that X shall complete his obligation as a lessor directly and only Y

can demand repair against X. In the case where Y repaired the ceiling by the request of Z or reimbursed the expenditure to repair if Z repaid the ceiling at his expense, Y can demand reimbursement against X.

4. Termination of Lease

Where an obligor fails to perform his obligation arising from the contract, according to Article 390, the other party may demand specific performance, damages, or termination of the contract.

Termination of a lease does not have retroactive effect and shall have effect only for the future (Article 617). The effect of termination of lease contract is quite different from other contracts which have retroactive effect. For example, X has leased a flat to Y for one year at a rental fee of which is 100 dollars per month However, after having rented for only 5 months, the lease is terminated lawfully. In this case, X doesn't need to repay 5 months rent to Y because the termination of lease contract doesn't have retroactive effect.

4.1. Occurrences of Lease Determination

Lease contract is determinate on the grounds of the followings:

1) Determination of lease on account of expiry of term (Article 612)

2) Notice of cancellation of the lease without fixed term (Article 615)

3) The loss or serious damages of a leased property

4) Termination of lease due to non-performance

4.2. Determination of Lease on Account of Expiry of Term

4.2.1. Principle

Where a lease contract has a fixed term for determination, the lease shall determinate upon the expiry of such term (Article 612).

If the term which is fixed by agreement has been past, the lease loses its effect and the lessee shall return the leased property and the lessor is obligated to pay the beneficial expenditure.

4.2.2. Exception

A lease contract is a continuous relationship based on the trust between a lessor and lessee. As mentioned, the lease contract shall lose its effect by elapse of the period in principle.

However, the parties in a lease contract expect that the contract shall last longer in most cases where they don't have any problem. Therefore, the Civil Code provides some exceptions and intends to keep such a relationship as long as possible.

(1) In case of a lease of immovable (Article 613)

In the case of a lease of immovable with fixed term, although the term of lease has arrived for determination, where a party has not declared his intention to refuse to renew before certain period, the lease shall be renewed and this renewal shall be a lease without fixed term. And in order to determinate a lease without fixed term, either party may seek to terminate at any time in accordance with Article 615. Obviously, Article 613 says that in order to determinate a lease of immovable, a party who want to determinate shall declare his intention to refuse to renew not later than three months prior to the expiry of the term of the lease in the case of a building, and not later than one year prior to the expiry of the term of the lease in the case of land.

The means of the declaration of the intention to refuse to renew the lease contract is not stipulated in the chapter on lease, so Article 310 regarding the general rule of declaration of the intention shall apply.

For example, X has leased a house to Y for one year from 1 January 2010 until 31 December 2010. If X wants to stop leasing the house, X has to notice his intention to refuse to renew to Y for three months before the expired date which is on 31 December 2010.

(2) In case of a lease of movable (Article 614)

In case of a lease of an movable with fixed term, even though the term of the lease has arrived for determination, where (1) lessor is aware that the lessee continues using and profiting from the leased property after a term of determination has lapsed, and (2) the lessor does not make any objection, the lease shall be presumed to have been renewed as a lease without fixed term and with conditions identical to those of the original lease except for the term.

In the case of a lease of movable with fixed term, the lessor doesn't need to declare his intention to refuse to renew beforehand if he wants to determinate the lease contract.

For example, Y leased a car from X for 6 month period at 50 dollars rent per month. After 6 month has past, Y still drives the car and X doesn't make any objection even though he was aware the fact that the term has been expired and Y still drives the car. In this case, the lease contract shall be presumed to have been renewed as a lease without fixed term and the rent is 50 dollars per month.

The intention of this article is to protect the lessee's expectation of continuous use of the leased property if the lessor doesn't make any objection despite that he knows that the lessee continues to use and profit from the property after the term has expired. On the other hand, if the lessor must make an objection within a very short term, such as a few hours, or the contract shall be presumed to have been renewed, it will cause a severe burden on the lessor. Therefore, a judge needs to decide a reasonable term while taking consideration of concrete conditions of the lease contract. For your reference, the Civil Code of Germany stipulates that the lessor shall make an objection within two weeks.

4.3. Notice of Cancellation of Lease Without Fixed Term

Some types of lease were created without a fixed term of determination; in this regards, it may cause a difficulty to the vulnerable party because when the other party wants to terminate the lease and the vulnerable party cannot prepare in advance. Therefore, in order to prevent the terrible consequences arising, the provision of Article 615 stipulates that if no term is fixed for a lease in the contract, either party may give notice of cancellation at any time and the lease contract will determinate upon the expiry of the applicable period of (1) 1 day in the case of movables, (2) 3 months in the case of buildings, and (3) 1 year in the case of land. Also, it stipulates that in the case of a lease of land which has a harvest season, the notice of cancellation shall be given after the end of the harvest season and before the commencement of the next cultivation.

Although the party has fixed the term for a termination less than a term as provided in Article 615, it shall be deemed that the lease will be terminated according to Article 615.

For example, X leased a building without fixed term to Y. If X give a notice of determination to Y which stipulate that X shall determine the lease contract after 2months have passed, the contract shall not determine before 3 months have passed.

Even in cases where parties have fixed a term for the lease, if one or both parties have reserved the right to determine within such a term, the provisions of Article 615 shall apply mutatis mutandis (Article 616).

4.4. Determination Due to a Loss of Leased Thing

Because a leased thing is a specific thing, when a leased thing is lost, the lease will be determinate because the purpose of lease cannot be achieved. Also, where the leased thing is lost due to the negligence of one of the parties, the party who has negligence shall be liable for any damages according to Paragraph 1 of Article 398.

Different from a sale contract, in the case of a continuous contract such as a lease, there is no room to consider that only an obligation to pay the rent remains if the subject matter has been lost. Therefore, the lease contract shall determine without declaration of intention if the subject matter of the lease has been lost.

For example, X leased a house to Y. but the house was fired due to the negligence of Y who burst a gas stove. In this case, the lease between X and Y was determinate and Y assumed liability to pay compensation for damages to X.

4.5. Termination of Lease Due to Non-performance

According to the Article 407, where one of the parties to a bilateral contract commits a material breach of the contract, the other party may terminate the contract immediately. This article can apply to a lease contract because a lease contract is a bilateral contract.

For example, in the case where the lessee has not paid the rent for long time, the lessor is entitled to terminate the contract because such failure can be

considered as a material breach of contract. In this case, the non-performance shall be substantial that trust between the parties is destroyed and further performance cannot be expected, so Item (d), Paragraph 1 of Article 408 can apply. However, it is left for the Cambodian practice that what term of non-payment can be considered as a material breach of the contract in the case of lease.

Section 4 Loan for Consumption

1. Intention

A loan for consumption is a contract whereby one party, called "lender", owns a property and delivers it to another party, called "borrower", and mutually agree that the borrower shall consume the property loaned and, upon the maturity of the loan term, assumes the obligation to return objects of the same type, quality and quantity as those received from the lender (Article 578). It is a bilateral contract because the lender shall be obligated to deliver things and the borrower shall have an obligation to return things as well.

For example, a person has borrowed rice and he can freely consume it and has the obligation to return rice of the same type, quality and quantity following the maturity of the loan term.

Loan for consumption is divided into two types:

- Loan for consumption with interest is a contract for value.
- Loan for consumption without interest is a gratuitous contract.

The differences between loan for consumption, lease and loan for use are:

Loan for consumption	Lease	Loan for use
- Return object of the same type, quality and quantity (not only the original object)	- Under obligation to return the original object (the same object as before)	- Under obligation to return the same object (the same object as before)
- Ownership has been transferred	- Ownership has not been transferred	- Ownership has not been transferred
- for value or gratuitous	- for value	- Gratuitous

2. Requirement

A contract of loan for consumption is formed by agreement of both parties (Article 579). The parties can also form a contract whose object is payment of the interest by an agreement. However, an agreement to establish a claim for interest shall not come into effect unless it is in writing and bears the signature of the borrower (Paragraph 3 of Article 583).

The parties can form a loan for consumption without establishing a certain period to return it. However, it is necessary to be decided upon the quality, number and the kind of the subject matter to form a contract of loan for consumption.

The specific property such as an immovable cannot be the subject matter of the loan for consumption because it is not substitutable.

3. Obligation and Right of Lender

3.1. Obligation to Lend the Subject Matter

The lender assumes an obligation to allow the borrower to use things that are in conformity with the contract, and the borrower can freely use, profit from and dispose of the things loaned (Article 587). The borrower obtains the ownership over the things.

3.2. Warranty Liability of the Lender

3.2.1. Lender Who Deliver Things Belonging to Another Person

(1) In the case of loan for consumption with interest

In the contract of loan for consumption with interest made between the lender and borrower, the lender who delivers things that are not his own property shall be obliged either to acquire the ownership thereof and transfer it to the borrower, or to substitute other things with the same type, quality and quantity owned by the lender. Even though the delivered things belong to the other person, such contract shall not be nullified. However, the borrower shall not be entitled to demand delivery of substitute things after consuming the things (Paragraph 1 of Article 588).

Furthermore, if the lender is unable to deliver the things or cannot find the substitute things, the borrower shall be entitled to terminate the contract, whether the borrower acted in good or bad faith (Paragraph 2 of Article 588).

Also, if the borrower who has accepted the delivery of things loaned without knowing that the lender had no title thereto may demand compensation for damage from the lender (Paragraph 3 of Article 588).

(2) Contract of loan for consumption without interest:

In the contract of loan for consumption without interest, if the lender was aware that the things which he has delivered belong to another person but he did not disclose the fact, the lender shall be responsible which stipulated in Paragraph 1 through 3 of Article 588.

Both case (1) and (2), if the borrower returns the things delivered or paid the value thereof to real owner, he shall be exempted from the obligation to return them to the lender (Paragraph 5 of Article 588).

(3) Right of termination of lender who has delivered things belonging to another person

If the lender delivered the things which belong to another person to the borrower without knowledge and he cannot transfer the ownership of the things or substitute things to the borrower, he may terminate the contract. However, if the borrower who acted in good faith at the time of the delivery has a claim for compensation for damages in accordance with Article 588, such termination shall only be permitted if such damages have been compensated for (Article 589).

For example, X delivered the rice without knowledge that it belongs to Z. Y manages a restaurant but he cannot open it for 2 days because he returned the rice to Z in accordance with Paragraph3 of Article 588. In this case, X can terminate the contract but he has to compensate a 2-day income to Y before termination.

3.2.2. In the Case Where the Thing Delivered is Defective

(1) In the case of loan for consumption with interest

The lender is obligated to deliver a thing without defect (Article 523, Article 539). Therefore, if the lender delivered things to the borrower through a contract of loan for consumption with interest and there is a hidden defect among the things thereof, the borrower who received the things without knowing of the defect may demand replacement by non-defective things and damages, if any (Paragraph 1 of Article 590).

(2) In the case of loan for consumption without interest:

In the case of a loan for consumption without interest, the liability of the lender is reduced. In principle, if the lender delivered defective thing to the

borrower, the borrower can return the things which have the same defect to the lender. However, it is difficult and sometimes nonsense to find the things which have similar defect. Therefore, the Civil Code provides that the borrower may return the value of the defective things (Paragraph 2 of Article 590). For example, X delivered 10kg of rice to Y as a loan for consumption without interest, but 2kg of them was in bad conditions and its value was 1/10 of the market price. In this case, Y can return 8kg of the same quality of rice and the value of 1/10 of the market price.

Also, if the lender was aware of the defect prior to the delivery but did not disclose the fact, the lender shall be obligated to replace by the things without defect and pay the borrower damages which resulted from the defective things (Proviso, Paragraph 2 of Article 590).

3.3. Demand of Return in the Case of Deterioration of Borrower's Economic Status

When the lender and borrower enter into a contract of the loan for consumption but the economic situation of the borrower performance of the obligation to return becomes doubtful before the delivery of the object thereof, the lender shall be entitled to terminate the contract (Article 581).

Then, how about in the case where the economic situation of the borrower has deteriorated AFTER delivery? Is the lender entitled to demand the return of the things thereof prior to the due date of the return for the reason of the deterioration of borrower's solvency?

The borrower has the right to use the delivered things until the date of the return. In other words, he doesn't need to return the things before the date of the return. It is called "benefit of time". According to Paragraph 1 of Article 594, the lender is not permitted to demand return of the things before the due date. However, this shall not apply if the borrower falls into any item of Article 331. Regarding to "time" according to Paragraph 1 of Article 330, time is presumed to be stipulated for the benefit of the obligor. Therefore, however worse the solvency of the borrower becomes, the lender may not demand return of the loaned things before the date of the return.

However, in the case where the situations which are stipulated in Article 331 each item occurs, the obligor shall lose the benefit of time, and consequently,

he has to perform his obligation immediately. For example, if the borrower has been declared bankrupt, he has to return the loaned things immediately.

Also, Item (d) of Article stipulates that where an event that was agreed upon between the parties has occurred, the obligor shall lose his benefit of time.

For example, "an event that was agreed upon between the parties" includes, for example, the special agreement which stipulates "if for any reason the borrower fails to pay interest for 3months, the lender can demand immediate payment of the entire remaining unpaid balance of this loan, without giving any one further notice" or "in the case where the borrower's properties have been attached by another obligee, the borrower shall lose the benefit of time and return the remaining loan immediately", etc.

4. Borrower's Obligation

4.1. Obligation to Return Things

The obligation to return is the most important and general obligation of the borrower, and this obligation shall be performed when the return date comes up. Additionally, the return shall be made in accordance with some principles stipulated in Article 591 through 595.

In principle, the borrower has an obligation to return, things of the same type, quality and quantity as those received by delivery from the lender on the return date or time (Paragraph 1 of Article 591). For example, if the borrower has borrowed seed of Malis rice (name of rice) in amount of 50 kilograms from the lender for one year and promised to pay 10 percent of interest per year. Hence, when the return date arrives, the borrower shall return the same type of rice seed with the same quality as the previous one equaling to 50 kilograms including 5 Kilograms of the interest. Totally, the 55 kilograms shall be delivered to the lender on the return date. The borrower cannot return of the thing fewer amounts, and the lender cannot demand the borrower to return more than the amount agreed in the contract unless there is a special agreement between the both parties. If the return does not fulfill the conditions determined above, the lender can deny receiving based on the grounds such as differences in type, quantity, or quality; also, the lender may demand the borrower to be responsible for non-performance.

There is a question: what should we do if the price of things fluctuates before returning?

According to the case above, the borrower still has obligation to return the things or currency to the extent amount he borrowed although the price of the thing or value of currency has increased or decreased to any level (Article 593). For instance, if one kilogram of gold costs 500 dollars on the date of the delivery and the period of the loan for consumption was two years. In this case, even if the price of gold has risen up to 1,000 dollars per kilogram, the borrower has to return one kilogram of gold.

4.1.1. Time of Return

The loan for consumption is divided into two types: the loan for consumption with fixed term and the loan for consumption without fixed term. In other words, it is not necessary to decide the date of the return to establish a loan for consumption.

In the case of the loan for consumption with fixed term, the lender is not entitled to demand return of the thing that is borrowed before the determined date in the contract (Paragraph 1 of Article 594). However, there are still some exceptional cases that the lender is permitted to demand return before the determined date—for example, the obligor (borrower) has been declared bankrupt;, the obligor has destroyed or diminished the security (thing securing the debt);, the obligor has failed to furnish the security deposit that the obligor was bound to furnish;, or where an event that was agreed upon between the parties has occurred (Article 331).

In the case of the loan for consumption without fixed term, the lender may give notice of demand for return to the borrower within "a reasonable period of time" designated by himself (Paragraph 2 of Article 594). How long is the reasonable period? There is no any article in the Civil Code stipulating the reasonable period of demand, so the determination of reasonable period shall be a period which is needed for the borrower to prepare and return the things after receiving the notice from the lender. It shall be decided while taking into consideration the contents of the contract or the number and kind of the things that were loaned.

In the case of the loan for consumption without interest, the borrower may return the thing at any time (Paragraph 3 of Article 594). There is a question arising whether or not the borrower may return the thing to the lender before the date of return in a contract of loan for consumption without interest. It would be understood that the borrower cannot return the things before the date of the return because the party should follow the agreement if any. Of course, if the lender agrees with early return, the borrower may return the things before the date of the return because they have stipulated a new date of the return.

In the case of the loan for consumption with interest, the borrower may return the thing prior to the agreed date of return; provided that if damage is thereby caused to the lender, the borrower must compensate such damage (Paragraph 4 of Article 594). It is problematic whether an interest which has been accumulated until the date of the return shall be included for damages which are stipulated in Proviso, Paragraph 4 of Article 594. For example, if the borrower Y has borrowed 20,000 dollars for 2 years at 200 dollars per month (assuming this interest rate isn't against the law). This interest was a large amount for X, the lender, and X expected to get a lot of interest from Y. However, Y has returned money back 1 year early from the date of return because he does not want to lose much interest and he has ability to return. This causes X shall lose the expected money. In this case, should Y compensate 2,400 dollars interest (200 dollars x 12 month) which X is supposed to receive? It has left to Cambodian practice, however, in Japanese practice, it is considered that the interest does not correspond to damage because interest is deemed to be a counter value for usage of the principle. In other words, X obtains interest from Y for which he cannot use the principle. From the view point of Y, he has to pay 200 dollars interest as a counter value for using 20,000 dollars. Therefore, Y doesn't have to pay 2,400 dollars interest even he returns it 1 year early because X can utilize the 20,000 dollars one year earlier. He can loan this principle to another person and obtain interest. Therefore, in Japanese practice, interest isn't deemed to be damages.

4.1.2. Place of Return

The parties may make an agreement concerning the place of return; however, if there has been no agreement between the parties concerning the place of return, the place of return shall be at the permanent residence of the lender (Article 595). This is a paraphrase of latter part of Article 445.

4.1.3. In the Case Where the Borrower Become Unable to Return the Thing

Generally, the borrower shall be obliged to pay the value of the things loaned on the date of return at the time and place of return in the case where the borrower becomes unable to return things loaned which has the same kind, quality and quantity (Paragraph 1 of Article 592). For instance, Y has borrowed a catfish from X in amount of 10 kilograms with or without the fixed date of return. At the return date, Y does not return the same kind and quality of catfish in amount of 10 kilograms to X, but Y just returns 100,000 Riels to X (assume that 1 kilogram of catfish costs 10, 000 Riels). In this case, X shall accept the return from Y.

On the other hand, if the date and place of return has not been specified by the parties, the amount of money equivalent to the value of the things loaned on the date and at the place of conclusion of the contract shall be payable (Paragraph 2 of Article 592). In other words, the value which the borrower shall return is not affected of fluctuation of the market price in this case.

4.2. Obligation to Pay Interest

The borrower has an obligation to pay interest to the lender in the case of a loan for consumption with interest, and for this interest, the borrower must pay according to the kind of the interest which is provided by legal interest rate and agreed-on interest rate (Paragraph 2 of Article 591).

5. Loan for Consumption with Interest

5.1. Intention

The loan for consumption with interest is a kind of loan for consumption that parties are in an agreement to bring into existence a claim for interests in addition to the principal.

Interest is defined that amount of money or other things calculated by multiplying a certain percentage by the number of things loaned and delivered to the borrower, as the price for consumption thereof (Paragraph 1

of Article 583). For example, Y has borrowed 100 from X with 2 percent of interest per month. In this case, the interest that must be paid is 100 x 0.02 = 2 dollars per month.

The principal money or the principal thing is the thing loaned and delivered to the borrower. According to the example above, the principal is 100 dollars that X has lent Y.

An interest is a legal fruit (Article 127). If the claim for the principal is transferred to another person, the claim for interest is also transferred and both the new lender and former lender may obtain interest in proportion to the number of days depending on the duration (Paragraph 2 of Article 128).

The parties can establish a claim for interest by agreement. However, a claim for interest shall not come into effect unless it is in writing and bears the signature of the borrower (Paragraph 3 of Article 583). This article aims to protect the borrower. However, even if the parties didn't make any document regarding payment of interest, and the borrower voluntarily paid interest despite that he knew the fact that the claim for interest shall not come into effect in this case, the claim for interest shall be valid to the extent of such payment. This signifies the Doctrine of Estoppel.

5.2. Interest Rate

According to Article 584, the interest rate is divided into two main types; legal interest rate and agreed-on interest rate.

5.2.1. Legal Interest Rate

In accordance with Degree 38 referring to Contract and Other Liabilities, 1989, Article 59 clarifies that the interest rate shall not exceed 5 percent per year; however, this stipulation influences seriously to private sectors and national economy, for social situation at the present time, such interest rate was very low that the lender dare not give the loan because he gets too low interest, and bears the high risk. In order to fulfill the gap in the previous law, the Civil Code permits to determine the interest rate based on the agreement of the parties or the law in case of no agreement of the parties.

If the parties have agreed to pay of interest but have not specified an interest rate, the interest rate specified in the Civil Code or by special law shall apply (Paragraph 2 of Article 584).

The Civil Code stipulates a legal interest rate shall be 5 percent per annum (Article 318). And it is possible to stipulate a different interest rate by special law.

5.2.2. Agreed-on Interest Rate

Agreed-on interest rate refers to the interest rate based on the agreement of the parties in a loan for consumption.

Due to the development of society and the modernization of law, a private sector may determine the interest rate in agreed contract.

The interest rate agreed to by the parties may exceed the legal interest rate but may not exceed the maximum interest rate (Paragraph 2 of Article 585). The maximum interest rate denotes that the upper limit on the interest rate that may be legally agreed to by the parties, as provided by law or ordinances. The maximum interest rate will be stipulated within the range of 10 to 30 percent of the annual interest rate, and be prescribed by the Joint Ordinance of the Ministry of Justice and the President of the National Bank of Cambodia.

According to former part of Paragraph 4 of Article 585, if the borrower has paid the interest which exceeds the maximum interest rate already, such excess portion shall be deemed to have been allocated to the repayment of principal. For example, the maximum interest rate is stipulated as 20 percent per year by law, but X has lent Y 1,000 dollars at a 40 percent annual rate for 5 years. Y paid 400 dollars for interest every year. In this case, 200 dollars is the limit interest for 1 year which is calculated in accordance with the maximum interest rate. So, 200 dollars (400 – 200) shall be allocated to repayment of the principal, then the principal of the second year shall be 800 dollars (1,000 – 200) and the maximum interest shall be 160 dollars (800 x 0.2). Thus, the principal will be decreased even though the borrower formally paid only interest in the case where what the borrower paid exceeds the amount of the maximum interest rate.

Moreover, even if after such allocation of the excess portion to the principal there remains a surplus to the lender, this amount must be returned to the

borrower together with damages. These damages shall be calculated in the form of interest at the legal interest rate calculated from the date of the payment of the interest until the date of the return (Latter part of Paragraph 4 of Article 585). For example, X has lent Y 1,000 dollars at an 80 percent annual interest rate despite that the maximum interest rate is 20 percent and Y has already paid interest for 2 years. In this case, the principal will be paid off and there still remains the surplus for the lender.

(i) The first year

$1,000 (principal) x 0.8 (agreed-on interest rate) = $800

$1,000 (principal) x 0.2 (maximum interest rate) = $200

$800 - $200 = $600 (exceeded interest = the amount which shall be allocated to the principal)

(ii) The second year

$1,000 - $600 = $400 (principal of the second year)

$400 x 0.2 = $80 (maximum interest of the second year)

$800 - $80 = $720 (exceeded interest = the amount which shall be allocated to the principal)

$400 - $720 = $-320 (remaining surplus of the lender)

In this case, the lender must return 320 dollars plus the legal interest from the date of the payment as damages.

5.2.3. Protection of Borrower

In the case of a loan for consumption with interest, the lender such as pernicious money lenders try to evade of law even the law stipulates the limitation of interest. Therefore, the Civil Code provides two provisions to protect the borrower.

(1) Modification of principal

If there is a difference between the amount of principal stipulated under the contract and the number or amount of things actually delivered by the lender to the borrower, the number or amount of things actually delivered shall be taken as the principal amount (Paragraph 5 of Article 585).

For example, X and Y made an agreement that X shall lend Y 1,000 dollars for 5 years at a 20 percent annual interest rate (consider that this interest rate doesn't exceed the maximum interest rate) but X has delivered only 200 dollars because X tried to deduct 800 dollars from the principal as 4 years interest. In this case, Y cannot use 1,000 dollars despite that he assumes 1,000 dollars debt. To avoid such a situation, Paragraph 5 of Article 585 stipulates that the amount which was delivered actually shall be taken as the principal amount. If this article applies, the principal shall be 200 dollars in above case.

(2) Deemed Interest

Money and all other things other than principal received by the lender in relation to the contract of loan for consumption shall be deemed to be interest (Paragraph 6 of Article 585). However, this shall not apply to contract execution fees and expenses of repayment (Proviso of Paragraph 6 of Article 585).

Even if the law puts restrictions on interest rates or the withholding of interest, a pernicious lender tries to receive money from the borrower ostensibly from commission, survey fee, etc. Therefore, the Civil Code provides that if the lender received money and any other things other than principal, it shall be deemed to be interest.

5.3. Time of Payment of Interest and Statutory Compound Interest

5.3.1. Time of Payment of Interest

Principle: The interest shall be payable upon the expiration of each year after delivery of the object. It's not the mandatory provision which means that it may be otherwise agreed (Paragraph 1 of Article 586).

Exception: The party may agree each other in term of monthly or a half year payment, etc. However, if the things must be returned within one year from the delivery, the interest shall be paid at the time of the return (Proviso, Paragraph 1 of Article 586).

5.3.2. Statutory Compound Interest

If the borrower does not pay the interest for more than one year, and the borrower does not still pay such interest despite demand from the lender, the

lender may compound such interest into the principal (Paragraph 2 of Article 586).

For example, X has lent Y for 1,000 dollars at a 20 % annual interest rate (let this rate is the maximum interest rate), but Y didn't pay interest for one and half years despite that X demanded the payment of interest to Y. In this case, X can incorporate the unpaid interest ($1,000 x 0.2 = $200) into the principal. Therefore, the principal of the second year shall be 1,200 dollars.

Also, the parties can make an agreement which stipulates that delinquent interest shall be incorporated into the principal more than once a year. For example, in the above case, X and Y have agreed that X can incorporate the delinquent interest every half year. In this case, the point of notice is that if Y didn't pay interest for 1year, interest will exceeded the amount of the maximum interest rate.

Maximum interest for 1 year: $1,000 x 0.2 = $200(a)

Maximum interest for half year: $200/2 = $100

The principal for the remaining half year: $1,000 + $100 = $1100

The maximum interest for remaining half year: $1,100 x 0.2/2 = $110

Total interest for 1 year: $100 + $110 = $210(b)

In this case, total interest for 1 year (b) exceeded the amount of the maximum interest rate (a). This conclusion shall be against the law on the maximum interest rate.

Therefore, it is possible to consider that the amount which exceeds the maximum interest (10 dollars in this case) shall be deemed to be void because it shall be the evasion of the limit of interest by law if the lender may receive interest which exceeds the maximum interest rate in reality via incorporation of the interest into the principal.

Section 5 Mandate

1. Intention

What is Mandate? Article 637, Definition of Mandate

"Mandate refers to a contract whereby one party, called the mandator, grants to another party, called the mandatary, the power to perform certain business on behalf of the mandator."

What is the meaning of business term in the context of mandate?

The term business in the context of mandate includes every affair such as the creation of contract, intermediacy of real property, or authorization for the conduct of a suit, etc. For example, X authorizes Y to enter into a contract to purchase a car with Z. This is an example of the creation of the contract by mandate. Also, if X asks Y to find a buyer for X's land and Y mediated X between a prospective buyer Z. This is an example of intermediacy of real property. In the case where X gave the authority to file complaint to Y, an attorney, it shall be mandate also. And the relation between doctor and patient also deems mandate. However, the custody of a thing is not included in mandate because it would be a deposit.

How the mandate and deposit are related? (Article 637)

A mandate is defined that "a contract whereby one party, called the mandator, grants to another party, called the mandatary, the power to perform certain business on behalf of the mandator" (Article 637). On the other hand, **Article 669** defines the deposit that "a contract whereby one party, the depositary, accepts a thing for custody for a certain period from another party, the depositor, and promises to return the identical thing to the depositor upon the expiry of the period of custody."

Therefore, the mandate and deposit are related to each other on the point that the contract providing a service whereas the distinction of the deposit is that the depository has to provide is "the custody of thing received" only. As for the service which is provided in the mandate is to administer every affair such as the creation of the contract, the intermediary, property, the authority to file the complaint, etc. In this context, a deposit can be said that one kind of a mandate but it is provided individually in the Civil Code.

Is mandate the onerous or gratuitous contract, or both?

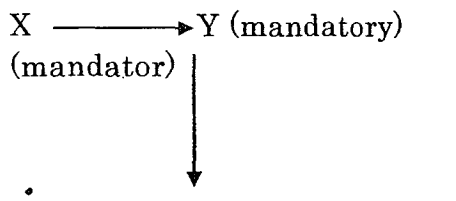
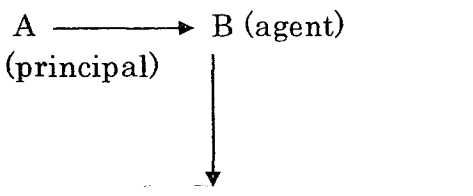
Article 638 provides that "a mandate may be for value or gratuitous. If no intention is declared that the mandate is for value, it shall be presumed to be gratuitous." This indicates that mandate may be for value or gratuitous in the context of this meaning; mandate is the gratuitous contract if party does not make any agreement regarding remuneration. The declaration of intention may be implied, expressed, written or orally stated at the time of making the contract.

2. Requirement

Mandate is a consensual contract, which does not require the written form to effect the mandate. This means that if the intention of both parties is matched, the mandate will be created. In other words, in the case where the mandator grants the authority to the mandatary who accepts to perform the business for the mandator. For example, X owns a plot of land and a house that he wants to sell those properties; so, he manifested that he will confer the authority to Y to enter the sale contract. When Y accepts this propose, the mandate shall be established.

3. The Relation with Agency

How the mandate and agency are distinguished? Article 637 defines that "Mandate refers to a contract whereby one party, called the mandator, grants to another party, called the mandatary, the power to perform certain business on behalf of the mandator". On the other hand, Article 364 denotes that "Agency is defined as a relationship wherein where a representative enters into a contract with another party by stating that he is acting on behalf of a principal within the scope of the agency authorization, the effects of the contract are imputed directly to the principal". These two systems are similar but they are different in the following:

Mandate	Agency
	
-When Y entered into the sale contract of the car with Z, Y didn't need to inform Z that he did on behalf of X.	When B entered into the sale contract of the car with C as an agent of A, B needs to inform C that he did on behalf of A.
-The effect of the sale contract of a car between B and C does not directly exist between A and C.	The effect of the sale contract that B concluded with C directly attributed to A.
-Duties and rights remain existence between Y and Z.	Duties and rights remain existence directly between A and C.

Is the Agency only originally from the Mandate?

It's not only from the mandate; it's originated from the employment contract, contract for work, etc.

4. Obligation of the Mandatary

4.1. Duty of Care

This duty is provided in Article 640.

Mandatary's duty of care is regulated that:

The mandatary shall assume a duty to administer the mandated business with the care of a good manager compliance with the main purport of the mandate; provided that this shall not prevent the parties from agreeing on a lesser standard of care for the mandatary.

The mandate contract is created based on a confidential relationship between a mandator and a mandatary, and the mandator trusts that the mandatary has special skills or expert knowledge.

The degree or range of this duty shall be decided while taking account of what and how the person in that position should pay attention in general. For example, a person who has high skill or knowledge such as a doctor shall

assume a high standardized duty to administer. On the other hand, the standard of the duty of care which is assumed by a person who voluntarily nurses a neighbor's child shall be less than an expert.

Also, the level or order of the duty of care exists irrespective of mandate for value or gratuitous mandate because the mandate is created on the basis of the principle of trust between the mandator and mandatary. But the degree of the duty may decrease according to the agreement of the parties (Proviso, Paragraph 1 of Article 640).

The consequence in the case where the mandatary infringes the duty thereof

According to Paragraph 2 of Article 640 which stipulates "if the mandatary breaches the mandatary's duty of care under paragraph 1 and thereby inflicts damage on the mandator, the mandator may claim compensation for such damage from the mandatary. In such a case, if the mandate is gratuitous, the court may reduce the amount of compensation." The meaning of this Article is that the mandatary shall assume the liability based on the general principle of non-performance that requires the party who inflicts damage on the other party to pay the compensation in the case where the breach causes damage arisen from the disobey of the clause of contract. In this case, the mandator can demand termination and/or damages. However, with regard to the gratuitous mandate, the court may reduce the amount of compensation because the mandatary hasn't obtained any benefit from the mandate. On the basis of equity between parties, the provision determines the distinction between mandate for value and gratuitous mandate.

4.2. Duty to Report

The mandatary must report the current status of the administration of the mandated business at any time if so requested by the mandator (Article 641).

This duty derived from the duty of the care of a good manager. It is necessary for the mandatory to comprehend what is going on about his business so that he can respond to prospective problems.

Does the mandatary report on the progress, although the mandator doesn't request?-Although the-mandator doesn't request to report on the progress, it is possible to consider that the mandatary shall report the current status of the administration when it is necessary for the mandator.

The consequence in case that the mandatary breaches this duty because the report is the legal requirement, in accordance with the general principle of non-performance, the mandator may terminate the mandate and he may be entitled to demand compensation in the case where damage occurred,.

4.3. Obligation to Deliver

Article 642 stipulates that "the mandatary must deliver to the mandator all money and other things received in the course of administering the mandated business. The mandatary must also deliver the received fruits to the mandator" (Paragraph 1), and "the mandatary must transfer to the mandator any rights the mandatory has acquired in his/her name on behalf of the mandator" (Paragraph 2).

It's because the mandator authorizes the power to the mandatary to administer the business for his own benefit; thus, when the mandatary completes the performance, he must deliver all the money and other things received in the course of performing the mandate business to the mandator. Moreover, the mandatary must deliver the fruits to the mandator too.

For example, in the case where X mandated Y to buy a new car from Z as his own obligation, and obtain a claim to have the car deliver against Z. if there is no special agreement, Y has to deliver the car to X in the case where Y received the car already, or transfer the claim to have the car deliver to Z in the case where he hasn't received the car yet.

4.4. Liability to Compensate for Damage Which is Spent

Because mandatary receives money from the third party regarding mandate performance, the money shall be delivered to mandator. So, Article 643 stipulates duty to compensate the mandator for damage if the mandatary spent the money for his personal benefit. The mandatary has duty to compensate the damage not only for the interest during a delay, but also others damages, if any.

This is a sanction for the infringement of the duty which is stipulated in Article 642. Also, this article shall apply only if the mandatary has spent money. If the mandatary has consumed a thing other than money which shall be delivered to the mandator, he shall assume liability of non-performance or tort.

In the case of mandate without agency, the mandatary shall obtain the ownership of the money which he received regarding the mandate contract. And the mandatary doesn't need to pay the same money which he received because money has substitutability. Therefore, even if the mandatary has spent the money which he received regarding the mandate, it does not necessarily correspond to "spent money for the personal benefit". It shall be decided while taking into account of the condition of the mandatary's monetary capacity, and whether the mandatary can pay the same account of money which he has spent or not.

4.5. Duties in Emergency after Termination of Mandate

In general, if the mandate has been terminated, all obligation and claim shall be extinguished. However, it is necessary to protect the interest of mandator from damage arising from unpredictable event in the period of termination of mandate until the mandator or others can administer all business which was entrusted to the mandatary (Article 650).

For example, in the case of the death of mandatary, the mandate shall be terminated (Item (a), Paragraph 1 of Article 649); however, the mandator may face difficulties to manage his business. Therefore, the mandatary's successor or his legal representative must administer the mandated business until the mandator, successor, or legal representative can administer the business.

Also, for example, X mandated Y to collect his monetary claim against Z and the mandate contract was terminated just before the completion of the extinctive prescription. In this case, according to Article 650, Y has to take measures to prevent the completion of the extinctive prescription, such as demand of payment, the interruption of the extinctive prescription (Article 489), etc. even after termination of the mandate.

5. Obligations of Mandator

5.1. Duties to Pay Remuneration

The mandatary cannot demand remuneration unless there is a specific agreement with regard thereto, because, in principle, mandate is gratuitous. However, Article 644 stipulates about rights to demand remuneration in mandate for value and determine the principle to make payment after that.

In the case of mandate for value, the mandator doesn't need to pay remuneration before performance of the mandated obligation (Paragraph 2 of Article 644).

Provided that if there is a provision for remuneration to be paid on the basis of a period, payment may be demanded upon such the period.

However, if a mandate is terminated in the course of its performance for cause not attributable to fault of the mandatary, the mandatary may demand remuneration in proportion to the performance already completed (Paragraph 3 of Article 644) because the purpose of the mandate is not to complete a certain work differently from a contract for work.

5.2. Duty of Advance Payment of Expense

According to Article 645, if costs will be incurred in administering the mandated business, the mandator must, at the request of the mandatary, pay an advance for those costs. This duty of mandator to pay the expense aims to make smoothly to administer the mandated business. Even though it is a mandate for value or gratuitous mandate, if the mandatary demands for advance payment of expense, the mandator must pay for the costs.

For example, X mandated Y to buy a car without agency authorization. Y must pay the purchase price to Z. Sometimes, it is the heavy burden for Y; hence, Y may demand X to pay the purchase price of the car in order for Y to pay this amount to Z.

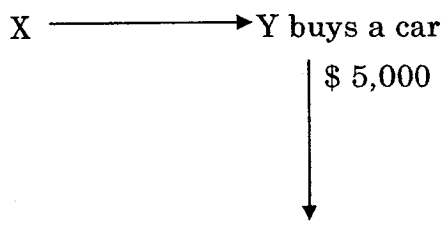
5.3. Duty of Reimbursement of Expense

According to article 645, a mandatary may demand advance payment of expenses. On the other hand, even if a mandatary doesn't request the mandator to pay the cost in advance, the mandatary may be entitled to demand the reimbursement of expense and interest from the mandator if he has spent his own expense for mandate business which is the benefit of mandator,.

Also, if the mandatary assumes the necessary obligation for administering the mandated business, the mandatary can demand the mandator to perform the obligation instead of him.

In mandate without agency authorization, the effect of the act of the mandatary shall be attributed to the mandatary. However, this article provides that in the case where the mandatary assumed the necessary obligation, he can demand the mandator to perform the obligation.

For example, X mandated Y to buy a car for 5,000 dollars. If Y entered into a sale contract of the car for 1,000 dollars with Z, Y can demand X to pay 1,000 dollars to Z. If the obligation has not yet fallen due, Y can demand X to render a reasonable security.



- If Y has paid $ 5,000 to Z
  ⇨ Y can demand payment against X.
- If Y has not paid yet
  ⇨ Y can demand X to pay $5000 to Z instead of him or
  Render a reasonable security

5.4. Duty to Pay Damage

According to Paragraph 3 of Article 646, if the mandatary suffers any loss due to the administration of the mandated business without negligence of the mandatary, he may demand that the mandator shall compensate such damage. This is an absolute liability for the mandator because the risk of the mandate shall be borne by the mandator. However, if such loss arises from the intention or negligence of a third party, the mandatary may only claim compensation from the mandator to the extent that he is unable to receive compensation from such a third party.

For example, X mandated Y to take care of X's child and an ownerless dog attacked the child and Y tried to protect the child and he was injured.

X ⟶ Y (Ask Y to look after X's child)

. A dog bites X's child ⇨ Y protects the child from being bitten

⇨ Y has been injured ⇨ Y may claim compensation from X (Compulsory responsibility)

Where such damage arises from a third party's negligence, Y may claim compensation from X to the extent that Y is unable to receive compensation from such third party. Therefore, for example, Z provoked dog to bite X's child which caused injury to Y. The medical expense due to the injure was 100 dollars. However, Z paid only 20 dollars to Y. In this case, Y may demand 80 dollars payment against X because Y gets injured due to protection of mandate business for X.

6. Termination of Mandate

6.1. Grounds of Determination of Mandate

There are two types of grounds the determination of the mandate; the determination by the termination of the mandate and the determination by the Civil Code.

6.1.1. Determination by Termination of Mandate by Party

A mandate may be terminated at any time (because it is a special provision). Since the mandate is based on a confidential relationship between parties, but if one of the parties lost the confident for the other party, they cannot maintain their relationship. Therefore, the Civil Code provides that either party can terminate the mandate without proper reason at any time (Article 647).

However, if a party terminates a mandate at a time that is detrimental to the other party, he must compensate the other party for any damages. For example, a mandatary terminated the mandate at the time when the mandator couldn't find a new mandatary, the mandatary has to compensate for damages, if any. Although, if the reason of termination has unavoidable grounds, for example, in the case where the mandatary was sick and he couldn't continue to the mandated business, the mandatary doesn't need to compensate for damages.

6.1.2. Determination by the Civil Code

In addition to termination pursuant to Article 647, a mandate shall determine for the following grounds (Paragraph 1 of Article 649):

- Death of the mandator or mandatary (Item(a))

- The mandator or mandatary being declared of bankruptcy (Item (b))
- The mandator being declared of commencement of guardianship or curatorship (Item (c))
- The mandatory being declared of commencement of guardianship of curatorship (Item (d))
- If the mandator or mandatary is a juridical person, its dissolution (Item (e))
- If the mandator or mandatary is a juridical, its merger with another corporation (item (f)) or
- The occurrence of any other grounds agreed by the parties (Item (g))

Many of those grounds overlap the grounds for extinction of the agency authorization by a contract (Article 368).

Also, since these above provisions are not compulsory, so the parties can make another agreement. It means that parties can make an agreement that even if there is a ground among the groups stipulated in the Article 649, the mandate shall not determinate. Moreover, parties can take another reason besides reasons which are stipulated in Article 649 to be the ground of determination of mandate.

6.2.Effect of Termination

Article 648 stipulates that termination of a mandate shall have effect only for the future and it does not have retroactive effect as other continuous contracts. The reason why the termination of the mandate doesn't have a retroactive effect is that the relationship among the mandator, the mandatary and the counterparty would be complicated if the terminate has a retroactive effect in the case of mandate.

As a result, as soon as a mandate is terminated, the mandatary must return money or property which he received regarding the mandate to the mandator, and the mandator must pay remuneration (in the case where there is a special agreement) or necessary cost the mandatary in proportion to the performance already completed.

Also, if a party has been negligent, the other party can demand damages (Latter part of Article 648).

Conditions for perfection of determination of mandate (Article 651) aim to protect parties of a mandate who does not realize about determination from unpredictable damages. Therefore, if a party who terminated the mandate without giving a notice to the other party, he cannot assert the ground of termination of a mandate against the other party.

For example, X mandated Y to buy a car. However, X has been declared of bankruptcy, but he didn't give notice the fact to Y. Y who didn't realize the termination of mandate entered into contract with Z. In this case, X cannot assert the termination of the mandate and the contract was established validly.

Section 6 Contract for Work

1. Intention

According to Article 652, a contract for work is a contract whereby one party called the contractor assumes the obligation to complete agreed upon work and the other party called principal assumes the obligation to pay remuneration for the results of such work.

Also, a contract for work is a contract for value and a bilateral contract that both parties to the contract perform the obligation towards each other.

Significantly, a contract for work is different from the mandate and the contract of employment. The differences are as follows;

In a contract of employment, the contents of the contract is that the employee promises to perform services and the employer promises to pay wages for it. The employee doesn't need to complete his work different from a contract for work.

In a mandate contract, the mandatary must conduct business which was mandated by the mandator and the mandatary doesn't need to complete it different form a contract for work. Also, a mandate contract is a gratuitous contract other than agreed.

2. Requirements for Creation of Contract for Work

The contract for work is not required any specific requirement, so that only parties agree each other is enough to establish the contract (Paragraph 1 of Article 336).

3. Obligation of Contractor

3.1. Obligation to Complete Work Without Defect

3.1.1. Intention

According to Paragraph 1 of Article 654, the contractor assumes an obligation vis-à-vis the principal to complete the work without defect.

Defects which stipulated in Paragraph-2 and 3 of Article 654 are:

- Work does not conform to the nature agreed

- Work is not fit for the use assumed in the contract.

- Work is not fit for normal use if no specified use is assumed in the contract.

- Work that is deficient in quantity, or

- The contractor produces work that is different from that ordered

Usually, the content of a contract for work is to complete work which has a certain nature,

For example, a principal asked a painter to draw his portrait, it can't be said that the work conforms to the nature agreed if the portrait is not like the principal.

Another example is that a contractor has built a building on the premise that the principal will use the building for a restaurant, but the contractor didn't fix the drain facility at all, in this case, the work done is not fit for use that was assumed in the contract.

Moreover, if the principal asked to make a pair of shoes without having specify the way would be used and then the shoes where broken into pieces after walking only one time, it corresponds to "if it is not fit for normal use".

An example of Paragraph 3 of Article 654 is that is the contractor made a pair of sandals despite the fact that the principal ordered him to make a pair of shoes. In this case, making of a pair of sandals was completed and it the principal can use them, but the contractor produces work that is different from that ordered.

3.1.2. The Responsibility of the Contractor in Case of Defective Work

Where the contractor completes the work with defect, the principal is entitled to demand the contractor to perform obligation according to the contract or chose any alternative choices permitted by the Civil Code. Such demand must be exercised within a period of 1 year which shall be computed from the time that principal became aware or ought to have become aware of the defect (Article 661).

As described above, the contractor shall not be exempted from obligation even though there is an agreement regarding exempting or limitation of liability if the contractor was aware but did not advise the principal (Article 662).

(1) Demand for subsequent completion by the principal

According to Article 655, if the work is defective, the principal may demand that the contractor effect subsequent completion within a reasonable time designated by the principal (Former part, Paragraph 1 of Article 655).

The contractor may choose to rectify the defect or redo the work at his option (Latter part, Paragraph 1 of Article 655). For example, if the contractor made a pair of shoes despite that the fact he was ordered to make a pair of boots by the principal , it might be easy and cost less for the contractor to make them again rather than rectification. In this case, the contractor can choose to make them again.

And if the cost of the subsequent completion is excessive in comparison with a detriment resulting from the defect, the contractor can refuse subsequent completion (Paragraph 2 of Article 655). In this case, the principal can neither demand payment of the cost for repair after completion of the repair by himself (Paragraph 4 of Article 656) nor demand damages (Paragraph 2 of Article 659). Therefore, if the cost of the subsequent completion is excessive in comparison with the detriment resulting from the defect, the principal has to bear the risk. If the principal want to avoid such a situation, he needs to make a special agreement with the contractor.

Moreover, the subject matter is defective and need to be returned, the contractor may demand that the principal return the defective work (Paragraph 3 of Article 655).

(2) Rectification of defect by principal

If the work is defective, the principal needs to demand subsequent completion while establishing certain period of time at first. And then, if the contractor doesn't complete subsequent work needed within such a period, the principal may rectify the defect himself and demand payment of the cost of rectification (Paragraph 1 of Article 656).

The principal may also rectify the defect himself and demand payment of the cost in the case where the subsequent completion is unsuccessful or if relying on the contractor in effecting the subsequent completion of the work is judged to be unduly detrimental to the principal (Paragraph 2 of Article 656).

The principal may demand that the contractor payment of the cost of rectification in advance in the case where the principal could complete the subsequent work of the defective work.

However, in the case where the contractor had refused to effect subsequent completion based on Paragraph 2 of Article 655, the principal may not demand payment of the cost for rectification nor advanced payment (Paragraph 4 of Article 656).

(3) Right of termination by the principal

If the work is defective, the principal may terminate the contract in accordance with the provisions of Book Four, Chapter Four, Section IV (Termination of contract). In other words, the principal can terminate the contract for work only if the defect corresponds to "material breach of contract". For example, if the defect is fatal, the subsequent completion is impossible, or the subsequent completion is possible but it takes a long time, it can be said that the defect of the work is a material breach of the contract.

Also, in the case where subsequent completion by the contractor is unsuccessful or where relying on the contractor in effecting the subsequent completion of the work is judged to be unduly detrimental to the principal, the principal may terminate the contract based on general provisions of termination (Latter part, Paragraph 1 of Article 657).

However, the above provisions shall not apply to buildings or other structures on land. If the principal is allowed to terminate the contract for work which stipulates that the contractor shall build a building or other structures because of the defect, the contractor has to remove the building after termination even though the building has been constructed. It shall be an excessive burden on the contractor and causes economic loss. Therefore, in this case, the principal may not terminate the contract even if the work is defective, and he can only demand the subsequent completion and/or demand damages. However, if a major defect of the structure has no use value to the principal, he can terminate the contract (Latter part, Paragraph 2 of Article 657).

For example, the principal ordered the contractor to build a house to reside in, but the building which the contractor constructed was shoddy with its

fundamental construction and is in danger of collapsing, it is not only no use vale for the principal, but also it can't be said that to remove the building shall be an excessive burden on the contractor or causes economic loss anymore. Therefore, in such a case, the principal can terminate the contract.

(4) Right to demand reduction for the price by the principal

The principal can demand reduction of the remuneration for the work on the grounds of a defect by declaration of intention to the contractor if the principal demands subsequent completion of the defective work while establishing a certain period of time but the contractor didn't complete the subsequent work needed within such a period. In other words, in this case, the principal can rectify the defect himself and demand payment of the cost of rectification (Paragraph 1 of Article 656) or reduction of the remuneration.

(5) Right to demand damages by the principal

The principle can demand damages in accordance with general provisions of damages and/or exercise his rights which are stipulated in Article 655 through 658. However, in the case where the principle demand damages as substitute for the subsequent completion, he can make a demand only after the expiry of the reasonable time that has been fixed for subsequent completion of the work, subsequent completion by the contractor is unsuccessful or where relying on the contractor in effecting the subsequent completion of the work is considered to be unduly detrimental to the principal. In other words, if the principal wants to demand damages, he has to demand the subsequent completion first.

(6) In the case where the defect has arisen due to the material or directions by the principal

Sometimes, the principal provides the materials or direction of the certain way of work for the contractor. In the case where the defective occurred due to the materials or direction by the principal, the contractor doesn't need to assume liabilities regarding defect. And the "direction" needs to include some concrete instructions more than "a wish".

If the contractor was aware that the materials or directions were not appropriate, but he didn't advise the principal of this affect, the contractor cannot be exempt from liabilities regarding defect.

3.2. Duty to Deliver the Object of the Work

Article 653 stipulates that the remuneration shall be paid simultaneously with the delivery of the object of the work. In other words, the contractor must deliver the object of the work after completion. Then, when and who obtains the ownership of the object of the work?

In the case where the content of the contract for work is to construct a building, this building cannot be the subject of real rights separate from the land (Article 122). Therefore, it can be said that even if the contractor provided the materials for the building, the ownership shall primitively belong to the principal. In this case, he can secure his right to demand the remuneration by the right of retention or a statutory lien over the immovable.

Then, what about a case where the content of the contract is to produce a movable such as a dress or shoes? For example, the principal provides the dress materials to the contractor and ordered him to make a dress, who shall obtain the ownership of the dress? How about in the case where the contractor provides the dress materials?

There are three possible way of thinking.

The first idea is that the principal shall obtain the ownership. The ground of this idea is that the contractor might think that he produces "the principal's property", and not his own property. Considering the contractor's intention, the ownership shall belong to the principal at the time that the contractor completed the work.

The second idea is that the contractor obtains the ownership, and he shall transfer the ownership by delivery. This idea aims to protect the contractor in the case where the principal cannot pay the remuneration due to bankruptcy or capital shortage. In this case, the contractor can withdraw the cost by selling the object.

The third idea is that a person who provides all of the materials or main material shall obtain the ownership. This is a compromised idea of the above two ideas. The Japanese practice follows this idea basically. However, this

idea is affected the article regarding processing of movable. Differ from the article 199 of the Cambodian Civil Code, it stipulates that "if a processor contributes work to the movables of others, ownership of the thing so worked up shall vest in the owner of the materials; provided, however, that, if the value derived from the work significantly exceeds the value of the materials, the processor shall acquire ownership in the processed thing". Therefore, this idea is not necessarily applicable to cases under the Cambodian Civil Code.

4. Obligation of the Principal

4.1. Duty to Pay the Remuneration

The principal is obligated to pay the remuneration to the contractor simultaneously with the delivery of the object of the work (Article 653). If the delivery of the thing is not required, the principal must pay the remuneration at the time the contractor has completed the work. The parties can make a special agreement regarding the time of payment of the remuneration because it is not a mandatory provision.

4.2. Duty to Receive the Object of the Contract

The principal has a duty to receive the object of the contract after the contractor has completed his work. If the principal didn't receive the thing with negligence, he shall assume the obligations of a delayed receipt (Article 456).

5. Determination of the Contract for Work

5.1. Right to Terminate of the Principal while Work is Uncompleted

The principal can terminate the contract at any time as long as the contractor has not yet completed the work (Article 663). The aim of this provision is to discharge obligation from the principal and the contractor if the principal doesn't need the work to continue anymore. However, the principal must compensate for damages to the contractor. For example, if the principal terminates the contract which stipulates that the contractor shall provide the materials and make a pair of shoes, he has to pay for the material's cost and remuneration until the time of termination.

5.2 Termination Based on Non-performance

Both the principal and contractor can terminate the contract for work based on the general rules of termination if the other party committed a material breach of the contract. However, if the immediate or instant completion of the work itself is in the contents of the contract such as a haircut or on-site repair, the party cannot terminate the contract after completion.

Chapter 5 Statutory Obligation

Section 1 Management of Affairs without Mandate

1. Introduction

The Civil Code has set forth the three types of obligation that entails to assume responsibility not by the contract.

① Management of affair without mandate (Management of business)

② Unjust enrichment

③ Tort

Now, we will study one of the three obligations which is the management of affair without mandate.

In general, a person has freedom of intention (Article 3 of the Civil Code); thus, where there is no intention, it does not entail the obligation, so that no person can force any person to assume an obligation with regard to any act if such person has no intention in light of the theory of private autonomy.

However, if any person does something one behalf of another and had the intention to perform in the sense of the protection and benefit for other person, person under the management of affair without mandate must assume obligation towards such person as described by law which is so-called management of affair without mandate.

Case Study:

A) A person found that the window of his neighbor was damaged because of the storm while his neighbor did not stay home. Such person did nothing and the water was leaking inside the house. His neighbor came home and then blamed that person.

B) A person found that the window of his neighbor was damaged because of the storm while his neighbor did not stay home. That person repaired the broken window in order to prevent from leaking as he spent on mirror and used his labor. Such person also injured his finger while repairing the window. What can such person demand from his neighbor?

As provided in the above Case Study (item A), no person is forced to perform the work in the manner, and thus the person shall not be blamed from legal perspective. (Ethical problem would be contained but this is another problem.).

However, in case of Case Study (item B), when any person who manages the affair without mandate even though there is neither contract nor any agreement, a person who receives the benefit is obliged to reinforce to some extent as an exception to principal of autonomy.; This is the statutory obligation.

2. Requirements of Management of Affairs without Mandate

① The management made without authorization (Paragraph 1)

② The management of affairs made on behalf of another person (Paragraph 1)

③ The manager commences to manage the affairs (Paragraph 1)

④ The management made in the manner most advantageous or in accordance with the intention of the principal (Paragraph 2)

2.1. No Authorization

If there is an authorization to manage such as a mandate contract, the management of affair without mandate is not applied, the party must exercise in accordance with the authorization of such management and that is not the matter of management of affairs without mandate.

Example: parental power holder or person under the general guardian, etc.

2.2. On Behalf of Another Person

The management is made on behalf of another

Example: Land is owned by X who leaves it unoccupied. Y takes the land to be the place for parking motorcycles on behalf of Y, himself; thus, in that case, Y cannot exercise the management of affair without mandate because Y intends to take advantage for himself. This might be a matter of tort law.

2.3. The Manager Commences the Management -

Commencement of legal act

Commencement of another act

- The legal act means the contract, or a unilateral legal act. Article 356.
- Another act that the person begins to repair or complete.

  For the broken window case, if the party makes the contract with repairer that the repairer fixes the window that would be the management of legal act.

  If he fixes the window by himself, it is not the legal act but still the management.

2.4. The Management is Made in the Manner Most Advantageous in Accordance with the Intention of the Principal

This requirement protects the principal from paying in excess by the management of affair without mandate or it is be fair and accurate in the name of the bona fide manager and responds to the moral humanitarian act and equity between private individual.

All in all, the manager must manage with the appropriate manner of management.

With respect to the most advantageous manner, if the manager is aware of or should be aware of the intention of the principal, he shall conduct the management in accordance with such intention based on art. 729-3. But, if the manager can't know the actual intention, what is the most advantageous hall be determined objectively. For example, when X saved drowning Y who actually committed suicide without knowing Y's intention, such saving is considered to be the most advantageous manner because saving someone drowning is objectively in accordance with the most advantageous manner.

But there is an exceptional case too, Article 730.

Example: In case of urgent management, even though such a management caused the damages, it is still the management of affair without mandate.

Example: A was unconscious. B sent him to the hospital located nearby, but the hospital does not have a specialist doctor, so A's illness became serious.

With respect of the intention, if the manager is aware of or should be aware of the intention of the principal, he shall conduct the management in accordance with such intention 729(3).

However, there is still an exceptional case. In the case where the principal wants to commit suicide by jumping into the water, with knowledge that the principal commits suicide, the manager rescues, takes him to hospital and pays 100 dollars for treatment, but the principal refuses to pay the medical cost asserting that saving him is against expressed intention of his.. Where we agreed with the intention of the principal, he will die; but if we do not agree with the intention of the principal, it is interpreted that the principal must pay the value to the manager against his expressed will. This is difficult problem and probably related to ethical problem. One possible interpretation is that the manager may not demand reimbursement just because saving is against the will of principal. Another possible interpretation is that the manager doesn't have to follow the intention to suicide because it is against the good moral (c.f. art.354). This shall be determined in accordance with Cambodian way of thinking.

3. Duty

3.1. Duty to Manage the Affairs in the Manner Most Advantageous to the Principal and Exercise in Accordance with the Intention of the Principal

As explained in Article 729, 730, care of prudent manager shall be taken in general.

3.2. Duty to Give Notice

The manager must give a notice to the principal on account of such management is without agreement and unaware of the principal's intention. Therefore, the manager has obligation to give a notice to the principal to be aware of his management (731) as well as the principal's intention, and declares his bona fide management. If the principal lives far away and cannot give a notice, the manager must give notice immediately when the principal is able to receive a notice.

3.3. Obligation to Continue Management

Where the manager conducts the management, the principal, however, does not yet come back or is not ready to conduct such management, the manager must continue management in the meaning of protection and the manner which is most advantageous to the principal until the principal is ready to conduct the management.

However, there is also the exceptional case if the continuation of the management is against the will of the principal or detrimental to the principal. Relevant Article: 732.

3.4. Duty to Report

The management of affair without mandate is similar to mandate, and the same obligation must be used for the benefit of the principal and report on the progress of any contract that he manages.

3.5. Duty to Demand Compensation for Money Spent

The duty is imposed based on the same contemplation as the duty to report.

4. Effect

4.1. Right to Demand Reimbursement of Expense etc.

- The manager may demand the reimbursement of necessary cost or beneficial expense for the management. (734-1)

- The manager may also demand the principal to discharge such obligation or to provide the reasonable security. (734-2)

- If the manager conducts affairs contrary to the intention of the principal, the amount of reimbursement is limited to the extent that the principal is actually enriched thereby. (734-3)

- Whether the compensation for damages which is suffered within a period of management is included in the necessary expense or not is not clearly shown in the wording and thus it is a difficult problem.

Example: When the manager repairs the management by the mirror and causes his finger to be wounded, $100 of treatment is considered as damages. As for the cost of $1,000 of the mirror, the manager may demand such $1,000

as the necessary cost of management. $100 cost of injury treatment can be calculated or not depends on the interpretation.

- Reasoning for exclusion: It is not included in the necessary cost. What is more, it is necessary to exclude it in order to prevent the principal from assuming more duty than he expects (the principal may prepare for paying the cost of mirror but not for the medical cost.), the damage is not demanded.

- Reasoning for inclusion: The management is in accordance with the intention of the principal and damage is arising during the management and is unavoidable one, the price is therefore included in the demand of necessary expense too (it is an interpretation).

Based on this idea, where the damage is avoidable, the manager cannot demand compensation for damages as the necessary cost of the management.

4.2. Right to Demand Remuneration

Generally, the remuneration cannot be demanded because the management of affair without mandate is commenced without the agreement (which is the main reason in an invocation of obligation for the remuneration) of the principal.

However, in cases where such management is included in the occupation or business of the manager, the principal will become aware of the fact of management and he does not refuse; it is not unfair for the principal who assumes the obligation if he is aware that management of the manager is included in the occupation or business.

Section 2 Unjust Enrichment

1. Introduction

The Civil Code encodes Unjust Enrichments as one of reasons to create the obligations, such as the Contract, Tort and Management of Affairs without Mandate, that require any person without legal cause deriving a benefit to return such benefit to the other party who lost the benefit and entitles the other party to demand such benefit without legal cause.

In general, provisions of unjust enrichment commence to work when a contract is proved null and void, rescinded and terminated etc. but that is not only the case.

Miscellaneous cases where normal property related rules dysfunctions are also governed by rules of Unjust Enrichment. That is why Unjust Enrichment is sometimes called "Clean Up" principle. Compared to other management sectors, Unjust Enrichment is quite simple. The simplicity of the Unjust Enrichment allows dealing with even unexpected issues to the legislators.

For example, A owed B USD1000. B and C are twins. A returned the money to C supposedly that C were B. Unjust enrichment may apply to this case because A suffers the loss while C has no justification to keep the benefit.

2. General Requirements

Based on Article 736.1, the general requirements are:

1. Benefit
2. Loss of Benefit
3. Causation between benefit and loss
4. The receipt of a benefit without legal cause

Let's study the requirements one by one with the given examples below. The two given cases below are frequently applied by Unjust Enrichment.

One is case where Unjust Enrichment is applied based on the apparent legal relationship such as rescinded contract. The other case is that Unjust Enrichment is applied in accordance with violation of rights of any person like ownership as a matter of fact.

Note that the two cases just more frequently happen than any other cases where Unjust Enrichment shall be applied in a broader sense.

I. A and B concluded a sale contract that A shall sell a car to B. A shall deliver a car to B and B shall pay USD10000 to A. Then A terminated the contract with B on the ground of fraud. What A and B could claim from one another?

II. B took a car parked at a plot of land while the owner of the car A was not present and did not agree to it. B drove the car for a month and returned the car before A knew about it. The car had not been damaged at all and its fuel was not used. B just filled out the fuel at his own expense. What A can demand from B?

2.1. Benefit

A party receives a benefit from the other party who loses such benefit. The benefit received is the benefit lost and it can be tangible or intangible. A tangible benefit in Unjust Enrichment normally refers to money or commodity. However, intangible benefit can be the benefit of usage or right to disposal.

In the first case, it is tangible benefit which A received USD10000 from B and B received the car from A.

In the second case, it is intangible benefit which B received the right to use A's car for a month. The value of such benefit is not always clear but In order to know how much benefit A is entitled to obtain, we should refer to monthly rental fee of the car of the same type or so.

2.2. Loss of Benefit

The amount of benefit lost must be proportional to the amount of benefit received. This is the principle of the return of a benefit received to the extent of the benefit lost. Generally, the loss of benefit corresponds to benefit concept in most cases.

In the first case, it is easy to define the loss because they are tangible things from different concept like claims and obligations. The loss and receipt of

benefit correspond clearly that A lost his car and B lost his money. The benefit of B is the loss of A and the benefit of A is the loss of B. However, it is different in the second case. Particularly, the problem is resolved as follows. What is the loss if a person uses another person's property while the owner has no intention to use or dispose this property at all? In relation to this, there are two ideas. Idea one provides that A does not lose any benefit because A did not use the car and it did not get damaged (fuel was not used). The second idea provides that A loses his benefit because A could have used the car and it is the loss as result of erosion of the car.

2.3. Causation

This requirement is not very different from a requirement among other requirements to demand compensation for damages of Tort i.e. causation of damages and unlawfully harmful conduct against rights and benefit. In Unjust Enrichment, in order to receive the right to the return of lost benefit, it is an issue whether there is a person acquiring such benefit. Is there any person losing a benefit acquired by another person?

Causation is generally acknowledged if it is proved that a person received a benefit due to the loss of another person without ground. The causation in Unjust Enrichment is mostly not a substantial issue because the loss is, in most cases, inevitably linked with the receipt of a benefit.

In the first case, A rescinded the contract with B on account of fraud after the delivery and payment. In this case, if A did not give the car, B could not have got the benefit in form of a car. In the same manner, if B did not give money to A, A could not have got the benefit in form of cash. Therefore, causation is acknowledged between A's benefit and B's loss as well as A's loss and B's benefit

In the second case, B took the car from A parked at parking lot for a month. If B did not take the car from A, A might not lose the benefit of using the car and B might not receive the benefit by using the car. Therefore, loss and benefit is considered to be linked with each other.

2.4. The receipt of a Benefit without Legal Cause

"Without legal cause" means without reasonable ground to get the benefit. It is not reasonable that a person without legal cause is allowed to receive a benefit from another person who loses such benefit.

In the first case, A rescinded the contract with B on account of fraud. In this case, A had no legal ground to keep USD 10000 which was paid by B, and B had no reason to keep the car given by A. Therefore, A has an obligation to return USD 10000 to B and B is obliged to return the car to A.

In the second case, B took the car from A for a month. No person can use the property of another person while the right owner has no intention to allow of use or dispose his own property. Therefore, this means B lacks of legal cause to acquire benefit of using the car. As a result, B has an obligation to compensate in exchange of using the car for a month to A.

3. Effect

An important effect is arising of the obligation to return the benefit. But the scope of the return is different from each other based on the subjective status of the person who receives the benefit.

3.1. General Provision

In general principle, the scope of return is limited to the extent that the benefit subsists. The reason why the scope of return is limited is because a person frequently receiving the benefit always consumes such benefit; therefore, it seems unfair if the person who receives the benefit has to return all the benefit when that person consumes such benefit without knowledge and negligence about lack of legal cause. (Article 736-1)

Next issue is how to determine whether such benefit subsists or not. Whether the benefit subsists or not does count on the court adjudication. However, concerning the benefit in cash for example, even the original benefit has been lost or used, such loss sometimes may cause the person receiving the new benefit. Therefore, the benefit is considered to be transferred and to still subsists in such a case.

Example

I. X and Y created a contract that X shall sell the jewelry to Y. X delivered the jewelry and Y paid US$ 10,000. Then X rescinded the contract because his capability has been limited (person under the general guardianship) until the contract was rescinded, X had bought a share of US$ 10,000, did the benefit subsist or not?

II. In the first case, X had paid his rental cost US$ 100 from the payment until the rescission of the contract which means that he can save his original asset. Did the benefit subsist or not?

III. In the first case, X celebrated a party that spent a lot of money lavishly (he would not have celebrated a party if he had not received payment). Did the benefit subsist or not?

Answer

Example I

In this case, X lost the original benefit, money, but it is considered to transform into the stock. Therefore, it may be considered to subsist.

Example II

Even X lost the benefit because X paid a rental costs, X can save his original assert. As a result, the benefit is considered to still subsist.

Example III

In this case, the benefit may be considered to be lost because the benefit was spent and lost at all.

3.2. Special Provision in Case of Mala Fide

In case a person receiving a benefit was aware that there was no legal ground or the contract was void, the said person shall be obliged to return any benefit subsisting at the time he became aware of the said fact together with the interest thereon (Article 737-1). In general, the scope of return is limited in order to protect the person receiving the benefit without awareness. But if a person who receives the benefit is aware that the obtained benefit lacks legal cause; it may be said that the said person has known that such benefit belongs to another. It is unnecessary to protect such a person. Therefore, the scope of return is not limited and the said person shall be obliged to return such

benefit together with interest at the time such a person became aware that he lacks legal cause to the benefit received.

A person who has received a benefit under a contract that is invalidated due to an intent or negligence of such person shall be obliged to return such benefit together with interest. (Article 737-2)

Example

Where a person is aware that the contract was void, that person shall return all the benefit that received via that contract.

Example

A contract is terminated or nullified due to the intent or negligence of any party, that person shall return all the benefit that he received.

Example

B has been cheated by A to make a contract. B terminates the contract in order to make the contract lose its effect, so A shall assume responsibility for nullity of that contract and A shall return the benefit that he has received.

4. Special Cases

4.1. Discharge when there is no obligation

A person who tenders anything as performance of an obligation that does not exist where such person was aware at the time of performance that the obligation did not exist, he may not demand return of the thing tendered (article 738 proviso).It is unreasonable to be aware that there is no obligation and to effect performance of the obligation. Thus law imposes sanction on such unreasonable act even though performer suffered loss that causes benefit of another.

Example

X paid $1,000 to Y because X confused that he is a debtor of Y. By examination of the requirements as described in Article 736, the act of X created the unjust enrichments due to the fact that:

1. Y has received the benefit US$ 1000
2. X has lost US$ 1000

3. Y has received the money from X without legal cause because X is not the debtor.

4. Y received the benefit because of X's loss.

So X seems to be able to demand a return of performance from Y.

But Proviso of article 738 stipulates the exceptional case.

Similar to above 3 examples, X was aware that he is not the debtor but he still paid $1,000 to Y. So X cannot demand Y for a return.

Please note that Article 740 can also apply to case where the first sentence of Article 738 applies if performer mistakenly believes that the obligation of another is his own, he may demand return of those delivered by such performance, but the demand of return is limited by Article 740 that even though the performance was made mistakenly, there is an exceptional case that the performer may not demand for a return.

4.2. Discharge before due date

In general, a debtor doesn't need to pay until the due date; the debtor has benefit of time. But if the debtor has tendered anything as performance of an obligation before the due date, that is considered that the obligor effects discharge of obligation by relinquishing the time benefit. So, even debtor has tendered anything as performance before the due date, the obligor may not be entitled to demand the return of the thing tendered. (main sentence of article 739)

But in case that the obligor tendered anything without being aware that the obligation has not yet fallen due, the debtor can demand the return of any benefit that obligee can use the performance received prior to maturity until maturity from the obligee.

Example

X borrowed the money from Y $1,000 and the due date of payment is on 01.05.2011

X paid Y $ 1,000 on 01.04.2011

Article 739 of Civil Code

In principle, X cannot demand Y to return the money which was already paid.

But in case X believes under the mistaken belief that it arrives at a due date and he was aware after payment, X can demand Y to pay the benefit that Y has received within a month in which Y can use such $1,000 (such as interest).

4.3. Discharge of Obligation of Another

A person who is not the obligor has tendered a thing as performance of an obligation under the mistaken belief that the obligation is his own, may demand return of the thing tendered by such performance. (Paragraph 1 of article 740) in case above where a person, who effects performance of an obligation of other, the obligee will received the benefit and the person who effects performance will lose the benefit. Therefore, demand of return of lost benefit can be made as the unjust enrichment. It is similar to the general provision.

However, where the obligee, being unaware of the mistake on the part of the person who effects performance believing that this constitutes a valid performance of the obligation, destroys the documentary evidence of the existence of the obligation or relinquishes security thereover, the person who effected the performance may not demand return of the delivered by the performance. (article 740, proviso) this is the exceptional case because if the demand to return was allowed, obligee will be placed in the difficult situation to return the benefit and demand to return from the obligor without evidence and security.

In such a case, the law protects the obligee and the performer may not demand a return of benefit because it is unfair for the obligee that has to take the burden of risk because of the negligence or mistake of the other.

Please note that where the performing person cannot demand a return, the performance of that person has to be considered as the performance of third party. (Paragraph 1 of article 434) and that person can demand reimbursement from the obligor. (Paragraph 2 of article 740)

Example

X paid Z $100.

Because X became confused that he is the obligor for the fact Y owed Z $100.

In general principle, X can demand Z to return the money due to the examination on the requirements to establish the unjust enrichment.

1. Z received the benefit of $100

2. X lost the benefit of $100

3. There is no legal cause as X does not have the obligation for Z which means there is no legal cause for Z to keep the $100.

4. Z received the benefit from the loss of X.

But in case that Z destroys the documentary evidence of the existence of the obligation or relinquishes security by believing that the discharge of obligation of X is a valid discharge of the obligation, X may not demand Z to return the money. (Paragraph 2 of article 740) About this case, even X cannot demand Z to return the money, X can exercise the right to reimbursement from Y. (Article 740-2)

4.4. Performance for illegal cause

In case that a demand for return of unjust enrichment would be in breach of public order and good morals or any law regarding public order, such demand shall not be allowed. (Article 741)

The necessity to deny the demand to return the performance of obligation that has been provided in any purpose against the society is to prevent any action that is against the society by nullifying the act so that the person who tendered the performance of obligation does not have the possibility to collect the expense.

It is a reflection of a principle of clean hands which constitutes the principle of good faith and prevents the court from providing legal aids to "dirty" claimant.

However, in some cases although any performance of obligation tendered has the purpose against the society, in reality a person receiving the performance of obligation is against the society more than the claimant of performance obligation; as a result, the denial of the demand of return of performance of obligation will urge the action against society. Therefore, the recognition or non-recognition of the demand to return does not depend on whether the reason of unjust enrichment against the society or not, it counts on the

problem whether a demand for return is against the society or not and this is not very simple problem.

Example

I. X and Y created a contract that X must kill Z for insurance money and Y will give $ 1,000 to X as a gift and Y already paid such $1,000.

Before X kill Z, Y filed a complaint to demand a return of money based on the unjust enrichment because the contract of killing person is invalid contract. (Paragraph 1 of article 354)

II. I. In the first case, what if such contract was created because of X's duress and Y was forced to pay?

- **Regarding the 1st case**

The contract between X and Y was null and void because it is contrary to the law.

With regard to Y's demand, the point is whether Y's demand is against public order or good moral.

First, from the concept of a principle of clean hand, Y who demands is a bad person; thus, Y may not be entitled to demand X to return $1,000.

Second, from the concepts of recognition that X, a person receiving a performance of obligation, is also bad faith, so if Y cannot demand X to return such money, it may motivate X to act against the society even more.

That is to say, if X doesn't need to pay money back, X could get money without doing anything by telling person that he can kill anyone that he want to kill by paying him $ 1,000 but doing nothing.

Therefore, if Y cannot demand X to return such money, it will push X to continue conducting in order to get money without any responsibility. In this case, it is an encouragement of the act against the society as well.

As you see, this is not very simple problem and I would introduce one possible solution. In this case, even though demand is allowed or not, there remains problem but the latter problem (X can get money by doing nothing) can be solved through criminal procedure (X can be punished criminally.). Therefore, concerning civil matters, the principle of clean hands may outweigh here.

- **Regarding the 2nd case**

Even if the contract is made by the duress of X, the contract is not valid because the subject matter of this contract is to demand X for killing Z.

The question is: may Y be entitled to demand X for a return of money or not?

The situation is similar to the case I. but in this case, Y is to blame less than the first case and thus the demand shall be more likely to be allowed from perspective of the clean-hand principle.

Section 3 Torts

1. What is tort liability?

Tort liability is a system of compensation for damages in the event of infringement of the right or benefit of another person in the illegal manners intentionally or negligently. Therefore, a person whose right or benefit is infringed will be entitled to demand damages from a tortious actor.

Example: In the event of traffic accident, A drove a car to collide at B's abode the door of which was broken. Thus, the act of breaking the door conducted by A which caused damages was a tortious act, so that B is entitled to demand that A compensate damages.

Tortious acts cover various kinds of cases which are not only a traffic accident, environmental ruination, or medical malpractice, but also the infringement of benefit (disputing over customer of others) as well as stealing a lead of creating a contract. Besides, the subject matter of damages is not only an economic harm but also mental harm (so-called reparation).

2. Basic philosophy of tort liability

Tort does require a tortious actor to compensate damages for economic and mental harm to an injured person in order to attain justice. Assuming liability for tort is according to the principle of liability for negligence; this means that, in the liberal society, freedom of act is guaranteed. Each person shall not assume liability in principle and shall assume liability for the result arising from the act that was or can be foreseen to infringe the right or benefit of another. With respect to an act of which the result may not be foreseen, law does not entail assuming liability in general because it will prevent a free act; hence, the principle of tort does not entail assuming liability as if damages had occurred where an actor did not conduct any intentional or negligent act in general (exception is some of special form of tortious act).

Article 742 of the Civil Code states:

"For the purposes of this Chapter, an intentional or negligent act is either of the following types of act:

a) an act that harms another where the actor has foreseen that a particular result would occur but accepted the occurrence of such result; or

b) an act with respect to which (i) a person having the same profession or experience as the actor could have foreseen that a particular result would normally occur from the act, but the actor failed to foresee the result due to an absence of care, and (ii) the actor owes a duty to avoid the occurrence of such result but neglected to fulfill such duty."

By the concept, the person who injures another without reasonable care shall be liable for such injury while the principle enable a person, before conducting an act, to take into account of its own act to avoid the occurrence of such result which can endanger another.

3. Elements

Article 743 of the Civil Code stipulates the Elements of general tort and burden of proof

(1) A person who intentionally or negligently infringes on the rights or benefits of another in violation of law is liable for the payment of damages for any harm occurring as a result.

(2) Paragraph (1) shall apply mutatis mutandis to cases where a harm has occurred due to non-performance of a certain act with respect to which the actor owes a duty to perform such act.

(3) Except as otherwise provided in this Code or in other laws, the person seeking damages must prove the intent or negligence of the tortious actor, the causal relationship between the actions of the tortious actor and the harm that occurred, and the harm suffered by the injured party.

According to art.743, Elements of general tort is

a) Intention or negligence

b) Illegality

c) Damage

d) Causation.

Let's take a look one by one.

3.1. Act by Intention or Negligence

3.1.1. Intention

Intention in Cambodian tort system constitutes of foresight and acceptance.

X and Y had a quarrel and X stabbed Y in the chest and killed him angrily.

Your common sense may tell you X killed Y "intentionally". Yes, that is right. But give it a try to analyze in accordance with the wording of civil code.

In this case, reasonable person can foresee the death if one stabs another in the chest with knife. Therefore, in most case, X is considered to have foreseen and accepted the result of death. This is the typical case of intention.

But it is exceptionally possible that X was not intentional killer. For extreme example, X can't be considered intentional if X has got serious mental disease such as delusion and didn't know stabbing in the chest can cause a death.

3.1.2. Negligence

Negligence constitutes of breach of both duty to foresee and duty to avoid.

And two duties are imposed on a party only when foresight and avoidance was possible. (Law never forces impossibility).

Think about car accident case.

In case of typical traffic accident, Driving a car to hit pedestrian did not show an intention of driver, who drove a car to collide and kill pedestrian but it may be a negligence of driver that he does not look the front when he arrives at pavement; as a result, it may be a negligent act conducted by X because, if we take into consideration over an overall aspect in society, we will find that a driver normally, when he reaches a pavement, must be careful by looking whether or not any person is walking on the pavement so as to avoid an occurrence of such dangers. As to the fact mentioned, we find that the driver was not careful enough to look at whether or not any person is walking on the pavement; however, he looked at the other side, which was an absence of care that the driver could foresee that he would drive a car to hit a person if he looked at on other side without looking straight and there was a person walking.

3.1.2.1. Duty to foresee

In most cases, it does not matter seriously on the possibility to know in advance. But there is an exception, of course.

Please consider an exceptional case which is a complicated issue

The following is a fictional case based on actual case in which the duty to foresee is one of the main issues.

A patient having hemophilia, (P's) used to need some blood products produced by human being's blood which is the important methodological treatment. But sometimes, unheated blood products contain AIDS virus in the past, and thus many patients have been infected with AIDS. P's lodged a complaint to sue a blood product provider (BPP) and the government, co-litigants, on the reason that BPP and the government should have known in advance the blood product had contained AIDS virus and thus shall have avoided the infection of (P's), (BPP shall have stopped providing and the government shall have forbidden the unheated blood product). (BPP) and the government mainly alleged that they could not have known in advance the risk of unheated blood product. In fact, AIDS is a disease which is recently found; not until some specific time, had anyone known the existence of the disease or how such disease is infected with.

What type of elements do you require to acknowledge the claim by P's?

Please remark: the case includes many issues, but please pay attention only to whether or not the defendant is negligent.

Generally, to recognize the claim of P's, it must be proved that the defendant shall have known in advance and should have avoided the occurrence of such result as well.

In this regards, it seems easy to prove that (BPP) and the government should have avoided the occurrence of AIDS infection, but the avoidance may be possible only in the event they foresaw or could have foreseen the risk of blood product and could use the alternative treatment (heated and safe blood product was invented after the realization of risk of the unheated blood product).

Therefore, the issue is whether it is possible to know that and from when it is possible to know.

Particularly, P's must prove that the defendant should have known that the unheated blood product had contained AIDS and can be transmitted to other patients.

Especially, many medical letters related to the possibility or example to get infected with AIDS via the unheated blood had been investigated in the proceedings of lawsuit in order to specify the time, from when BPP should have known the risk of using blood.

Finally, the court had specified the time from when the defendant could have foreseen the risk in using such blood, which was the time when an occurrence of HIV virus would have been realized from the medical letter and the heated and safe blood product was found and used.

3.1.2.2. Duty to Avoid the Occurrence of the Result

Such duty is almost overlapped with the illegality because some grounds that the results should be avoided are due to the fact that such results are deemed bad consequence, and what is bad or not is almost same as what is illegal or not.

3.1.2.3. Level of Duty

Whether duty to foresee and to avoid is satisfied or not is determined on base whether, by making a comparison, person having the same profession and experience may foresee the result or avoid a danger, but it is not the person who has carried out the act directly may know in advance or not.

Please consider what is inconvenient to determine on the basis of actual capacity of the actor where a duty is breached?

On the basis of actor's capacity, more intelligent and careful person is more likely to assume liability because such person is deemed to have good ability to foresee the possibility of the result of his own conduct in advance whereas a careless and imprudent person is likely to exempt from assuming responsibility.

It is unfair and it takes unreasonable long times to settle a lawsuit because a judge must realize the actual capacity of the actors in every proceedings of litigation.

Judge must determine what level is appropriate or reasonable via a decision-making of many cases.

3.2. Illegality

Once again, a duty to avoid is almost overlapped with the illegality because some grounds that some results should be avoided are due to the fact that such results are deemed bad consequence, and what is bad or not is almost same as what is illegal or not.

Please notice that although a tortious act is mostly crimes, illegality is not necessarily limited to those.

I would like to give an example in Japan.

For example, where any person killed another intentionally, such killing must be a crime and a tortious act simultaneously was taken place in Japan.

Currently, a deceit is not a crime in Japan but it has been still deemed a tortious act with respect to any spouse who is deceived because it may infringe upon the happy and peaceful life of other spouse's marriage.

I have known that most of the tort cases are judged based on the Criminal Code in Cambodia, but whether it is a crime or not and whether it is a tort or not is a different question; thus, it must be decided separately.

In fact, citizens are entitled to receive civil trial.

3.2.1. Basic Philosophy

Paragraph 1 of article 743 of civil code states that a person who intentionally or negligently infringes on the rights or benefits of another in violation of law is liable for the payment of damages for any harm occurring as a result.

Here, the violation of law shall be understood in broad sense. Violation of law means not only the violation of criminal law but also act against the social rules. Therefore, duty to avoid is almost overlapped with illegality because the reason why duty to avoid is imposed is because it is against the social rule.

Please notice that although most tortious acts are criminal acts, illegality is not necessarily limited to those criminal acts.

For example, if someone kills another intentionally, such a killing is crime; and this is also tortious act in civil context at the same time. On the contrary, cheating is not a crime now in Japan, but this offense is considered as tortious act to cheat spouse because it can abuse peaceful marriage life of the spouse in civil context.

Crime is judged in criminal procedures, but whether the act is a felony or not and whether the act is illegal or not is different issue.

For tortious act, people shall have rights to receive a civil trial different from criminal one, especially when tortious act is not a crime.

3.2.2. Excuse from Illegality

In general, either intentional or negligent infringement of rights and benefits of others is illegal, but some types of infringement are not considered as illegal. Therefore, there is a case that the infringement of right or benefit of others is not illegal act. For example, in case where a person was attacked first and the person defends oneself against the attack by making the attacker injured, so this is justifiable as self-defense.

Thus, some reasons to justify the infringement of rights or proper benefits of others are called "excuse from illegality."

Article 756 of civil code states reasons of excuse from illegality, in which paragraph 1 stipulates "consent from victim and assumption of risk", paragraph 2 states " justifiable self-defense and emergency escape" and paragraph 3 states "act that is acceptable under prevalent social standard", which all these points will be explained consequently as follows:

3.2.2.1. Consent or Assumption of Risk

In principle, consent or assumption of risk of victim justifies the infringement of right and benefit because the people shall have right to manage personal benefits freely including damaging them. But consent or assumption of risk as above-mentioned is possible if victim can manage right of personal benefits with capability to declare the intention. Consent to manage victim's right or benefits shall not be contrary to public order and good social customs.

For example, the consent to cut pinky finger of the victim in a gang (this is Japanese ritual in gang society for begging apology) is contrary to public order and good social customs, so the act cannot be excused from illegality.

However if medical operation needs high professional techniques and it is harmful, the doctor explained in detail in advance the illness status of victims and treatment methods, and then victims agrees with operations. After the doctor conducts operation, the victim is dead. Operation resulted in death of victim; the doctor will be free from illegality in general.

3.2.2.2. Justifiable Self-defense and Emergency Escape

Justifiable self-defense and emergency escape are similar to corresponding concepts in criminal case.

A. Justifiable Self-defense

Justifiable self-defense is self-defense against unlawful harmful conduct by others. Justifiable self-defense must be according to the following conditions:

1- Unlawful harmful conduct

2- To defend the physical well-being or property of oneself or another

3- Necessary act

4- Time of unlawful harmful conduct and time of action that made someone victimized are closely related

5- There is balance between method of self-defense and degree of violation

For example, A jumps to hit B (unlawful harmful conduct) and B immediately hits A back to defend himself (to defend himself). Immediately beating back was made with hands to hands (time of unlawful harmful conduct and time of action making someone victimized are closely related and there is balance between self-defense and degree in violation). Therefore, attacking back of B is justifiable self-defense which the infringement is exempted from illegality, and it is not tortious act.

On the other hand, if B hit A back after three days in revenge, B's attack lack the condition of close relation of time and thus it shall not be considered self-defense. In other words, both attack by A and B are illegal.

For another example, if B hit A back by gun against A's attack by hand, it lacks the condition of balance and thus it is also illegal.

B. Emergency escape

Unlawful harmful conduct by emergency escape is justified to protection person from danger.

Unlawful harmful conduct by emergency escape shall conform with the following conditions:

1-Present or impending danger

2- In order to defend the physical well-being and or property of oneself or another

3- Action made someone victimized unavoidably

4- Time of unlawful harmful conduct and time of accident are closely related

5- Balance between defense method and degree of danger

For example, when there is fire (present or impending danger). In order to prevent fire from going widely to other people's houses (defend physical well-being or property of oneself or another), a group of firemen have destroyed the houses that are close to the fired house (unavoidable defending act, time of harmful conduct and time of accident are closely related and balance between defense methods and degree of danger). Therefore, difference between justifiable self-defense and emergency escape is that justifiable self-defense is the action to victimize made against unlawful harmful conduct, while emergency escape is the action present or impending danger, not only unlawful harmful conduct.

3.2.2.3. An Act That is Deemed Reasonable and Acceptable under Prevailing Social Standards

Paragraph 3 of Article 756 of the Civil Code says a person who commits an act that is deemed reasonable and acceptable under the prevailing social standards shall not be held responsible for any harm caused thereby. However, what society considers reasonable and acceptable is difficult to prove, and this problem must depend on the meaning of justice in Cambodia. Generally, an act which causes damage in some contact sports such as boxing or rugby

football may be deemed reasonable and acceptable under prevalent social standards.

3.3. Damages

Damages can be divided into two kinds of damages.

One is Economic Damages and the other is Non-economic Damages

Furthermore, economic damages are divided into two: The first is the actual cost, which the victim may not help but pay because of the tortious act, such as medical expense, and the second is the lost benefit such as salary that shall be going to be paid if the victim continued to work in case where the victim is dismissed due to a tortious act.

Most typical (or may be only one of) Non-economic damages are mental damage in which case the court has to estimate to be some specific monetary amount.

3.4. Causation

To engage any person in assuming responsibility for compensation for damage, there must be a cause and effect between the act and damages confirming that such damages resulted from the tortious act and the claimant for damages has the duties to prove the fact. For example, A files a lawsuit to demand compensation for damages because he was injured as a result of actions by B. In this case, A must prove that B injured him and caused damages. In other words, the damages would not be compensated if it was not caused by tortious act.

3.5. Competence to Assume Liability

In principle, the Civil Code provides protection to a person whose ability is too weak to judge and act in reasonable manners. With respect to tortious responsibility, a minor who is under 14 years or mentally defective person is exempt from the tortious responsibility.

In contrast, the law requires special responsibility from a supervisor as a remedy for the victim.

3.5.1. Minor under 14 Years Old

Growth speed depends on the individual; the capacity can therefore be determined on a case-by-case basis. This means that even if the child is only 13 years old, he may be smart enough to assume tort liability whereas a person who is 21 years old may still may need a protection due to lack of ability. However, in order to clearly prove the criterion, the law clearly states the criterion··· age.

Therefore, the victim may not assert that some persons who are under 14 years old must assume liability even though persons are too smart to be given protection.

3.5.2. Mentally Defective Person

Mentally defective person lacking capacity to understand legal ramification are exempted from tort responsibility as well as the person under 14 years old. However, unlike the person under 14 years, such a person can still assumes liability if he or she becomes incompetent intentionally or unintentionally.

For example: If X was aware that he would be quite violent and was likely to hit someone when he was drunk and instead of that, X got drunk intentionally and caused Y, accompanying him, to get injured, X could not assert that he should be exempted from liability although he had the metal problems when he hit Y.

3.5.3. Remedy for the Injured Party

Where any person has committed a tortious act, but that person is incompetent, the person, who has the duty to supervise, shall be responsible for the damages infringed by such incompetent person.

Article 746 of the Civil Code stipulates the liability of the person supervising as below:

Case 1: A person having legal duty defined in the law to supervise a minor under 14 years old or a person who due to metal defect or other reasons lacks the capacity to understand the legal ramification of their action is liable for any harm caused to others by the action of the minor or person lacking capacity.

Case 2: A person who has a legal duty defined in the law to supervise the minor 14-years-old or older is jointly liable with the minor for any harm caused to others by the action of the minor.

However, the person under a duty of supervision who is liable for damages pursuant to case 2 above can avoid liability by proving that he has fulfilled his duty to provide regular and consistent supervision.

4. Effect

4.1. Principles of Cash Restitution

According to article 757 paragraph 1 of Civil Code stated clearly that: Damages shall be paid in money in principle. This principle defines that damages suffered by victims shall be assessed in cash and tortfeasor shall pay in accordance with money calculated.

In addition to principle of monetary damage, civil code also states an exceptional case if the appropriate remedy by monetary damages cannot be received. Article 757 paragraph 2 of Civil Code stipulated 2 remedy methods: restitution and injunctive relief. In fact, in case there is nuisance caused by neighbor, restitution of damage in cash alone is sometimes insufficient. Therefore, the victims can demand a prohibition of nuisance in order to halt an enlargement of further damages. This is a reasonable remedy method for the case of nuisance caused by tortfeasor.

Aside from that, civil code also provides special provisions for the case of defamation in article 757 paragraph 3 which states that: a person who suffered harm to their honor or reputation may demand, in addition to damages, that the tortfeasor take measures to restore the injured party's honor or reputation, such as a published apology. In fact, restoring a reputation is one of restitutions already stated in 757 paragraph 2 of civil code. However, civil code additionally provides special provisions like article 757 paragraph 3 to coordinate with freedom of speech or belief, meaning that restitution of reputation through making an apology in public is a remedy method which effect less on freedom of speech compared to other rescue method other than this. In addition, a published apology is method that can be executed by substituted execution.

4.2. Scope of Damage

Normally, the damages consist of two types. One is economic damage and another is non-economic damage. Economic damage includes actual cost and loss of benefit, whereas non-economic damage includes mental suffering or recession in evaluation. Problem for non-economic damage is evaluation or calculation to monetary value. Very simple example of this problem is how much the value is in case where damage is loss of life. Although life is too invaluable, judge shall evaluate it in cash to determine amount of compensation which tortfeasor shall pay compensate.

Other than that, another possible issue is that to what extent a tortfeasor can be demanded to compensate? This point is called scope of cause and effect relationship. That is to say, method of evaluation determines whether it is damage that tortfeasor shall compensate or not based on cause and effect relation between action and damage that happened.

In order to adjust consideration on both mention issues above, please consider a case as follows:

X has injured Y, who is 9 years old negligently in a traffic accident.

Because Z1, who is father of Y, has known about the accident and came back from his business trip, he spent the returning flight fee, and he has lost opportunity to make a big business, because of cancellation of meeting with client. His company has bankrupted due to failure of meeting in this business.

Z2 who is a mother of Y suffered a depression and miscarriage because of feeling stress that result from traffic accident. However, Z2 is mentally delicate person that partially contributed to depression and miscarriage.

Y became vegetable for three years inside the hospital and lastly Y passed away because of traffic accident and medical malpractice as well. Z1 and Z2 believed that Y would go to university, and earn at least 3 times as much as average because Y is a clever boy.

In this case, what does X need to compensate? How much?

Based on above hypothesis, possible damages are as follows:

1. Economic Damage

- Actual cost includes: medical cost for Y, medical cost for Z2, flight cost which Z1 paid to return to see his son who had the accident.

- Loss of benefit include: loss of benefit of company Z1 because the loss of opportunity to do business and bankruptcy of company include loss of benefit (income) that can be provided to Y if he survives.

2. Non-economic Damage

- Mental suffering of Y that experienced because of traffic accident.

- Metal suffering of Z1 and Z2 that is parents of Y.

According to above hypothesis, we shall observe how to calculate damages above in cash and which damage that has linked with cause and effect?

Probably, many people may agree to the idea that medical cost for Y and mental damages of Y, Z1 and Z2 shall be included in compensated items. However, how about medical cost for Z2? How about flight fee for Z1? How about loss of benefit of company? This is a very difficult matter related to scope of compensation.

One more, many people may agree to the idea that mental damages for Z1 and Z2 shall be compensated but problem is how much the wrongdoer shall compensate, this is the matter of calculation and also very difficult problem.

Two issues are difficult problem in a way that there is no only one single answer. Probably, the answer may vary among the different social standards. Therefore, the issues in Cambodia shall be solved by Cambodian social contexts.

4.2.1. Calculation in Cash

Article 758's paragraph 1 of civil code determined principle of calculation of damage as follows: When calculating the economic loss caused by a tortious act, the difference between the economic situation that would be presumed to exist had the tortious act not occurred and the actual economic situation after the tortious act occurred shall be calculated using statistics and other materials to the extent possible.

Based on this provision, civil code bases its calculation of damages on a comparison.

In addition, civil code provides special provision for background of calculation of damage.

Based on 759 of civil code determined that: when a thing is destroyed or damaged by a tortious act, the injured party may seek compensation for the price of the damaged or destroyed thing, cost of repair. Example, tortious act damaged a car and that car cost 1000 US dollars, but if it is repaired, it cost 500 US dollars. In this case, court will acknowledge a demand of compensation for only 500 US dollars which is the cost of repair, based on article 759 of civil code. In addition, as for the damaged or destroyed thing, the court should not acknowledge mental distress in general because the destruction of thing is a loss of property and compensation for damage will be received when the thing is already fixed or when the owner has already received new thing instead. But in case that the broken thing has personal value such as gift from deceased parents or the beloved person, the court can recognize the mental distress due to tortious act.

On the other hand, damages for body harm, article 761 of civil code describe the damage that the victims can seek compensation:

- Economic Damage:

    + Medical expenses already paid

- Medical expenses expected to be paid in the future

- Loss of income while receiving medical treatment

- Future income that cannot be received in the future due to the residual effects of the injury.

For this point, it is sometimes difficult to calculate the amount to be received in the future especially in case that the victims are jobless when tortious act happened. On this point, Japanese court determined statistics of salary of Japanese people in general to evaluate income that the victims could receive if the victims had not damaged. On the other hand, court shall consider many factors to calculate such damages such as profession, educational background.

- Mental distress: in this case, compensation for mental suffering will be determined based on degree of wound and consequence left including emotional suffering during treatment and in the future.

Asides from that, as for damages for wrongful death, article 760 of civil code determined damages that can be sought:

- Damage suffered by victims:

- Medical expenses which have already been paid or which the injured party is obligated to pay from the date of the tortious act until the date of death.

- Income that victim was unable to receive between the date of the tortious act and the date of death.

- Damage that suffered by the dependent:

- The amount of support that the dependent was unable to receive because death of victims.

- Expenditures made in place of the injured party, funeral expense, etc.

- Mental distress: according to article 760 paragraph 3 of civil code, persons who can demand damages for emotional distress that happened because of the death of victims include spouse, relatives within the first degree of consanguinity and relatives living in the same household as the victim.

On the other hand, as for damage caused by injury to honor or reputation, article 762 of civil code determined that: if one's honor or reputation is damaged by a tortious act, the victims can seek damages for mental or emotional distress accompanying the drop in one's social standing.

Calculation of cash for compensation for emotional suffering always caused serious matter for judge. However, precedent of court will determine case by case. Please note that Japanese court did not take any property of tortfeasor to be factors to determine the amount of mental damages for mental or emotional distress (the wrongdoer shall not be ordered to compensate more just because he is rich).

4.2.2. Scope of Damages

We have to study tort that arises and results in harm. Such damages include both property and mental harm. Therefore, a creation of right to demand for a compensation for damages arising out of tort with respect to the injured party is stated in the provision of Article 757, 758, 760, and 761 of the Civil Code. But the main issue is what the reasonable scope of damages is? Which specific damage is included in the scope of damages? Every question is the difficult

problem, which must be solved through decision-making of each case in the future precedents. Anyway, Art.401 regarding scope of damage in case of breach of duty may be analogically applied to the case of tort.

That is to say, damage may be divided into two:

A- Normally occurring damages

B- Special damages

Based on this idea, normally occurring damages is included in the scope of compensation because it is fair that the damages of which occurrence can have been reasonably foreseen by concerned party at the time of tortious act. For example, in the traffic accident case, the car hit the person very slightly and the person got the bruise. In this case, the occurrence of bruise can have reasonably foreseen by concerned party and thus this damage is considered normal one. On the other hand, as to special damages, in principle, it is not the object of compensation because it is too much burden on wrongdoer to assume liability on compensation which may not occur in normal case but occurred under special circumstances and it is considered necessary to limit the scope of damages in such a case. In the case above, if the person got dead just by the slight hit by the car, which normally doesn't lead to death, under the special circumstances that the person has chronic illness, it is not necessarily fair that the wrongdoer shall assume liability for death. However, special damages shall be compensated when wrongdoer can have foreseen from perspective of fairness such as a case where the wrongdoer know chronic disease in the example. The idea is so much criticized, and other opinion is just only to determine the extent of reasonable scope for the tortious actor whether the payment is reasonable or not case-by-case basis.

In this regard, it may be beneficial to collect more and more precedents so that reasonable scope of damages shall be found. In other words, practice may outweigh theory.

4.3. Reduction of Damages

We have to study the concept of the scope of damages stemming from the tortious acts and it has to make an evaluation in cash of the damages of property or mental harm which is required to pay. But there is a case where some amount shall be deducted from the compensation from perspective of

fairness. Set-off of loss and benefit, contributory negligence are examples where reduction of damages is considered necessary.

4.3.1. Set-off of Losses and Benefits

Art.763 says where an injured party receives a gain or benefit from the result of a tortious act, the amount of such gain or benefit shall be deducted from the amount of recoverable damages.

This is necessary because the aim of tort liability is recovery from injury to the situation which would be presumed to exist if the tortious act had not occurred (c.f. art.758).

That means that injured party shall neither suffer a loss nor gain benefit after recovery.

Typical example of set-off of loss and benefit is living expenses.

In case of death by car accident, successor to injured party can demand compensation of the rest of lifetime earnings which injured party could get without car accident but not the full amount because injured party could get wage (for example 100 dollars per month, for example) but also he could not help spending living cost (30 dollars, for example). Therefore, such a living cost shall be deducted in order for the successor to injured party not to get the more benefit than he could get if tortious act did not occur.

4.3.2. Contributory Negligence

Art.764 says that if the negligence of the injured party or of supervisor contributed to the occurrence or aggravation of the injury, the court may take the degree of contribution of such negligence into account when calculating the amount of recoverable damages.

Typical example of application of art.764 is car accident case in Japan maybe because almost all the car accidents occur because of faults of more than one party.

X's car and Y's bike crashed against each other.

Both car got broken completely and economic value of X's car is 10,000 dollars and Y's, 1,000 dollars.

Luckily, both parties themselves got no physical injury

X filed a suit against Y seeking for compensation of his car.

X asserted that Y was negligent because Y looked aside.

Y filed a counter suit against X seeking for compensation of his bike. Y asserted that X was negligent driving too fast.

The court found that negligence of both X and Y contributed to the accident and that contribution ratio of X and Y was 3 to 1.

How much shall the court order X and Y to pay to the other?

.The point in the provision is as follows.

Art.764 states that the court MAY take the negligence into consideration but not the court MUST do so. Therefore, if taking the negligence into consideration is considered unfair, the court doesn't need to do so.

For example, in Japan, if one of the parties injured another intentionally, we, Japanese judges, don't take the negligence of injured party in general because we think it is unfair to do so in case of intentional tortious act versus negligence of injured party.

Of course, however, it is also one of the problems which is up to Cambodian practice.

4.3.3. Other Reasons

Contributory reason of victim is one of the examples which is not stated in the provision but acknowledged as a defense in Japanese precedent. This concept may be necessary in such a case where reasons (but not the negligence) on the victim's side contribute to the result.

5. Special Forms of Torts

5.1. Introduction

General form of tort liability requires not only occurrence of damage but also intention or negligence. The requirement of intention or negligence can guarantee the individual freedom because person doesn't need to be liable for damage even when he injures someone but he acts carefully enough and without any intention or negligence.

In addition to that, person is not responsible for the damage caused by another, which is a reflection of individualism.

Both are important doctrines but they sometimes cause unfair conclusion in this sophisticated society and needs adjustment.

Cases

I. A runs a company which stocks chemical substances including toxic one. One day, because of big earthquake, some toxic chemical was released and that injured some people around there.

One of the injured, B wants compensation but A asserted that unpredictable earthquake caused the release and thus he is neither negligent nor intentional about release of the toxic.

II. C employs many taxi drivers. D, one of them ran over E accidentally. E wants compensation but D doesn't have any asset while C is rich running taxi company but refuse to compensate because C did neither injure E himself nor was negligent at all about the accident.

If we stick to the ideas mentioned above (individualism and requirement of negligence), Either B or E can't get compensation while A and C are exempt from liability but it seems unfair and the civil code provides solution for that. That is some special forms of act.

By the way, the reason why exemption of A and C are considered unfair may be two as follows.

One is that A runs a business dealing with the dangerous item as a nature and thus he shall be responsible for damage to others even without negligence which directly contributed to the accident.

In other words, in this case, A is considered to be liable not based on negligence but on the fact that wrongdoer deals with danger.

The other one is that C gets the benefit from what D does and thus C shall also suffer the loss from what C does.

Either of these two ideas that person shall be responsible if he deals with something dangerous in nature and that person shall be responsible for loss

caused by another do if he gets benefit from that one is the grounds for special form of torts.

5.2. Liability of Persons Having a Duty to Supervise

5.2.1. A Person who Has a Legal Duty to Supervise a Minor under the Age of 14 or a Person who Due to Mental Defect Lacks the Capacity to Understand the Legal Ramifications of Their Actions

In the event that the tortious act results from a minor under the age 14 who is an incompetent person to assume responsibility, the minor cannot be held liable in tort but person having a duty to supervise the incompetent person has to be held liable to compensate regardless of any unintentional or intentional negligence under the supervision stated in Paragraph 1 of Article 746.

5.2.2. Person Having a Duty to Supervise a Minor of 14 Years Old or Elder

In that case, the supervisor may be exempted from the responsibility by proving that he has performed his duty to provide regular and consistent supervision without any negligence.

5.3. Employer's Liability

5.3.1. Requirement

According to the article 747, elements of employer's liability are as follows:

A. An individual who uses employees to perform work or an individual who is in charge of supervision of employees instead of employer.

B. Damages

C. Employee is intentional or negligent

5.3.2. Defense

The employer is responsible even if he is not negligent at all.

That is a kind of "strict liability".

In case of supervisor in place of the employer, he would be exempt from liability when he supervised properly.

5.3.3. Effect

5.3.3.1. Damage

Employer or supervisor must take responsibilities jointly with employee for the damages caused by the employee.

5.3.3.2. Compensation from Employee

As employee is a wrongdoer himself, employers or supervisor can demand compensation from employee in case where the employee or supervisor has compensated to the injured party. However, Employer or supervisor is unable to obtain all payments back, but he/she is able to get back just the amount in proportion to degree of actual negligence of the employee.

Regarding the tortious act committed by employee (person who is used by employer in his or her own business), the person who is employee shall take responsibilities; in addition, employer or supervisor on behalf of the employer (supervisor representative) shall also take responsibilities with employee without involvement of negligence or intention of the employee. Having employer take responsibilities is based on perspectives that loss also belongs to where benefit belongs to

In case where supervisor representative has properly conducted supervision, he will be exempted from responsibilities but employer himself, can't.

5.4. Tortious Act of Juridical Person

Tortious act of juridical person is the provision that is similar to responsibility of the employer. However, differences are as follows:

A. In the case of tortious act of juridical person, wrongdoer is limited to director or other legal representative while there is no such a limitation in case of responsibility of employer.

B. Juridical person cannot make defense as one in the employer's responsibility (proper supervision).

Tortious act committed by representative of juridical person, such a representative shall take responsibility. Besides, juridical person shall also take responsibility.

For juridical person, regarding tortious act committed by the representative, it shall comply with the article 748. Concerning tortious act committed by staff or employee other than the representative, article 747 shall be applied.

Regarding tort responsibility of juridical person, no exceptional provision exists as one of employee because the responsibility of juridical person is stricter. If compared with normal employee, the relationship between representative and juridical person is very close. In addition, the act of representative institution is the act of juridical person himself. Thus, there shall be different responsibilities from employees. In case where the juridical person pays the damage, such a juridical person can demand compensation from the representative.

5.5. Tortious Act of public official

5.5.1. Background

In the past, some major countries did not recognize state's responsibilities. For example, in England, as old legal proverb says "king can do no wrong", state's responsibilities are not recognized. However, after that in most countries, they recognize state's responsibilities.

Like other countries, Article 39 of the Constitution of the Kingdom of Cambodia states that "Khmer citizens shall have rights to denounce, file complaint or claim against any breach of law by state and social organs or by members of such organs committed during the course of their duties".

5.5.2. Elements

The article 749 requires the following elements:

A. public official

B. Exercising public authority

C. Intentionally or negligently harming another illegally.

Element B is absolutely required so that private activities of officials do not cause responsibilities of the state.

5.5.3. Effect

According to the article 749-1, public official himself do not take responsibilities, but only state is responsible for tortious act when article 749 applies. National government or governmental entity can demand compensation only when officials committed breaches of duties seriously (Art.749 paragraph 2).

Different point to the employer's responsibility is that no exceptional-case provision for state or social organs exists and a demand for compensation by state or social organs against for public officials could be made only when there is act committed contrary to serious duties.

5.6. Animal Possessor's Responsibilities

The article 750 does not require any intention or negligence and therefore, animal possessor shall be responsible for compensating the damage if and only if they supervised properly without any fault.

5.6.1. Elements

A. Animal possessor

B. Cause any harm to another

C. Relationships between cause and effect

5.6.2. Effect

Person who shall be liable, in principle, is animal possessor without consideration of a condition of whether or not the possessor is negligent or not, meaning that the possessor shall take responsibility without making any fault. This is not permitted to be exempted from the responsibility.

Provision of this article is not focused only on "animal possessor" but also on some cases if the raised animal runs to bite the other person, the term of animal possessor does not mean to define only the animal owner, but also there must be included in animal raiser who shall take responsibility for the damage.

5.7. Product liability

5.7.1. Conditions

A. Existence of unreasonably dangerous defect

B. Movable

C. Causing damages to other people.

5.7.2. Effect

Liable person, in principle, is manufacturer and includes:

A. the manufacturer of a movable property that incorporates a defective part or materials

B. Importer

C. Person who labels his or her name on movable shall be also deemed as manufacturer and thus they are also liable (Art. 751-2-3-4).

In case where users or consumers or others suffered damages due to defective goods (products) that manufacturer sells in retail shop, such a manufacturer must take responsibilities to compensate the damage. This is the responsibility of the manufacturer.

Article 751 is stipulated in order for the users or consumers or others suffering damages due to goods (products) to be able to demand that the manufacturer liable by just proving the evidence of "defect" without having to prove that the manufacturer commits fault.

5.8. Liability for Dangerous Item

Items stated in article 752 are the highly dangerous objects. Therefore, the owner, or managers of those items shall be responsible for compensation for damages caused to others due to their dangerous items even though they are intentional or negligent.

Defenses stipulated are as follows:

A. Force majeure (unavoidable force)

B. No failure in management of hazardous objects and damage caused by the act of victim or third party.

5.9 Responsibility for Structure Affixed to Land

Article 753 is a provision which states responsibilities for structure affixed to land. Examples of structure affixed to land are buildings or fences, etc., that causes damages to others. This article requires structure owner or manager to take responsibilities for compensation for any damage.

For example, in case where the fences of leased house partially fell down and injured walker, the house owner (landlord/lessor) and tenant (lessee) shall be liable for paying a compensation for damages jointly. If manager (lessee) proves that he/she manages properly, he/she will be able to be exempted from responsibility. Nevertheless, as for the owner, there is no such an exceptional provision. Although the fence is fallen down due to construction company constructed inappropriately, the owner shall take responsibilities.

5.10. Joint tort

5.10.1. General Provision with Respect to Joint Tort

If damages have occurred because of the act caused jointly by several persons, each actor is jointly liable for the resulting harm. With respect to the scope of compensation, if the joint acts are closely associated, like a case of conspiracy, each tortious actor is jointly liable for all the damages. However, in the event of no very close association such actor can be liable only for that percentage of the total harm by establishing the percentage of his contribution, according to Article 754 of CC. please note that, even in case where there is no close relationship but wrongdoer cannot prove his individual percentage contribution, such wrongdoer cannot be exempt from the liability for all the damages.

Example 1: A Factory diffuses X substance whereas B Factory disperses the Z substance. Both X and Z substances do not harm or affect other people respectively but those substances become the toxic one by chemical reaction that harm the people residing surrounding the factories. Each factory asserts that they do not hold responsibility for damages because each of factories merely releases the substance which does not cause any harm. How do you decide with regard to this case?

Conclusion

Example 1: Based on the provision of Article 754, A and B Factory that diffuses X and Z respectively must be jointly responsible for the compensation of damages towards injured persons because harm resulted to residents near factories is caused jointly by the acts of two factories. In this case, the actors are not engaged in a conspiracy but, probably, it is impossible for A or B to

prove its individual percentage and if so, both are liable for all the damages jointly.

Example 2: X and Y drove a car and then ran over Z at the same time, Z shortly passed away.

1- X and Y ran over Z negligently and it is not clear which one hit the vital point. Who shall be liable for his case (X, Y, or both) and how much shall the liable person compensate?

2- X and Y ran over Z negligently and it's found that the injury caused by X contributed to the death of Z for 30% and Y contributed to the death of Z for 70%. Who shall be responsible? How much shall liable person compensate?

3- X and Y conspired together to run over Z and it's found that the injury caused by X contributed to the death of Z for 30% and Y contributed to the death of Z for 70%. Who shall be liable? How much shall liable person compensate?

Conclusion

1- The successor of Z may be entitled to demand the damages caused by X and Y in accordance with the provision of Paragraph 1 of Article 754 of the Civil Code and thus X and Y shall be jointly liable for all the damages.

2- The liability of damages caused by X and Y is held through percentage. X: 30%, Y: 70% according to the provision of Paragraph 2 of Article 754.

3- With respect to the act caused jointly by X and Y, it is applied according to the provision of Paragraph 1 and 2 of Article 754 and thus Both X and Y shall be jointly liable for all the damages without regard to their individual contribution percentage.

6. Other Related Rules to Torts

6.1. Fetus

Fetus in existence at the time that a tortious act is conducted shall be entitled to seek damages for the harm arising from such act after it is born according to the provision of Paragraph 1 of Article 9. Moreover, the fetus may demand

damages for emotional distress based on the provision of Paragraph 3 of Article 760.

6.2. Extinctive Prescription

The right to demand damages on account of a tortious act shall be extinguished by prescription upon:

A. The expiration of three years from the time that the injured party becomes aware that he is entitled to seek damages against the tortious actor,

B. OR ten years from the time that the tortious act occurred. This provision is regulated to be beneficial for the legal stability.

- Please remark on the Article 765, Extinctive prescription (special provision) and Article 482, Extinctive prescription period for general claim.

Chapter 6 Security

Section 1 Hypothec

Introduction

Hypothec is a type of real security right that a debtor or a third party who furnishes the property as a hypothec and the obligee reaches an agreement to impose duty over the immovable property in order to secure an obligation towards the creditor without the transfer of possession to the creditor.

Hypothec is a legal system to secure the debt by the things that are furnished as a security. One of the biggest merit of the hypothec is that debtor does not necessarily transfer the possession of the things which is the object of hypothec to the creditor because that enables the debtor to continue living on it or to exploit such things as usual even though it is hypothecated; this is distinct from pledge and transfer as security set forth in Civil Code that debtor has to transfer possession of things to creditor and from gage (according to Land Law 2001) that debtor has to transfer certificate of possession of thing to the creditor. Another advantage of hypothec is that debtor is able to create multiple hypothecs on immovable towards multiple creditors and the order of payment depending on the order of registration of hypothecated land.

Therefore, it is very important to understand the creation of a hypothec contract and the effect of a hypothec contract because if the hypothec contract is made but it doesn't meet the legal requirement, it will not have legal effect and the creditor also doesn't have the real security right over the hypothecated immovable thing by the debtor as well. Actually, the creditor may not enforce his hypothec or be entitled to obtain satisfaction of his claim in preference to other creditors.

More significantly, hypothec set forth in this Civil Code may only be enforced over the immovable thing, perpetual lease, or usufruct whereas hypothec over the movable is stipulated in the framework of special laws.

1. Definition of Hypothec

Based on article 843 of Civil Code, "Hypothec" is defined as a right that a hypothee is entitled to obtain satisfaction of his claim in preference to other creditors out of the immovable property that has been furnished as security by the debtor or a third party without transfer of possession.

With regard to this, the hypothec is a legal basis that is created to preserve the interest of creditor. A creditor who is entitled to hypothec to secure debt has a priority to other creditors who don't hold hypothec.

Example:

Mr. B is a creditor of Mr. A over $10,000. Mr. A furnished the immovable L as hypothec to Mr. B to secure debt. Mr. A also has other creditors such as Mr. C and D. If the due date to pay debt arrives, but Mr. A doesn't have money to pay, Mr. B may enforce his hypothec right over immovable L owed by Mr. A. It is assumed that such immovable is sold at the price of $10,000 only. The amount of money from the sale has to be paid only to Mr. B. Other creditors won't obtain the payment arising from a sale of the immovable L. But Mr. C and D may be still entitled to demand the payment from Mr. A.

2. Creation of Hypothec

2.1. Requisite of creating hypothec between parties

As mentioned above, the understanding of requisite towards parties in the creation of hypothec is so important to enable the creditor to enforce hypothec.

Article 844 of Civil Code states that a hypothec is created through an agreement reached between a creditor and a debtor or third party that furnishes immovable property as security.

According to aforementioned article, we find out that the requisite for parties to create hypothec is the agreement between creditor and debtor or third party that only furnishes immovable property as security but it doesn't require the registration.

The question is whether hypothec requires the party to create the oral or written contract creating hypothec in order to be effective? Because the

mentioned article 844 doesn't limit the formal condition for creating hypothec contract of parties; the agreement can be made in any form, orally or in document. However, this Code sets forth the formal condition for creating hypothec contract to enable party to assert hypothec against the third party that such hypothec contract is notarized and registered in the land registry (Article 845, Civil Code). Therefore, Notarial document or the registration is not a requisite of hypothec contract towards party which means that either oral or written instrument is effective for parties. Even if they do not create the written instrument hypothec, the hypothec agreement is still effective. It may, however, cause difficulty for them to prove the evidence before the court and more significantly, it may be difficult to the hypothee to enforce his hypothec right because according to article 496 of code of Civil procedure requires the title of execution one of which is Notarial document certified by the notary. Therefore, even though Civil Code doesn't require the formal condition of instrument creating hypothec, parties shall create the notarized instrument hypothec to ensure the quickness and easiness in execution of hypothec.

Example:

Mr. A wanted to borrow $10,000 from Mr. B. Mr. A owns a piece of land L. In order to secure debt, Mr. B required Mr. A to furnish his land as hypothec to him. Mr. A and Mr. B entered into a written contract, but such instrument hypothec was just created privately not certified by notary and it wasn't even registered in the land registry either. In this case, not only loan for consumption but also the creation of hypothec is effective between Mr. A and B. If Mr. A doesn't have money to pay debt to Mr. B when the due date comes; Mr. B can file a motion with the court for enforce a hypothec right. By the way, even though notarization or registration is not required for creation of hypothec right, Notarial document, the judgment or the document having the same effect is required at the time of enforcement in order to prove the existence of right. Therefore, again, it is better and easier for the creditor to have a Notarial document.

The problem will arise when Mr. A has other creditors such as Mr. C and Mr. D and he only owns that immovable L. Can Mr. B bring his hypothec to assert against Mr. C and Mr. D or not? In this case, is Mr. B entitled to rights of the

payment stemming from a sale of immovable L prior to Mr. C and Mr. D or not?

What will happen when Mr. B and Mr. C didn't register their hypothec, but Mr. D, the creditor, did register the hypothec right? To answer this question, please examine the asserting hypothec against third party in the following.

2.2. Requirement for perfection of hypothec contract

What is the requirement for perfection of hypothec contract?

Legal relationships sometimes contain two different conditions such as condition of effect for parties and asserting hypothec for the third party who is not a party. Hypothec which is the right arising from the contract of parties also has the particular condition to assert against the third party. Because hypothec is the right that influences not only on the creditor and debtor, but also on other third parties such as person purchasing hypothecated land and other creditors who are not hypothee. Thus, it is necessary to understand condition of legal requirement to enables the hypothee to assert the hypothec against the third party.

According to article 845 of the Civil Code, a hypothee may not assert the hypothec against a third party who is not the hypothecator unless the instrument creating a hypothec is notarized and registered in the land registry.

Ground requiring the registration in the land registry is public notice. Because when some immovable property is hypothecated,, a hypothee would satisfy his claim from such hypothecated in preference to other creditors. Therefore, it demands a public declaration of such rights through a registration in land registry in order to enable the third party apart from parties to see and to be aware of those rights. When the hypothec was already registered, even the purchaser of hypothecated immovable property by registration may not deny the effect of the hypothec right. In other words, the purchaser only acquires the land with the burden of hypothec right when the hypothee can assert his hypothec. In conclusion, to assert a hypothec against third party, the requirement must be met in the following:

- hypothec contract shall be in writing

- hypothec contract shall be notarized.
- hypothec contract shall be registered in the land registry.

Example:

1- X has ownership of land (L) which is worth $3,000. Land is leased to a third party. X wants to borrow money from Y $1,000. Y suggests him to furnish his land (L) as hypothec.

Does X have to transfer the ownership title of his land to Y to secure the debt?

Answer: X needs not transfer his ownership to Y if X and Y agree that L be hypothecated.

2- How much money he expect to borrow through furnishing his land (L) as security?

Answer: It is under $3,000 which is the value of the land.

3- X and Y agreed that X shall furnish (L) as hypothec. Y agreed to lend X $1, 000. After that, X gave his land (L) to Z. Can Y enforce hypothec or not? If not, what shall Y have done?

Answer: Y may not enforce the hypothec against Z or demand the land from Z to sell at auction to receive the debt payment if Y didn't notarize and register the hypothec right because Z is a third party. Therefore, to enforce the hypothec, Y shall register the hypothec otherwise Y just only lodges a normal complaint to demand indemnification from X.

4- X furnished his land as hypothec to secure his debt $1,000. This hypothec is notarized and registered in the land registry. X wants to sell his land to Z. Can he do that?

Answer: X may sell the land. However, even though he sold the land to Z, Z can acquire the land with the burden of hypothec. Therefore, the purchase price must be lower than $3000 because of risk that X enforces his hypothec right.

3. Effect of Hypothec

3.1. Scope of Effect of Hypothec

When a hypothec is created over a piece of land, the hypothec has the effect on the properties attached to that land including a building existed on the hypothec land, whether the building was constructed before or after the creation of hypothec. (Article 846)

This is because, according to Article 122 set forth in the Civil Code, things attached to land or comprising a part thereof, particularly buildings or structures immovably constructed on land is the component of land. Therefore, the hypothec will have the effect on what is the component of the land, too.

Example:

Mr. A owns a piece of land. Mr. A constructed a building on that land prior to his creation of hypothec. After that, Mr. A furnished the land as hypothec to Mr. B. At that time, the effect of hypothec of Mr. B comprised on both land and building.

Hypothec over immovable things do not extend to the either legal fruit or natural fruit arising from the immovable things (Article 848). Because hypothec is created on the exchange value on the immovable things to secure the obligation but hypothecator over the immovable is still entitled to the right to use and the right to receive income and the benefit over the immovable; thus, fruit belongs to hypothecator. It means that although land or building is already hypothecated, the rental fee arising from the land or building still belongs to hypthecator. However, when the hypothecated immovable is sold by the enforcement of hypothec, the purchaser will fully make acquisition of the ownership and hypothecator will lose the ownership over the immovable; the right to use and the right to receive income and the benefit on the immovable thing of the hypothecator will be extinguished too. Therefore, art.848 and art.849-2 say that hypothec will have the effect over the fruit when the hypothecated immovable is attached and the hypothee can attach fruit. Procedure of enforcement with regard to the fruit after the attachment is stipulated in Article 516 of Code of Civil Procedure.

3.2. Subrogation

As already explained, hypothec is the right on exchange value of specific object. Therefore, a hypothee may enforce his hypothec against money or other things which the hypothecator is entitled to receive by reason of the sale or loss of, or damage to, the object thereof (first sentence of paragraph 1 of article 849) because they are considered transformation of the value of the hypothecated immovable property. But a hypothee may not enforce the hypothec after the money is paid or the thing is delivered to the hypothecator (Second sentence of paragraph 1 of article 849). Because although hypothec is created on and may be enforced against only the specific thing; such money or other things cannot be distinguished from other property after they are delivered to the hypothecator. Thus, the hypothec can't be enforced against such property anymore. Therefore, if the creditor wants to enforce the hypothec through subrogation over the thing, the creditor has to enforce the subrogation based on hypothec before the delivery of money or thing by reason of the sale or loss, or damage to, the object thereof to the debtor.

Example:

Mr. A created hypothec over his building to Mr. B to secure his debt that is $10,000. But Mr. C burnt the building. So, Mr. B, the hypothee, may demand compensation arising from the burnt building from Mr. C through the subrogation over the thing of the hypothee of the thing. But if Mr. C has already compensated for the damage of the building to Mr. A, Mr. B may not demand the indemnification from Mr. A through subrogation because the compensation for the damaged building that Mr. A received already became Mr. A's normal property. But Mr. B still may demand the borrowed money from Mr. A as a normal creditor.

3.3. Right of Indemnification of a Third Party Security Provider

If a person, who creates a hypothec to secure the debt of another, discharges the debt or loses ownership of the hypothecated immovable as a result of the enforcement of the hypothec, such person is entitled to demand

indemnification to the debtor in accordance with the provisions of this Code regarding guaranty (Art. 850 of the Civil Code). This provision responds to the Article 911 and some other relevant provisions of the Civil Code.

Example:

X is a debtor who owed $1,000. Y is a hypothee and Z is a third party security provider who secures a debt around $1,000.

Y enforced his hypothec and obtained adequate compensation and Z lost his ownership (other person acquired such ownership)

In this case, Z is entitled to demand indemnification of $1,000 from X.

Differences between third party security provider and guarantor

Main differences between the rights and obligation of the third party security provider and guarantor are two. One is that a guarantor assumes obligation while a third party security provider doesn't and the other one is that a guarantor is responsible for all the amount of guaranty while responsibility of security provider is limited to loss of furnished property at most. Please see the example below:

Mr. A is a creditor whereas Mr. B is a debtor. Mr. C owns an immovable property and then he furnished his immovable as a hypothec to secure a debt of Mr. B. At that time, Mr. C is called a third party security provider in this case. Mr. C holds the similar position as an individual guarantor, but it is different. Mr. A who is the hypothee is entitled to only demand Mr. B, a debtor, to effect performance, not to demand from Mr. C. If Mr. B effects the performance to Mr. A, Mr. A may not enforce the hypothec anymore. However, if Mr. B cannot effect the performance to Mr. A; the immovable property of Mr. C will be subject to an order of attachment made by Mr. A.

A difference from guaranty is that, if Mr. C is the guarantor, Mr. A, a creditor, has the claim against Mr. B and Mr. C. This means that Mr. A is entitled to demand either Mr. B or Mr. C to effect the performance.

3.4. Raking of hypothec

As mentioned earlier, debtor may create hypothec on only one property to multiple creditors. That is the most advantageous among many points compared to gauge.

Based on Article 851 of Civil Code, it says where multiple hypothecs have been created on an immovable in order to secure multiple debts, the rank of their priority shall be based on the order of their registration.

3.4.1. Meaning of the Ranking of Hypothec

Where the enforcement of hypothec on immovable property, there are certain provisions set forth in Code of Civil Procedure that are closely related to this topic which will be put into discussion even though we are studying the substantive laws. The procedure of the enforcement is to cope with the conflict between multiple hypothec or ones between hypothec and holder of real rights or real security rights over an only immovable property which is the subject matter of the enforcement of hypothec. These particular will be illustrated in the following:

A- In principle, real security rights are enforced by the compulsory sales to obtain satisfaction of claim in preference from proceeds arising from such sale. Shall other real security rights than exercised one on the immovable property such as hypothec be extinguished after sale? According to first and second paragraph of Article 510 of the Code of Civil Procedure, real security rights, usufructuary real rights, and leasehold on the immovable that can be held up against security rights of the execution creditor shall remain in existence upon compulsory sale as enforcement of security interest. Any right on the immovable other than those provided above shall be extinguished by the compulsory sale.

Based on this article, we've found that if the application for the commencement of procedure of enforcement of a real security right is commenced by a creditor who possess any real security right in advance, other real rights including the real security rights that exist in the rank of priority higher than the a person holding the real security right who applies for the enforcement in advance won't be extinguished by the procedure of the enforcement (Article 510, Para. 1). In contrast, if real rights or other real security rights have the rank of priority lower than the real security right that applies for the enforcement in advance, the real right or the real security right on the immovable property will be extinguished by the enforcement (Article 510 Para.2 of the Code of Civil Procedure).

Example:

Mr. A, B, and C are the hypothee on a plot of land. Mr. A is the hypothee in the first ranking; Mr. B is the hypothee in the second ranking; and Mr. C is the hypothee in the third ranking. If Mr. A files a motion to enforce the hypothec prior anyone, at that time, Mr. B and Mr. C may also participate in the distribution. But if Mr. B or Mr. C files a motion to enforce his hypothec, Mr. A may not participate in the distribution because the hypothec of Mr. A is not extinguished. Mr. A may still file a motion to enforce hypothec against the third party who makes an acquisition of ownership over that land by the compulsory sale.

Therefore, the Cambodian Civil Code adopts the principle of successively acquiring real security right which means that the purchaser of an immovable property of the enforcement successively acquires any burden existing on the immovable property after the compulsory enforcement. This principle pays the attention to preserve a person holding the real security right on the immovable property. For such principle of successively acquiring the real security right, the purchaser may buy the immovable at lower price than the real price of that immovable property without burden of real rights and real security rights because he has to assume the duty of the obligation secured by the real security right which is the fundamental condition.

Also, Paragraph 1 of the Article 449 of code of Civil Procedure says the purchaser has to be responsible to satisfy claim secured by the real right that the purchaser receives acquires successively.

More significantly, the hypothee in the first rank may obtain satisfaction of claim in preference to the other hypothee in the next order. Creditors don't obtain the payment proportionally to the amount of the claim.

Case Study
X is the hypothec right holder in the first rank securing 400 Dollar of Mr. A.
Y is the hypothec right holder in the second rank securing 300 Dollar of Mr. A.
Z is the hypothec right holder in the third rank securing 200 Dollar of Mr. A.
The object of hypothec is the land (L) owned by Mr. A

1-1. X applied for the enforcement of his hypothec. Hypothecated land (L) was sold at the price of $600.

Who shall get the money arising from the sale? How much? Which right shall remain and be extinguished?

Answer: By the application of enforcement by X, her own hypothecs and the hypothecs in the lower rank would be extinguished. Then, proceeds of 400 dollars would go to X and remained 200 would go to Y but would not go to Z. Distribution would satisfy all the amount of claim of X and the part of claim of Y. remaining amount of claim of Y is 100 dollars and Z, 200 dollars.

1-2. What if the price of sale is worth $2,000?

Answer' All the hypothecs would be extinguished. Proceeds go to all the creditors because the amount is enough to satisfy all the amount of claim. Then remained 1100 dollars go to A.

No claim right would continue to exist because of the satisfaction.

2- Y applied for the enforcement of his hypothec. Land (L) was sold at $600.

Who will be entitled to receive the money from selling that land and how much?

Which rights shall remain and be extinguished?

Answer: Application by Y would extinguish her own hypothec and the hypothec of Z because hypothec of Z is in the lower rank than Y but it wouldn't extinguish the hypothec of X. Y would acquire 300 dollars in preference and then Z would acquire 200 dollars. Remained 100 dollars would go to A. claim right and hypothec of X would remain.

3- Z applied for the enforcement of his hypothec. Land (L) was sold at the price of $600

Who will be entitled to receive the money from selling that land and how much?

Which rights shall remain and be extinguished?

Answer; Application by Z only would extinguish only her own hypothec because other two hypothecs are in the higher rank than one of Z. Then, 200 dollars of proceeds would go to Z and remained 400 dollars would go to A. Claim rights and hypothecs of X and Y would remain.

The case below is independent from the above case study.

X is the hypothee in the first rank securing money $400.

Y is the hypothee in the second rank securing money $300.

The object of hypothec is the land (L) owned by A. Based on the examination of Z, the price of land (L) is worth $1,000, how much is amount of money that X expect to borrow from Z through furnishing that land (L) to be security?

Answer: if estimated price of L is 1000 dollars, Z can expect to acquire the 300 dollars from L because the 700 dollar value is already furnished as a security. Therefore, if the interest is not taken into consideration, Z can lend 300 dollars to A at most and would suffer loss.

3.5. Scope of claim secured

According to article 852 paragraph 2, where a hypothee is entitled to receive interest or periodic payments, he can enforce the hypothec only in regard to payments due for the last two years. However, if a special registration was made in regard to periodic payments for an earlier period after they became due, the hypothec may also be enforced in regard to such payments from the time of such registration. Where a hypothee is entitled to demand damages due to the debtor's default, the provisions of paragraph (1) of article 852 shall apply in regard to the last two years. However, the damages together with interest and other periodic payments may not exceed the total amount due over those two years.

The reason why the law mentions so is because it is necessary to preserve the other hypothee who is in the lower position in order to know how much value of immovable property is furnished as security.

Example:

Mr. A furnished his land, of which value is 2000 dollars, as hypothec to Mr. B to secure the debt of $1,000 on 06/07/2006 with the annual interest of 10%. The delay of interest is 20%. The due date of payment is on 06/07/2011. Mr. A wants to borrow more money from Mr. C. For example, today is 06/07/2015. Therefore, last 2 years that will be calculated is in 2013. Therefore, A can get the 1400 dollars from the hypothec at most and thus C shall lend 600 dollars

at most (if C takes the interest into consideration, C shall lend less than that.).

Example:

Mr. A is debtor who owns a piece of land that is worth $500. Mr. A furnished that land as hypothec to Mr. B in order to secure a debt from 2001 to2011 for the amount of $100 with the annual interest of 10%. Mr. A also borrowed money from C by comprising his land the object of hypothec to Mr. C to secure a debt $200 from 2005 to 2011 with the annual interest of 10%. Mr. A hasn't paid the interest to Mr. B for five years which equals $50. Mr. A also hasn't paid the interest to Mr. C for five years which equals $100. Suppose that land is worth $500.

In this case, by the application of enforcement of hypothec right by B, B gets = 100 + (100 X Interest 10% X 2years) = $120

Mr. C gets = 200 + (200 X interest 10% X 2 years) = $240

Please note that Mr. A still owes Mr. B the interest of $30 and Mr. C the interest of $60. Mr. B and Mr. C may still demand such interest from Mr. A as a claim right holder but may not demand as a hypothec right holder regarding the remained amount.

4. Enforcement of Hypothec

According to the provision stipulated in Civil Code, if hypothecator failed to perform his obligation, a hypothee may apply for an enforcement of his hypothec to the court for compulsory sale of hypothecated immovable. In other words, the hypothee may not enforce the hypothec if the obligation is performed (Article 853 of Civil Code). The procedure of the enforcement of hypothec is set forth in the Code of Civil Procedure.

Example:

Mr. B is a hypothee of $1,000 over land L owned by Mr. A. If Mr. A doesn't pay a debt on a due date, Mr. B may apply for the compulsory sale. It is assumed that immovable L is sold at the price of $1,200. Thus, the price which is worth $1,000 has to pay the creditor, Mr. B. But if the land is sold at the price of only $800, Mr. A still owes Mr. B $200. And Mr. B may still be entitled to demand the remaining debt of $ 200 from Mr. A, but not in the name of the

hypothee because the hypothec of Mr. B is extinguished due to the sale of hypothecated things through the court procedure of compulsory execution. Therefore, the remaining claim of Mr. B is a normal claim.

4.1. Purchaser

With regard to the enforcement of hypothec, there are a number of particulars that the movant should comprehend:

A- A debtor may not become a purchaser of the immovable property that he furnishes as a hypothec because if the debtor has enough money to purchase the hypothecated immovable property, he should pay debt to the creditor and that is better than waste of time and expenditures over such enforcement of hypothec (Article 438 of Civil Procedure Code).

B- On the other hand, the hypothee or third-party security provider may purchase the hypothecated immovable property because no provision prohibits the hypothee or the security provider from offering the purchase in general.

C- If the proceeds of the immovable is not sufficient for the procedural cost of the execution, such a procedure is considered to be improper and useless. Therefore, art.435 requires the creditor in execution to offer that he will purchase such immovable property in the fixed price in one week after a notification to the creditor in execution when the surplus is unlike to arise after paying the procedural costs. If the creditor fails to do so, the court must cancel the application of the execution. Therefore, prior to the enforcement of hypothec, execution court must appoint the evaluator and order him to evaluate the immovable based on the research concerning the feature of immovable, relationship of possession, and other current situation.

A creditor who makes a motion of the hypothec enforcement must bear to pay the execution cost and procedural cost to a court in advance according to art.375 of CCP.

4.2. Rules Adjusting the Compulsory Execution When Multiple Creditors on Immovable Property Which is the Subject Matter of Hypothec Exist

As mentioned earlier, the compulsory execution of hypothec is not very complicated in case there is only one object of hypothec and a hypothee, but

the execution will be more complicated when there are multiple hypothees or the object of hypothec is more than one that it is necessary to require provision to adjust the execution.

4.2.1. Compulsory Execution in Case of Multiple hypothees

In respect of a compulsory execution in case of multiple hypothees on an immovable, many questions are raised such as "Can only hypothee in the first rank apply for the enforcement of hypothec?", "May the hypothee who is in the second or ultimate rank file a motion for the enforcement of hypothec prior to the hypothee in the first rank?" "What is the effect of the motion for the compulsory execution of the first rank hypothee" "Are these hypothecs extinguished simultaneously or some of which must remain existence after the compulsory sale?", "how much does each hypothee receive the distribution from the proceeds?" and so on.

To respond the aforementioned questions, Article 510, Paragraph 1 and 2 of Code of Civil Procedure says Real security rights on the immovable that can be held up against security rights of the execution creditor shall remain in existence upon compulsory sale as enforcement of security interest. Any right on the immovable other than those provided above shall be extinguished by the compulsory sale. Anyhow, Article 449, Paragraph 1 of Code of Civil Procedure stipulates that the purchaser shall be responsible to satisfy such secured claim guaranteed by the security right that the purchaser acquired.

No provisions of both substantive law and procedural law of enforcement of real security right prohibit the lowest rank hypothee from filing a motion for the compulsory execution prior to the highest rank hypothee.

This means that, if the prioritized rank hypothee applies for the enforcement, the lower rank hypothec will be extinguished subsequently. On the other hand, if the subsequent rank hypothee files a motion for enforcement, the hypothec of higher rank hypothee won't be extinguished. The question is what such requirement for perfection refers to; it refers to the order of registration of the real security rights. The question is how the proceeds would be distributed when more than one hypothecs are extinguished. In this regard, the distribution of the proceeds shall be entitled to the order of priority right, not of proportion.

To clearly understand in respect of the procedure of enforcement, please examine the case study below:

Case of Multiple Hypothees

For instance, the price of land (L), which is owed by A, is estimated to be worth $1,000. For simplification, interest, procedural costs are not taken into consideration.

X is the first rank hypothee who secures 500 dollar debt of A.

Y is the second rank hypothee who secures 400 dollar debt of A.

Z is the third rank hypothee who secures 300 dollar debt of A.

1- What hypothec rights still remain in existence and are extinguished after X's hypothec is enforced? How much is prices of land (L) estimated to be sold? And how much distribution will each hypothee receive?

Answer: According to paragraph 1 and 2 of Article 510 of Code of Civil Procedure, if X applies for the enforcement of the hypothec in advance of someone else, the hypothec of both Y and Z will be extinguished upon the compulsory sale because their hypothecs are security rights which can't be held up against A's hypothecs. Instead of extinction of their rights, Y and Z will participate in distribution automatically. The minimum sale price of land (L) will be $1,000 because the original value of L is $1000 and all the hypothecs are extinguished by this enforcement. When a purchaser buys L at the minimum sale price, X receives $500; Y receives $400; and Z receives $100.

2- What hypothec still remain remain in existence and what hypothec is extinguished after Y's hypothec is enforced? How much price of land (L) is assessed for sale? And how much will each hypothee receive?

Answer: If Y applies for enforcement of hypothec prior to anyone, the hypothec of Z will be extinguished at that time because of paragraph 2 of article 510 of Code of Civil Procedure. But X's hypothec is not extinguished because of paragraph 1 of article 510 of CCP. Z may participate in a distribution with Y too. But X may not participate in the distribution; in contrast, X may apply to enforce his hypothec later on. The minimum sale price will be $500 because the purchaser will acquire the land with the burden of hypithec securing 500 dollars. When a purchaser buy at the minimum price, Y receives $400 and Z

receives $100.

3- What hypothec right still remain in existence and what hypothec is extinguished after Z's hypothec is enforced? And how much will each hypothee receive?

Answer: If Z applies to enforce hypothec prior to anyone, the hypothec of Z will be extinguished. But the hypothec of both X and Y won't be extinguished because of paragraph 1 of article 510 of Code of Civil Procedure. X and Y may not participate in the distribution. In turn, X and Y may apply for enforcement of their hypothec against the acquirer of land (L) later on. The minimum sale price will be $100 because purchaser has to have burden of X and Y's hypothec securing $900 in total. When purchaser buys the land at this minimum sale price, Z receive $100 only.

Based on the aforesaid case, whichever hypothee applies for enforcement prior to anyone, distribution that Z receives is still the same amount as long as it is sold at the each minimum sale price.

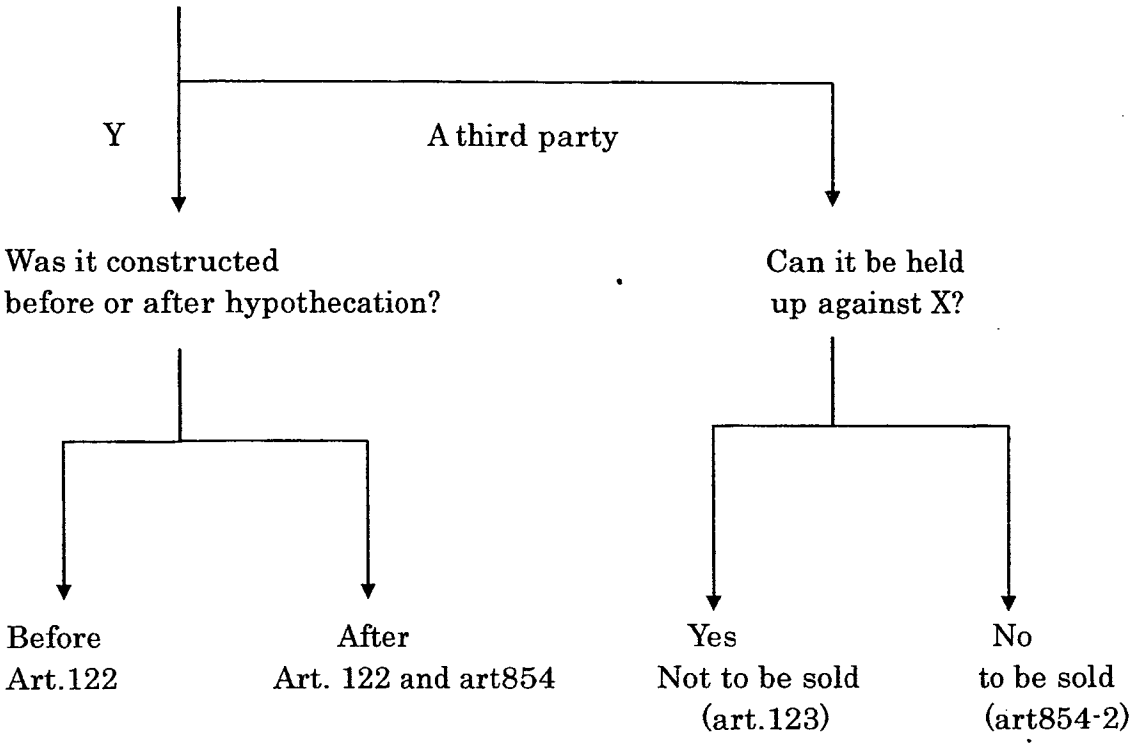
4.2.2. Compulsory Execution over Building Owned by a Third Party

According to Article 854 of Civil Code, where the hypothecator or a third party erects a building on land after it is hypothecated, and the hypothecator owns that building, the hypothee may demand the compulsory sale of the building together with the hypothecated land. However, if the price of the land together with the building thereon is less than the price of the land as a vacant plot, the hypothee may demand that the hypothecator remove the building prior to the compulsory sale of the land. Such stipulation is in accordance with Article 122 of Civil Code, saying that things attached to land or comprising a part thereof, particularly buildings or structures immovably constructed on land are components of the land.

In case where the third party owns the building on the hypothecated land based on perpetual lease, usufruct or lease, if the third party may not assert such perpetual lease, usufruct, or lease against the hypothee, the hypothee may demand the compulsory sale of the building together with the hypothecated land.

Chart

Who owns the building at the time of enforcement of hypothec?



4.2.3. Third party acquirer's right

According to the Article 855 and 856 of Civil Code, a third party acquirer of a hypothecated immovable which it is not through the compulsory sale may become the purchaser at the compulsory sale and obtain reimbursement from the proceeds of the sale of the immovable with priority over the hypothee.

Example 1: X is the hypothee securing the claim in the amount of $1,000. Y is the hypothecator on land (L) which is worth $3,000. Z bought the land from Y in the price of $2,000. Z spent the cost of $500 to increase the value of that land which goes up to $3,500. In case, X afterwards demands to sell that land at compulsory sale.

Suppose that, the value of the land that is assessed is worth $3,500; Z purchased that land if he wants. In this case, the price of the compulsory sale is worth $3,500. If Z purchased the land, at that time, right to demand compensation will be extinguished because the purchaser of the immovable

property by the compulsory sale – a third party acquirer and the hypothee is a single person.

If Z doesn't buy, Z may only enforce his rights in order to demand the reimbursement of $500 from X because the price increased by the improvement of Z.

Example 2: Mr. A furnished his land L as hypothec to Mr. B who is the first rank hypothee. Next, Mr. A created a perpetual lease over land L to Mr. C by registering in the land registry. Mr. A transferred land L to Mr. D. Mr. B is the first rank hypothee who enforced the hypothec on land L and Mr. E is the purchaser of that land L via the compulsory sale.

When Mr. B enforced hypothec on land L, the perpetual lease cannot be asserted against hypothee because it is created after the hypothec; so the perpetual lease of Mr. C may not be asserted against the hypothec of Mr. B. So, Mr. E who purchased that land via the compulsory sale has the same status as Mr. B who is the hypothee. This means Mr. E may acquire the ownership over land L without any burden of the perpetual lease.

For Mr. D, (when he got this land via the transfer from Mr. A) may not make Mr. D get the ownership over this land because this land is both hypothecated and in the perpetual lease. If Mr. D wants to acquire land L without any burden, Mr. D has to comply with Article 855 regarding Third party acquirer's application to purchase, which means that Mr. D may apply to purchase this land via the compulsory sale the same as Mr. E. Otherwise Mr. D may lose the ownership over that land.

4.2.4. Simultaneous or Staggered Application of Proceeds in Case of Joint Hypothec

Joint hypothec is a kind of hypothec of which subject matter is more than one, but it is furnished to secure the claim.

According to Article 857 of Civil Code, saying that where two or more immovable properties are hypothecated to secure the same claim and their proceeds from compulsory sale are to be applied simultaneously to its satisfaction, the burdens of satisfaction of the claim shall be allocated in proportion to the value of each immovable.

If the proceeds of only one of the immovable properties are to be so applied, the hypothee may obtain full satisfaction of his claim. In this case, the

hypothee next in the rank may exercise the right of the prior hypothee via subrogation to the extent of the amount that the prior hypothee would have received out of the other immovable properties in order to avoid unfairness that the proceeds may be changed by the arbitrary of the hypothee in the higher rank. In other words, by subrogation, every hypothee in the lower rank than joint hypothee can get the same amount in the end. Please take a look at the following example.

Example:

Mr. A is the hypothee of $ 600 over two plots of land owned by Mr. B. The first land is worth $800 and the second is $1,200. When B is unable to pay on the due date of payment, Mr. A may enforce the hypothec on both lands of Mr. B or he may choose anyone of these two. But Mr. C is the second rank hypothee on the first land in the amount of $600. Mr. D is the second rank hypothee on the second land in the amount of $900.

In case A enforces both hypothecs simultaneously, because the lower rank hypothec would be extinguished, the amount of the proceeds from both lands may sum up to 2000 dollars. Then, according to art.857-1, A get 240 from the first land and 360 from the second land. Therefore, C gets remained 560 from the first land and D gets 840 from the second land.

In case Mr. A enforces the only hypothec over the first land. The proceeds may be $800.At that time, Mr. A is entitled to receive $600 from the price of first land not just 240, according to art.857-2 first sentence and the other $200 is delivered to Mr. C and, in this case, without art.857-2 second sentence, C may not get any more from the second land because his hypothec is already extinguished while D can get full satisfaction of 900 because A has already acquired full satisfaction.

Second sentence of the art.857-2 allows C to subrogate the hypothec of A over the second land to the extent A can acquire from the second land (360). Therefore, C can get 560 as total and D get only remaining 840.

In case Mr. A enforce his hypothec on the second land which is worth $1,200 first. At that time, Mr. A received $600 from the second land according to art.857-2 first sentence and the remaining money of $600 is paid to Mr. D. in this case, based on art.857-2 second sentence, D can subrogate the hypothec of A over the first land to the extent A can get from the first land (240).

Therefore, by subrogation, D can get 240 from the first land and C can get remained 560, which equals to the result of simultaneous exercise of the hypothec.

5. Disposal of Hypothec

5.1. Sub-hypothecation

A hypothee may hypothecate his right of hypothec in order to secure the debt of himself or another. This is referred to as 'sub-hypothecation'.

Where a hypothecated thing is sold by compulsory sale and the proceeds are apportioned, the sub-hypothee may receive satisfaction of his claim from and to the extent of the amount to be apportioned to the hypothee. However, during the period that the claim of the sub-hypothee has not yet become due, the sub-hypothee may demand only that the amount to be received be officially deposited.

For example: Mr. X is the hypothee who secures the debt of Mr. Y in the amount of $1,000 over the land L which is owned by Mr. Y. Mr. X owes $2,000 to Z and he then hypothecates his right of hypothec to secure his claim with respect to Mr. Z.

In this case, Mr. Z may receive the amount of $1,000 from the sale of land L with priority.

- If the due date of X's obligation has not come yet, Z can demand that 1000 dollars shall be deposited

Requirement to be effective: sub-hypothecation is not effective where it is not notarized and also registered.

Sub-hypothecation may not be asserted against the principal debtor, a guarantor, hypothecator or their respective successors unless the principal debtor is notified of such disposal or consents thereto. Notice or such consents are necessary for them to be aware of who the true hypothee is.

5.2. Transfer or Waiver of Hypothec

A hypothee may transfer or waive his right of hypothec for the benefit of (an)other creditor(s) of the same debtor.

A transferee of a right of hypothec may exercise the received right of hypothec as security for his own claim right. This means that if a hypothec is transferred, the hypothee who has transferred such hypothec will become the creditor without hypothec whereas the creditor who receives the transfer of hypothec will become the creditor with hypothec. Briefly, between the parties of the transfer of a hypothec, the transferee's claim has greater priority than the claim of the transferor.

A person who waives a right of hypothec may not thereafter assert the right of hypothec against the creditor(s) for whose benefit the waiver was made. This means that between the parties of waiver of the right of hypothec, both parties cannot assert the priority right against each other.

All in all, transfer and waiver of hypothec are similar concept to each other, but there is a difference. What is transferred or waived has priority with respect to each other.

Example: Mr. X has the first rank hypothec right over land L which secured $400 debt. Mr. Y has the second rank hypothec right which secured $200 debt. Mr. Z is the third rank hypothee, having a claim of $600. Mr. A is a creditor who has a claim of $400 without security. Mr. B is the debtor hypothecator of land L. Let's assume the land L is worth $1,000.

1. Mr. X waives his hypothec for the benefit of Mr. A and this waiver is registered. After that, Mr. X exercises his right of hypothec. Who is eligible to receive a distribution and how much?

2. Mr. X has transferred his hypothec for the benefit of Mr. A and such transfer is registered. Next, Mr. A has exercised his hypothec. Who is eligible to receive a portion and how much will they get?

Conclusion:

1. The normal distribution shall be as follows. (X:400, Y 200, Z400) By waiver, X may not assert his priority against A, for whose benefit X waived his hypothec, but still assert his hypothec against Y and Z. As a result, the distribution to X shall go to X and A in proportion of their claim rights and the remaining distribution goes to Y and Z as normal.

2. In case of transfer, the transferor loses the right and the transferee shall acquire the right instead. Therefore, the result is as follows.

Claim	Normal distribution	Waiver of hypothec	Transfer of hypothec
Mr. X: 400	400	200	0
Mr. Y: 200	200	200	200
Mr. Z: 600	400 (remaining 200)	400	400
Mr. A: 400	0 (remaining 400)	200	400

5.3. Transfer, Waiver or Change of Ranking

A hypothee may transfer or waive his priority ranking for the benefit of another hypothec creditor of the same debtor. Moreover, a hypothee may change the priority of his ranking among multiple hypothees with the consent of all the other related hypothees. However, where such a change would affect the interests of another party, such party's consent must be obtained.

Where the object of a right of hypothec is sold by compulsory sale and the proceeds are apportioned among multiple hypothees, a transferee of a priority ranking in regard to the right of hypothec may receive satisfaction for his claim from in preference and to the extent of the total amount to be apportioned to both the transferor and the transferee.

Where the object of a right of hypothec is sold by compulsory sale and the proceeds are apportioned among multiple hypothees, a hypothee who has received a waiver of a priority ranking in regard to the right of hypothec may, between himself and the hypothee who has waived the priority ranking, receive equal repayment from and to the extent of the total amount to be apportioned to them.

A hypothee who consents to a change in priority ranking may enforce the right of hypothec in accordance with such consent.

The transfer and waiving of the ranking of hypothec is similar to the transfer and the waiving of hypothec. However, one difference in the subject matter of

transfer and waiver of ranking is the rank. The person waiving or transferring the rank of personal benefit is also the creditor of the hypothec.

Example: Mr. X has the first rank hypothec right over land L for which secured $400 debt. Mr. Y has the second rank hypothec right which secured $200 debt and Mr. Z is the third rank hypothee, who has claim of $600. Mr. A is the creditor having the claim of $400 without security. Mr. B is the hypothecator of land L. Let's assume the land L is worth $1,000.

1- Mr. X waived the hypothec for the benefit of Mr. Z and this waiver is registered. After that, Mr. X has exercised his own hypothec. Who will receive the distribution and how much they will get?

2- Mr. X has transferred the rank of hypothec for the benefit of Mr. Z and this transfer was registered. Mr. Z then exercised the hypothec which was transferred. Who will receive the partition and how much they will get?

3- Mr. X, Y and Z agreed to change their rank. The newly agreed ranking is Mr. Y, ranked first; Mr. Z, ranked second; and Mr. X ranked third. How many hypothees will be provided with the share?

Conclusion

1. In this case, as a result of waiver, X and Z receives the distribution in proportion to their amount of claims to the extent of original distribution to them (800). Therefore, 320 of 800 dollars goes to X and remaining 480 goes to Z. this doesn't affect the amount of distribution to other hypothee (Z)

2. Unlike waiver, transferee acquires the preference to the transferor, therefore, the distribution goes to Z first to satisfy his claim and then the remaining 200 goes to X.

3. The change of ranking is effective among agreed parties and the distribution is apportioned as they agree.

Claim	Normal distribution	Waive	Transfer	Change
Mr. X: 400	400	320	200	3rd = 200
Mr. Y: 200	200	200	200	1st = 200
Mr. Z: 600	400 (remaining 200)	480	600	2nd = 600

Mr. A: 400	0 (remaining 400)	0	0	0

6. Extinction of Hypothec

6.1. Introduction

According to Article 769-4, where a debt is extinguished due to satisfaction, prescription or other reason, the real security right is also extinguished. Therefore, it is so-called subordinate nature of the real security right.

However, note that the real security right would not be extinguished unless all the amount of secured claim is extinguished. This is called the indivisibility of real security right based on Article 771.

6.2. Payment of Price

In the case where a third party who has purchased ownership of or perpetual lease or usufruct on the hypothecated immovable pays the price thereof to the hypothee on the hypothee's demand, the hypothec shall be thereby extinguished in favor of the third party.

Hypothec will be extinguished where the third party who acquires the hypothecated immovable pay the purchase price that he has to pay in order to acquire the immovable as demanded from the hypothee. This means that the hypothec will be extinguished where the hypothee demands the third party acquirer of hypothecated immovable pay the purchase price of the immovable and the third party acquirer pays the prices upon the demand.

6.3. Extinctive Prescription

6.3.1. Article 865

Article 865 says that "No hypothec shall be extinguished by prescription in relation to obligor and the hypothecator unless it is extinguished simultaneously with the claim the hypothec secures."

In the light of fact that a hypothec is created in order to secure the claim, the hypothec can be extinguished by prescription when the secured claim is extinguished. (Subordinate nature)

If the hypothee made the interruption of extinctive prescription of claims which is secured, (Article 489) even if the creditor does not make the interruption of extinctive prescription of hypothec itself, the hypothec is not extinguished independently based on art.865.

6.3.2. Extinction of Hypothec by Acquisition of Hypothecated Immovable Property by Acquisition Prescription

Hypothec is extinguished when the third party other than the debtor or the hypothecator has fulfilled the requirement for prescriptive acquisition with respect of hypothecated immovable (first sentence of Article 866). This provision is designated because the prescriptive acquisition of ownership is not a successive acquisition but it is the original acquisition of ownership. It means that the original acquisition of ownership is an acquisition of full ownership without taking over burdens which existed.

Example: A loaned the money from B by furnishing immovable possessed by C as hypothec.

If C does not know that immovable thing is comprised as the hypothec and fulfilled the requirement of possession by prescription determined in the law, C can acquire the ownership of such immovable thing. In this case hypothec is extinguished.

As for the successive acquisition, such as an acquisition of ownership through a sale, where the buyer purchases a piece of land which is furnished as a hypothec, the buyer acquires ownership over the hypothecated immovable. Moreover, hypothec is the real rights and has been used to assert against the third party when registering. Thus, even though the buyer does not know about existence of the hypothec, hypothee can assert his hypothec against the buyer of the hypothecated immovable. However, some persons acquire the ownership via a sale and purchase, but asserting that he fulfilled the requirements of prescriptive acquisition of ownership at the same time. In this case, the third party can acquire the ownership but hypothec is not extinguished if the third party acquirer of the hypothecated immovable acquires the immovable with the knowledge of the existence of the hypothec. (Sentence 2 of Article 866)

Section 2 Right of Retention

1. Definition

Right of retention is a kind security rights which is stated in the Civil Code. This right refers to right which may retain the thing until the claim is satisfied where a person possessing a thing belonging to another has a claim arising in regard to such thing (Article 774, Civil Code).

The holder of a right of retention does not satisfy the secured claim in preference. However, where a third party demands to return the thing which is the object of retention, the holder of a right of retention may deny returning the thing until the claim is satisfied (retaining effect). Therefore, in the real practice, the holder of a right of retention in preference may substancially be able to satisfy the claim in preference to others.

2. Requirements of Right of Retention

Right of retention does not happen unless the requirements are fulfilled: (a) possessing a thing belonging to another, (b) having a claim arising in regard to such thing, (c) the claim has already become due, and (d) possession does not commenced by a result of tortious act.

A. Possessing a thing belonging to another

"Possessing" means that the thing shall be in the hand of the creditor. A right of retention is extinguished by the loss of possession of the thing retained. However, this shall not apply to cases where the thing retained has been leased or pledged with the consent from the debtor (Article 789). A "thing" means a movable or immovable.

For example, A and B has made a contract for work that A repairs the car of B at the factory of A. After the car is taken to the factory, the car of B is being in the possession of A.

The right of retention can be applied to the thing belonging to a third party, not to the debtor.

For example, in the example of car repair above, if the car is rented from C, A can exercise the rights of retention on the repair fee.

B. Having a claim arising in regard to such thing

To create right of retention, there must be a relation between a claim and such thing.

For example, in a car repair above, the claim of repair fee arises in regard to the car. As a result, A can retain the repaired car until the claim is satisfied by the right of retention on B.

For another example, A and B has made a lease. During the lease, lessee B has spent his own expense to repair the house. When the lease duration elapsed, lessor A demands the house back. In such the case, for the claim of house repair cost which B spent, B has the right of retention on the repaired house.

C. The claim has already become due

The possessor who has a claim arising in regard to such thing does not have the right of retention unless the claim has already become due (Article 774, paragraph 1, proviso).

In the car repair case above, if A and B had made a special agreement that B shall pay the repair fee ten days after the car is repaired; A do not have the right of retention on the car of B, until that 10 days passes.

D. Possession commenced not as a result of a tortious act

The right of retention shall not take effect unless the possession over thing is arisen lawfully; it shall not apply where the possession commenced as a result of a tortious act (Article 774, paragraph 2).

For example, A stole a broken ring from B, and A has repaired the ring. Next, B found that A was a thief who had stolen the ring, and he demanded the ring back. However, in such the case, A does not have the right of retention for the repair cost because the possession of the ring was commenced as a result of the tortious act.

3. Effects

3.1. Right to Retain

A possessor can retain (=keep possession) the thing.

This is called "retaining effect" in Japan. By this effect, the obligor is forced to make performance in order to get the possessed thing back.

3.2. Preferential Application of Fruits

Unlike other real security rights such as hypothec right, the holder of right of retention may not sell the subject matter in order to get the money from that.

However, right holder can receive the fruits and apply them to satisfy the claim based on art.775.

Art.776 requires the fruits to be applied to the interest first.

Typical example of fruits may be the baby of the cattle and the rental fee in case the subject matter is leased with the consent of the obligor.

3.3. Duty of Holder of Right of Retention

The right holder shall possess the thing with the care of good manager (art.776-1). More specifically, lease, use or furnishing it as a security without consent of the obligor is prohibited (art.776-2).

Violation of the rule leads to the extinction of the right of retention (art.776-3).

3.4. Right to Demand Reimbursement

Necessary expenses shall be reimbursed promptly by the owner (art.777-1).

Useful expenses shall be reimbursed when the increase in value remains. Amount of the reimbursement is amount of expenses or the amount of increase of value by the owner's option (therefore, practically the lower amount may be reimbursed.). The court shall give the grace period.

4. Prescriptive Extinction

Right of retention can be exercised only when there is a claim to be secured. But exercise of right of retention is distinguished from the exercise of the claim itself (art.778). The obligee- holder of right of retention shall take other measure to interrupt the prescription.

5. Extinction of Right of Retention

As I explained, the violation of art.776 leads to extinction of right of retention.

In addition, there are some other grounds for extinction of right of retention.

First, extinction of the secured claim is also the reason for extinction of right of retention. This is, again, called the subordinate nature of the security right.

Second, the debtor may extinguish the right of retention by furnishing other adequate security (art.779).

Third, loss of possession also leads to extinction of right of retention because possession is an essential factor of right of retention.

Exceptions to this rule are case where the subject matter is leased or furnished as a pledge with consent of the obligor and the case where the holder of right of retention recovers the possession pursuant to the art.237 (right to demand the return of thing in possession.). C.f. Art.780-1, 2

Section 3 Pledge

1. Introduction

A pledgee shall have the right to possess the thing received from obligor or a third parties as security for their claim, and to have their own claim paid prior to other obligees out of that thing.

2. Type of Subject Matter of Pledge

According to Article 816, the words things are used as the subject matter of the pledge but this article does not have any more specification. The subject matter of the pledge is, therefore, a movable thing (Article 829), an immovable thing (Article 834) and the right over a property (Article 840).

3. General Nature

3.1. Requirements

Article 818-1 stated that a pledge shall be created when the thing to be pledged is delivered to the pledgee by the debtor or a third party who provides the security.

This article means the pledge shall be created by the agreement of the parties only without requiring any special forms. In addition to that, the delivery of the subject matter of the pledge is also a requirement to make the pledge effective because the law has prohibited the pledger from directly possessing the thing to be pledged.

3.2. Scope of Secured Claim

A pledge shall secure the principal, interest, penalties and expenses for enforcement of the pledge, expenses for preservation of the pledge, and compensation for damage arising from non-performance of the obligation or from latent defects in the thing pledged.

3.3. Effect

3.3.1. Right to Retain

A pledge may be created through the agreement and delivery of the thing pledged from the pledger or the third party to the pledgee. Therefore, the

pledgee is entitled to hold possession of the thing pledged. The pledgee has the right to retain over the thing pledged by this possession and the debtor is mentally forced to perform his obligation in order to receive the thing pledged back by this effect.

3.3.2. Priority Right of the Pledgee to Other Creditors from the Thing Pledged and to Receive Satisfaction from Its Fruits

A pledgee may collect fruits produced from the thing pledged and obtain satisfaction of his/her claim in priority to other obligees. Those fruits shall first be appropriated to the payment of interest on the claim, and any remainder shall thereafter be appropriated to the satisfaction of the principal.

3.3.3. Obligation of Pledgee

The pledgee shall possess the thing pledged with the duty of care of a good manager. Where the pledgee does not follow this obligation, the obligor may demand the extinction of the pledge. This means that the obligor can demand that the pledgee return the thing pledged in case of breach of this duty.

3.3.4. Pledgee's Right to Reimbursement

Where a pledgee has defrayed the necessary expense in regard to the thing pledged, he/she may seek reimbursement for such expense from the owner (art.824-1).

Where a pledgee has defrayed useful expenses in regard to the thing retained, he/she may seek reimbursement from the owner of, at his/her option, either the amount defrayed or the amount by which the value of the thing has increased, so long as the increase in value remains in effect. However, the court may upon application of the owner grant him/her reasonable time for reimbursement. (Art.824-2)

3.4. Extinctive Prescription of Claim

The exercise of a pledge shall not preclude the running of extinctive prescription of the claim.

The exercise of a pledge has a different meaning from the execution of a claim right itself. Because the exercise of a pledge shall not preclude the running of

extinctive prescription of the claim, the pledgee shall take other measures to interrupt the prescription.

3.5. Sub-pledge

3.5.1. Sub-pledge with the Consent of the Pledger

A pledgee may sub-pledge the thing pledged in order to secure his own debt with the consent of the pledger.

3.5.2. Sub-pledge under the Responsibility of Pledgee

Even if the pledger does not give consent to the pledgee, the pledgee can sub-pledge the thing pledged even there is a force majeure.

Example: X has pledged jewelry J to Y to secure his own debt of $1,000 dollars. Y sub-pledge J to Z to secure his own debt of $2,000 dollars without the consent of X.

1- If Y did not perform his obligation and Z executes his sub-pledge, how much money can Z receive? In this case, Z may receive $1,000, which is the limitation of the amount that has to be apportioned to the pledgee.

Z has damaged the jewelry through his fault. What can X demand against Y if X is aware of this case? In the case, Y assumes liability for the damage (art.826-2).

3.6. Prohibition against Forfeiture Agreement

Although pledge is made through the consent of pledger and pledgee based on "principle of private autonomy", law has limited some rights over parties of pledge which prohibit creating forfeiture agreement before the due date for performance upon parties' agreement unless otherwise provided for in this Code or other laws. The reason why law does not allow creating forfeiture agreement before the due date for performance is to protect the pledger and prohibit pledgee from gaining too much benefit. In contrast, if the contract or any act of creation of pledge or agreement that allow pledgee to acquire ownership of the thing pledged or dispose of it is made after the due date for performance, this shall not be prohibited (Art. 827).

4. Pledge over Movable

4.1. Requirements for Perfection of Pledge

The contract of pledge over movable does not require a registration. In order to make it effective, pledger just only delivers the thing pledged to pledgee for direct possession. Therefore, where the pledgee of movable is in continuous possession of the thing pledged, he can assert the pledge against a third party (Article 829).

If the pledgee of a movable lost the possession of the thing pledged by dispossession made by third party, he can still assert against the dispossessing third party and recover the same solely by bringing an action for recovery of possession (Art. 830).

Therefore, the requirements for perfection of pledge are possession of the thing pledged.

4.2. Use of or Receipt of Benefit from Thing Pledged by Pledgee

In principle, pledgee cannot use the thing pledged for his own benefit or lease it. However, with a permission and consent from the pledger, pledgee may use or lease it because we need to respect the free will of private person. In addition, to take care of the thing pledged and to avoid any damages, pledgee may only use the thing pledged so long as such use is necessary to preserve it without consent from pledger but may not lease the thing pledged. If the pledgee use or lease the thing pledged without consent from the pledger or such use is not necessary to preserve it, the pledger may demand the extinction of the pledge based on art. 831 of Civil Code.

4.3. Summary Enforcement of Pledge

Summary enforcement of pledge refers to an exercise of the rights of pledgee to become the owner of the thing pledged through court without going through the compulsory execution procedure, which means when the due date for performance arrives and the claims of pledgees of movable are not performed, the pledgees may demand from the court immediate appropriation of the thing pledged to the performance of the claim (Ar.t 832).

It seems like the forfeiture agreement which is prohibited in Art. 827 of the Civil Code. However, the summary enforcement of pledge over movable in Art.

832 differs from forfeiture agreement stated in 827 because Art. 827 prohibit the party from making a contract agreeing that pledgee acquire ownership of the thing pledged by act of creating pledge or contract made before the due date for performance; whereas, Art. 832: pledgee acquires ownership of thing pledged not by act of creating pledge or contract made before the due date for performance but from the court by strictly fulfilling 4 conditions such as from the court, rightful evaluation, notification to pledger (obligor) and reasonable ground. The reason why requires these strict conditions is to protect the interest of pledger and third party security provider.

4.4. Ranking of Pledge

Generally, when a thing is pledged to secure a debt, that thing must be transferred to pledgee for possession; therefore, obligor is unlikely to pledge the thing pledged to another pledgee. However, in some circumstances, a movable may be pledged for several creditors which lead to consider the ranking of pledge. In the principle, ranking of pledge over a movable to secure several claims, their respective priority ranking shall follow the chronological order of their creation. (Art. 833)

Example: A pledge a bike to B and the bike was deposited to C. A transferred the possession of the bike by direction to C (cf. art.229-4). Then, A pledges the bike to D. In such a case, B is ranked as first of pledge as he gets it before D.

5. Pledge over Immovable property

5.1. Pledgee's Right to Use and Receive Profits

In principle, pledgee cannot use or enjoy benefit over thing pledged without consent from pledger (obligor) such as pledge over movable which requires consent from debtor as stated in Art. 831. However, there is a big change which allows pledgee of immovable to use and enjoy benefit in case where the subject matter of pledge is the immovable property without consent of obligor (Art. 834/1). Example: A pledges a farm land to B. B may use and enjoy benefit of this farm land without consent from A.

Even though pledgee may use and get benefit of immovable which is the subject matter of the pledge without consent from obligor, such a use and enjoyment of benefit shall respect the methods of using immovable or claim

with definite and indefinite period of time related to special rule regarding land for cultivation.

5.2. Obedience to Ordinary Use

The pledgee of an immovable may use and receive the profits of the immovable in accordance with its ordinary use for own benefits. The method of ordinary use refers to the use of original nature of immovable. In case the land is for cultivation, it shall be used for cultivation, but not for a renting house. The reason that the pledgee has to exercise the ordinary use of immovable is to avoid the serious harm to the obligor where the pledgee alters and changes the method of ordinary use.

5.3. Special Rules Regarding Land for Cultivation

5.3.1. Claim with Indefinite Period

If the claim is clearly defined, the pledgee will be ready to prepare for a delivery of land for cultivation to the debtor when the contract becomes due that it does not infringe the pledgee's interest. On the other hand, claim with indefinite period, the security provider can extinguish the hypothec right at any time by performing obligation secured by the hypothec right; so, if the debtor extinguish the hypothec right within the period that the pledgee seeded or planted the crops on the land for cultivation and the law requires the pledgee to return the land to debtor, it will seriously infringe the interest of the pledgee. In this regard, law gives right to the pledgee of immovable to use the land for cultivation if the time for harvest of the crops which the pledgee seeded or planted is coming within a year, the pledgee may use the land till the time for harvest of the crops, even though the claim is extinguished by the satisfaction of the claim (See Article 834-2)

5.3.2. Claim with Definite Period

With respect to the claim with definite period, even though the pledgee seeded or planted, if the time becomes due and the debtor satisfied the claim which is extinguished, the obligee shall deliver the land to obligor. Obligee cannot assert not to deliver the land on the ground that the time for harvest of the crops is arriving within a year after the performance within 1 year that is the same to the claim for indefinite period. However, if the claim is extinguished

before a due date for performance by satisfaction of claim, the pledgee can use the land for cultivation if the time for harvest of crops that he planted or seeded is coming within 1 year till the time for harvest of the crops because the claim was extinguished before the due time and it is not the fault of the obligee.

However, even in this case, if the due date will come in advance of time of harvest, this rule shall not apply because loss of harvest is expectable from the beginning. (art. 834-3 proviso)

5.4. Costs of Management

Cambodian Civil Code states that pledgee of an immovable (creditor) is required to pay the costs of management thereof and shall bear all other charges pertaining to such immovable because the pledgee of an immovable is entitled to use and receive profit arising from the immovable which is the subject matter of the pledge. However, the pledgee is not responsible for paying tax of immovable because the payment of the tax is the burden of the owner of land.

5.5. Interest

The pledgee of an immovable may not demand interest on the secured claim because he may have already been entitled to use and receive profit arising from the immovable which is the subject matter of the pledge (Article 836 of the Civil Code).

5.6. Special Agreement in Pledge

As described, the pledgee is entitled to use and receive profit from the immovable which is the subject matter of pledge and must pay the cost of management and other burdens with respect to the immovable, and he may not be entitled to demand the interest over his claim; however, both parties of the pledge may otherwise make an agreement regarding those conditions that is different from that in pledge based on the special provision in the act of creation of a pledge (art. 837).

For example, where an agreement is created, pledgee of immovable can be exempted from the payment of cost of management, or other burdens with respect to immovable, even though the pledgee of immovable is entitled to use

and receive profit. In a similar way, if there an agreement exists to allow the creditor to demand for the interest, and even though the creditor is entitled to use and receive profit from immovable subject to pledge, the agreement will be effective, and the creditor may demand the interest.

5.7. Duration

The duration of a pledge of an immovable cannot exceed five years. If a pledge of an immovable is created for a longer period than five years, such period shall be reduced to five years but the pledge of an immovable may be renewed. However the renewal period cannot exceed five years from the time of renewal (Article 838 of Civil Code).

5.8. *Mutatis Mutandis* Application of Provisions Regarding Hypothec

In accordance with article 839 of CC, in addition to the provisions of this Section (pledge), the provisions of Chapter Five (Hypothec) shall apply mutatis mutandis to pledges of immovable.

Followings are some examples of mutatis mutandis application of provisions concerning hypothec right.

The provision of Article 845 of Civil Code, concerning asserting hypothec shall apply mutatis mutandis to pledges. Therefore, a pledge may not be asserted against a third party unless the pledge thereof is notarized and registered with the land registry.

Regarding scope of effect of hypothec set forth in Article 846 shall also apply mutatis mutandis to the pledge, for instance, when a pledge of land is created, the pledge also extends to things that attach to the land, including the building residing thereon. Even though the building is constructed prior to or after the pledge is created, party may not set any condition that is contrary to the one set forth in a contract creating a pledge (Article 846 of Civil Code); because based on Article 122 of Civil Code, things attached to land or comprising a part thereof, particularly buildings or structures immovably constructed on land are components of the land in general. Thus, a pledge of the land will extend to things that are components of the land.

Together, ranking of hypothec stated in Article 851 shall also apply mutatis mutandis to the pledge, which means that priority of the pledge shall be based on the order of their registration.

Simultaneously, scope of claims secured of Article 852 applied to hypothec applies to the pledge as well. This means that where the pledgee is entitled to receive interest or periodic payments, he can enforce the pledge only in regard to the amount of payments due for the last two years. However, if a special registration was made in regard to periodic payments for an earlier period after they became due, the pledge may also be enforced in regard to such payments from the time of such registration.

Such determination is because it's necessary to protect other (prospective) security right holder in the lower ranking in order to know how much value remains unfurnished so that they may know how much she shall lend money.

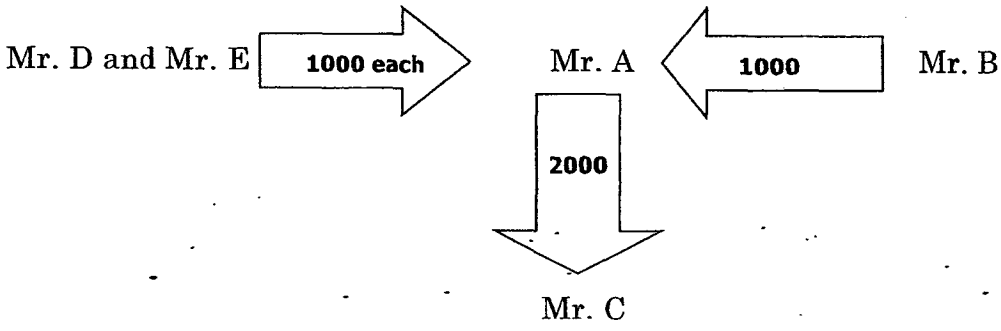
6. Pledge over Rights

As we know, pledge can be created under three types of object such as pledge over movable, immovable, and rights.

A pledge over movable or immovable, the subject matter of pledge shall be delivered to the pledgee. In contrast, pledge over the rights refers to the debtor pledges his claim he owns against third party debtor to his pledgee in order to secure debt.

Example: Mr. A is a creditor of Mr. C over $2,000. But Mr. A wants to borrow $1,000 from Mr. B. If Mr. A does not own any property to be pledged to Mr. B to secure a debt, Mr. A can pledge his claim he owns against Mr. C to Mr. B in order to secure a debt that he is in debt to Mr. B.

How is the pledge over claim beneficial?



How is the pledge over claim beneficial?

Example: Mr. A is a creditor of Mr. C over $2,000. But Mr. A wants to borrow $1,000 from Mr. B. Mr. A has pledged his claim against Mr. C with the amount $1,000 (among $2,000 that Mr. C is in debt), to Mr. B in order to secure a debt that he is in debt to Mr. B.

The benefit with respect to the pledge over claim arises for pledgee especially when there are other creditors in general such as D and F. In this regard, if Mr. A has pledged his claim he owns against Mr. C with the amount $1,000 ($2,000 in the claim) to Mr. B, Mr. B will receive the priority rights of $1,000 that Mr. C pays to Mr. A prior to Mr. D and Mr. E who are the general creditors of Mr. A.

However, how can the pledgee assert the pledge over the claim against other creditors? This matter will be discussed in the following topic.

6.1. Requisite of Pledge over Claim with Respect to Parties

Regarding the pledge over right, an agreement is considered to be requisite for establishment in general because the right is intangible and may not be delivered. Exceptionally, if the right, of which exercise requires the possession of document such as check, establishment of the right requires delivery of that in its nature of pledge.

6.2. Requirement for Perfection of Pledge over Claim

In order for pledgee to be able to assert against third party debtor(C in the case above) and other third party (D and E in case above), a person who pledges his claim he owns against the third party debtor must notify the creation of the pledge to the third party debtor or the third party debtor has given consent thereto. The notice and consent as described above may not be asserted against a third party other than the third party debtor unless they are evidenced by a date-certified writing.

In case above, without any consent or notification, C can refuse to pay to B because B may not assert his pledge against C. Then, in order for B to assert his pledge over C, B needs notification or consent and C may not deny the performance to B.

Without consent or notification without date certification, B may not assert his priority against D and E and thus D and E may, for example, attach the claim and acquires the distribution in proportion of amount of claim because B may not assert his priority. If B wants to assert his pledge over D and E in addition to C, B needs notification or consent by a date-certified writing.

According to Article 8 of the Law on the Application of Civil Code, date-certified writing refers to:

A- Notarial document: for a notarial document, a date of making such document is the date-certified.

B- A privately-produced document noted by notary or court clerk on the date the letter is shown and signed. In this case, such a date is the date-certified.

C- A privately-produced document by which one among signatories is dead. In this case, such a date of the death is the date-certified.

D- A privately-produced document which deemed as the original place of a date-certified instrument. In this case, such a date on the instruments is the date-certified of the private letter which is deemed as the original place.

What are the documents considered as notarial ones? They are stipulated in Article 9 of the Law on the Application of Civil Code. It refers to the certified writing made by notary or consul, or the certified writing made by the competent authority for the proceedings of registration.

6.3. Enforcement of Pledge through Collection of Claim

According to Article 842, paragraph 1, a pledgee does not need to apply for an enforcement of security right in order to collect the money.

If the subject-matter of the claim is money, the scope of collection is limited to the amount of the secured claim (Cf. Article 842, paragraph 2).

If the due date of claim which is the subject matter of a pledge arrives prior to the due date of claim of the pledgee, the third party obligors may deposit the amount to be paid, and such pledge shall exist over the money deposited (Article 842, paragraph 3).

If the subject-matter of the claim is not money, the pledgee has a pledge over the thing to be received as satisfaction thereof (Article 842, paragraph 4).

	Pledge over movable	Pledge over immovable	Pledge over rights
Subject matter of pledge	Movable	Immovable	Claim
Requisite of contract for parties	Agreement	Agreement	Agreement
Requirement for perfection of contract against third parties	The continuous possession for the things pledged	Notarial document and registration in the land registry.	The third party debtor must be notified or the third party debtor has given the consent which is made by date certified writing.
Priority of ranking in the challenge with other security rights	Order of the commencement of possession	Based on the order of land registry	Depends on a date certified letter of such notification

Section 4 Transfer as Security

1. Introduction

For example, X is the wholesale man, and he wants to borrow money from Y. Y demands a security instead of lending money.

X does not have any immovable property; as a result, X cannot create hypothec. Only goods in the warehouse belong to his property. He may not be able to run a business if he pledges goods stocked in warehouse to Y because those are goods to be sold to retailers.

Moreover, each goods are changed day by day; therefore, it seems to be practically impossible to furnish them as security. What shall X do?

Security without transfer of possession is very beneficial for debtor where the debtor get benefit from the goods which are the subject matter of the security.

Regarding immovable property, hypothec can be created without transferring possession.

For movable property, transfer as security can be created without transferring the direct possession, and transfer as security can be created more than one movable by only one agreement so that the debtor can continue to get benefit from that movable.

Although it seems that hypothec and transfer as security is different, there is something common. For example, there is a third party having the legal interest about the subject matter of the security right. In case of hypothec right, there is a registration system to let third party know the legal status concerning the subject matter.

On the other hand, regarding movable, there is no registration system as immovable in order to notify the legal status to the public. Thus, it is necessary to have a rule where the third party comes to have legal interest about the subject matter of security such as a case where the third party buys the goods which are the subject matter, especially when he does not realize that it is the subject matter of the security.

2. Requirements

According to Article 888 and Article 889, the requirements to create transfer as security are as following.

a- One or more than one movables

If movables are more than one, it shall be defined according to the type of movable, location or other standards as aggregate movable.

Transfer of ownership as security over aggregate movable is quite useful when someone like merchants wants to furnish some goods as security because he can furnish security only by once.

b- An agreement

c- Assignment of possession to assert the transfer as security against the third party.

With respect to the assignment of possession, these requirements do not exclude any of the four forms of assignment of the possession; hence, the assignment of possession by agreement can fulfilled these requirements.

In case Where X and Y have agreed that X must transfer the ownership of the movables in the warehouse as the security and X transferred the (indirect) possession to Y by assignment of possession by agreement, Y can assert the transfer against the third party.

3. Effect

3.1. Scope of Effect

The effect of a security interest under a transfer as security shall extend to all things that are affixed to the object of the security interest before or even after the creation of real security right according to Article 891, paragraph 1.

Parties can make a special agreement which is contradictory to the Article 891, paragraph 1.

3.2. Effect on Fruits

If the security creator or a third party on instruction from the security creator directly possesses the object, the effect doesn't extend to fruits. This part is very similar to hypothec.

The reason which does not have an effect because the creator and a third party on instruction are entitled to use and profit from the property which they are directly possessing.

For example:

Mr. X furnished Y with his motorbikes for rent to another as security interest under transfer as security and transfer the possession by assignment in order to borrow money from Y. Mr. X is the direct possessor of the motorbikes which is the subject matter of the security. As a result, Mr. X is entitled to get the benefits from that subject matter by renting bike, and Y is not entitled to get any interest such as rental fee (the effect of security interest under a transfer as security doesn't extent to fruits).

On the other hand, where the holder of a security interest under a transfer as security or a third party on instruction possesses the subject matter directly, Article 822 (priority right to receive satisfaction from fruits) shall apply mutandis mutatis. It means that fruits delivered from the subject matter of security interest under a transfer as security shall be appropriated to the satisfaction of the right holder's claim in priority to other creditors. The described fruits shall first be appropriated to interest, and the remainder, if any, shall be thereafter appropriated to the principal.

3.3. Subrogation

A holder of security interest under a transfer as security can subrogate money or other things to be received as a result of sale, loss, or destruction of or damage to the object of the security interest under the transfer as security.

There are two exceptional cases to this rule:

First, the holder of a security interest under a transfer as security cannot subrogate after the money or other things have been paid or returned to the creator already.

Second, where the movables are aggregation and are originally planned to be sold to the others, the holder of the security interest under a transfer as security cannot subrogate at all.

Example 1:

Mr. X furnished Mr. Y with his goods as the security interest under a transfer as security. After, Mr. X sold the goods to Mr. Z.

In such the case, Mr. Y can subrogate the proceeds from Mr. Z. However, where the proceeds have been delivered to Mr. X already, Mr. Y cannot subrogate.

Example 2:

Mr. X furnished Mr. Y with his goods in the warehouse as aggregate movable, which are planned to be sold as security interest under a transfer as security. In This case, whatever comes in or goes out, the goods currently in the warehouse is considered to be aggregate movable property. Therefore, The effect of security doesn't extend to the things gone out.

In such the case, Mr. Y cannot subrogate the proceeds.

3.4. Scope of Secured Claim

Scope of secured claim under the transfer as security shall secure the principle, interest, penalty, expenses for enforcing the security interest under the transfer as security, the expenses for preserving the object, as well as compensation for damage resulting from default on obligations, or a hidden defect in the object according to Article 895. This means that to what extent does the scope of claim have in case where the holder of the security interest under the transfer as security enforces the transfer as security? As described above, it will extend to the principle, interest, penalty, expenses for enforcing the security interest under the transfer as security, the expenses for preserving the object, as well as compensation for damage resulting from default on obligations, or a hidden defect in the object. This article is substantially same to the provision regarding pledge in Article 820.

3.5. Disposition of Object by a Third-party Security Provider and the Holder of the Security Interest under the Transfer as Security

3.5.1. Disposition of Object by a Third-party Security Provider

3.5.1.1. Normal Movable

In case where the movable is transferred as a security, it still can be under the possession of the security provider. In this case, by taking advantage of his possession, a security provider may transfer it to third party or furnish it as a security as a matter of fact. In this case, it is necessary to determine which one, security right holder or third party, may assert the priority about the movable against another.

Example:

According to art.894, the point is whether a third party fulfills the requirement of bona fide acquisition of ownership over the movable property or not. In case X owes Y a debt; then, X transfers his car as security, but X still continues the possession; afterwards, X sold his car to Z, who hasn't known the creation of security interest under the transfer as security. In this regard, based on the bona fide acquisition of ownership of immovable, Z may create the acquisition of ownership where it reflects a loss of security interest of X. With this regard, Y may not execute the security interest under the transfer as security over the car.

On the other hand, in case Z doesn't fulfill the conditions of bona fide acquisition, Y can assert his priority as a security right holder based on art.772.

Is there any solution to protect Y from Z's acquisition of the subject matter? The possible method may be to put a mark on the car in order to show that it's the object of security interest under the transfer as security; by doing so, Y can make the third party who wants to buy the car bad faith or negligent.

3.5.1.2. Aggregate Movable

In the event of an aggregate movable, a security provider may dispose the object which is planned to be sold freely based on Paragraph 2 of Article 894.

For example, in case X owes a debt to Y, X has transferred the goods in the store as aggregate movable as security, but X still continues the direct possession; and X sold the goods that he has planned to sell since the beginning to Z, who has known the creation of the security interest under the transfer as security made by X. in this case, according to art.894-2, even though Z knows the existence of the security right of Y, Z can acquire the

ownership of the goods. This is because the goods would cease to be the part of aggregate movable when getting out of the scope of the aggregate movable.

3.5.2. Disposition by the Holder of Security Interest under the Transfer as Security

In case the object of the security interest under the transfer as security is disposed by the security right holder that he directly possessed of, art.897 is applied.

In the event of disposition by the holder of security interest under the transfer as security, it is similar to the disposition of object by the security provider the problem of which is whether a third party fulfills the requirement of bona fide acquisition of ownership of movable or not. In the above case, Y has acquired the possession of goods in the store from X; without the consent from X, Y has sold such said goods to Z. Z didn't know the object of sale contract is the object of transfer as security. In this case, Z may be entitled to acquire the ownership of movable lawfully as X can merely demand for compensation from Y; in contrary, where Z has negligence or is a bad faith person, X may retrieve the said movable.

3.6. Special Provisions in the Event that the Holder of the Security Interest under the Transfer as Security Takes Direct Possession of the Object

Article 896 states that the provision of Article 821 (Retention of thing pledged), Article 823 (Pledgee's duty to preserve thing pledged), and Article 824 (Pledgee's right to reimbursement) shall apply mutatis mutandis to the case where the holder of the security interest under the transfer as security or a third party on instruction from the holder takes direct possession of the object. The reason is because the relationship between the holder and the object of the security interest under the transfer as security is identical to the relationship between pledgee and the thing which is the subject-matter.

4. Enforcement of the Security Interest under the Transfer as Security

There are two methods in the enforcement of the security interest under the transfer as security. First is the conversion to cash; and the second is the conclusive transfer of ownership according to the provision of Paragraph 1 of Article 898. For example, X is the wholesaler and he wants to borrow the

money from Y. Y demands him to furnish the security instead of lending money. X doesn't own any immovable; consequently, X and Y has agreed that X transfer the ownership of movable in the warehouse as security, then X has transferred the indirect possession to Y through assignment of possession by agreement in order to assert the transfer as security against third party. The amount of secured claim is $200, but X has not paid. Y intends to enforce his security interest under the transfer as security. Therefore, there are two ways which Y can select.

4.1. Conversion to Cash

Where a due date of payment has arrived, X does not pay. Y may take a measure by himself to convert the object to cash by giving notice to the security creator.

4.2. Conclusive Transfer of Ownership

Besides the conversion to cash, the holder of the security interest under the transfer as security can select another choice which is the conclusive transfer of ownership meaning assuming ownership of the object conclusively.

4.3. Duty to Pay the Difference

Based on the provision of Paragraph 3 of Article 898, the holder of the security interest under the transfer as security must pay the security creator the difference as a settlement. This means that although the holder of the security interest under the transfer as security can chose either choice, the holder has duty to pay the difference as settlement if the price of object exceeds the amount of debt payable according to Paragraph 3.

4.4. Right of Retrieval of a Person who Provides the Security

In principle, when the due date has arrived and the payment is not made, the holder of security interest under the transfer as security can exercise either choices to enforce, but if the security creator pays even after the due date but before the payment of difference, ownership must be transferred to the security creator.

After it's due to pay, Y gave a notice to X and takes the goods from the warehouse to estimate the price and then sold those goods. Prior to the end of

the assessment, X was really fortune for having enough money to pay the debt and demanded Y to return those merchandises. X may be entitled to demand. However, if Y sold that goods to Z, X may not demand but can claim compensation because right of retrieval is extinguished by the completion of enforcement of security interest.

Section 5 Guarantee

1. Introduction

Guaranty is the contract made by persons that is stated in Article 900-1 of the Civil Code which provides that the guarantor undertakes to the obligee that in the event the obligor (principal obligor) fails to perform his obligation, the guarantor will perform the whole or part of such obligation together with the obligor. If the obligee hopes that, if the principal obligor becomes insolvent or fails to perform his obligation, the creditor will have another substitute obligor that is called the guarantor.

This is similar to the security right such as hypothec, but they are different in some part. In case of hypothec, transfer as security or pledge, what is guarantees is the value of specified things, while the guarantor guarantees the debt with all his property within an amount of money to be secured.

2. Creation of Guaranty Contract

2.1. Basic Conditions

According to Article 900, Paragraph 1, agreement between prospective guarantor and the obligee is required, but the intention of the obligor is not required. In other words, even if the obligor does not agree with the guaranty, the guaranty contract can also be executed. The guaranty contract shall be created by the contract which gives effect according to the agreement between the guarantor and obligee.

2.2. Protection of the Guarantor

As explained in introduction, guarantor must guarantee within the scope of guaranty with all of his property, which can be sometimes too much burden on the guarantor. Therefore, the civil code protects the guarantor from suffering unexpected loss in some manners.

A. Provision of important information

According to Article 900, Paragraph 3 of the Civil Code, where assumption of the guaranty obligation does not constitute part of the business of the prospective guarantor, the obligee shall provide the prospective guarantor

with any and all material information concerning the guaranty obligation to be assumed, thereby giving the prospective guarantor a chance to fully deliberate (whether to enter into the contract of guaranty based on such information). It means that the obligee is required to provide all material information and give that person a chance to consider carefully for the guarantor who is not experienced in the guaranty. If this cannot be done, the guarantor can rescind the guaranty contract.

B. Documents

According to Article 901, Paragraph 1 of the Civil Code, the guaranty contract undertaken can be made without being recorded in an instrument or document but the guarantor can revoke such a contract any time. However, if the guarantor has voluntarily set to perform the guaranty obligation, the guarantor cannot revoke such guaranty contract. However, in principle, the guaranty contract shall be made in writing. The content of the guaranty obligation shall be specifically described in the guaranty instrument or document.

C. Handwriting

According to Article 901, Paragraph 2, if the guaranty obligation is made in connection with a monetary obligation, the amount of guaranty obligation shall be in handwriting of the guarantor. This means that the amount of the guaranty obligations reflects the careful and clear decision made by the guarantor; therefore it requires the guarantor to write the amount of money by his/her own hand which is important point in order for the guarantor to recognize the bind of the guaranty contract. Therefore, in case where the guaranty obligation is in connection with a monetary one, the guarantor may revoke the guaranty contract at any time if the amount of guaranty obligation is not written by the guarantor's own hand.

3. Effect of the Guaranty Contract

3.1. Scope of the Guaranty

Generally, the guaranty contract shall include the interests, penalties, damages and all other charges incidental to the underlying obligation in general without special agreement. Besides, the guaranty contract may specify the amount of

penalties or damages for non-performance of guaranty contract other than non-performance of underlying obligation. According to Article 903, Paragraph 1, the guarantor shall include the guaranty obligation of money as the interest of penalties, damages regarding the underlying obligation and other arisen out of underlying obligation. If the parties to the contract make a special agreement, they shall conform to such special agreement.

According to Article 903, Paragraph 2, the guaranty contract shall specify the amount of penalties or damages payable for non-performance of the guaranty obligations separately from the underlying obligation.

Example: A has an obligation of 10,000 US dollars to B. Interest and amount of compensation (in case of delay) are respectively agreed to be 7%.

- C shall guarantee not only the principal money of 10,000 US dollars but also the possible interest and penalty if C and A create a guaranty contract without any special agreement.
- Through a special contract, C can guarantee just the principal or possible interest.
- As well as partial guaranty, C and A can make a special agreement on interest for any delay for its own non-performance. For example, A and C can promise that C shall pay an interest of 10% for delay of the guaranty obligations. In this case, C is obliged to pay 10,000 dollars which is the principal money, 5% interest and 7% for the interest for delay arising from the principal money and if he makes a delay of performance of guaranty obligation, he shall pay 10% interest for delay of the guaranty obligations.

3.2. Nature of the Guaranty Obligations

Article 904 Paragraph 1 states that where an underlying obligation does not exist, a guaranty shall not be created. It clearly states some effects arising from the nature of the guaranty obligations which is called the subordinate nature of the underlying obligations. But, there is the contract to guarantee the damages which does not have the subordinate nature.

The guarantor shall not have more serious guaranty obligations than principal obligations of the obligor. (Article 904, Paragraph 2) the extinction of the underlying obligations shall operate to extinguish the guaranty obligations as

well because the implementation of the guaranty obligations is security of the underlying obligations so if the underlying obligation is extinguished due to any reason the guaranty obligations is also extinguished. (Article 904, Paragraph 3)

In order for the guaranty obligation not to be extinguished prior to the underlying obligations and in order to collect the underlying claim, it is necessary to interrupt prescription period against the underlying obligor, for example a demand for performance against the principal obligor shall also be effective against the guarantor as well. (Article 904, Paragraph 4)

When the claim having the guaranty obligation is transferred, the claim owed to the guarantor shall be transfered unless guaranty contract provides otherwise (Article 909 paragraph 5) This is because claim against the guarantor is the secondary right.

3.3 Right of Guarantor

Some grounds regarding underlying obligation affects the guaranty obligation. This is also reflection of subordinate nature of guaranty obligation.

Let's take a look at some examples.

Basic fact: X has a claim right against Y and Z guaranteed obligation of Y.

1. In case where prescriptive period regarding underlying obligation is completed, Z also can invoke the prescription in order to extinguish it based on art.905-1.

2. In case 1, even if X renounces the benefit of prescription, Z still can invoke prescription for his own benefit based on art.905-2.

3. In case where Y has defense such as defense of simultaneous performance, Z can also assert the same defense based on art.905-3.

Similarly, if Y has a claim right against X, Z can also reject the performance to the extent underlying obligation is extinguished by the set-off based on art.905-5.

4. In case Y assumed an obligation because of X's duress, fraud and so on but not yet rescinded, Z can reject the performance of guaranty obligation based on art.905-4.

Note1:

Z can reject the performance but Z may not exercise the right of rescission because it is up to underlying obligor whether he should rescind or not from perspective of principle of private autonomy.

Note2:

If Z knew that contract between X and Y was rescindable and guaranteed it as part of his business. Z shall assume the independent obligation regarding the same subject matter of underlying obligation based on art.906.

3.4. Qualification as Guarantor

When an obligor has a duty to furnish a guarantor to the obligee, the guarantor must be a person of full legal capacity who has sufficient financial ability based on art.907-1 and the obligee may demand that the obligor furnish other security based on art. 907-3.

If the guarantor ceases to fulfill the conditions, the obligee may demand that the obligor replace the guarantor with a person who fulfills such conditions based on art.907-2.

Intention of these provisions is that obligor is required to furnish the security sufficient to effect performance while art.907-4 states that these provisions shall not apply when the obligee has designated the guarantor because the obligee shall be responsible for his own designation.

3.5. Principle of Joint Guaranty

A guarantor who is obligated to perform jointly and severally with the principal obligor may not demand of the obligee that performance be demanded from the principal obligor prior to the guarantor or (ii) exempt oneself from enforcement of the guaranty obligation by establishing that the principal obligor has sufficient resources to tender performance and is easily subject to execution.

Guarantor has such defenses only when they make special agreement.

1- Demand of the obligee that performance be demanded from the principal obligor prior to the guarantor

2- Exempt oneself from enforcement when the principal obligor has sufficient resources to tender performance and is easily subject to execution.

3.6. Effect of Events Occurring with Respect to Guarantor

On the contrary to the events that occur with respect to the principal obligor, events that occur with respect to the guarantor shall have no effect with respect to the principal obligor according to Article 909.

There is an exception that a demand or other grounds for the interruption of prescription that is made or occurred to the guarantor who has been commissioned by the principal obligor according to Article 909, proviso.

For example, where the obligee demands with respect to the guarantor who has been commissioned by the principal obligor, the prescription period regarding the underlying obligation shall be interrupted, whereas the demands with respect to a guarantor who has not been commissioned by the principal obligor doesn't interrupt the prescription.

3.7. Co-guarantors

Generally, where multiple persons undertake to be guarantors in a contract, each guarantor is obligated with respect to the entire amount of the underlying obligation based on Article 910, Paragraph 1.

However, by making special agreement to apportion the guaranty, the co-guarantors may limit each co-guarantor's liability. The burden shall be presumed to be shared equally unless such special agreement does not exist (Article 910, paragraph 2).

Differences between apportion and burden is in the following:

X borrowed $3,000 from Y. Z1, Z2 and Z3 guaranteed X's obligation. When the due date of payment has arrived, Y demands X to pay, but X is unable to do so.

1- Where Y demands an amount of $3,000 from Z1, Z1 may not assert that Z1 must pay only $1,000.

2- After the payment of $3,000, Z1 may demand $1,000 from each of Z2 and Z3 according to the amount of burden.

According to Article 910, where a special agreement does not exist, each

guarantor is obligated with respect to the entire amount of the underlying obligation. This means that the obligee may demand from either one of guarantors or multiple guarantors.

In the absence of the special agreement, the burden of the guarantor shall be presumed to be shared equally. Thus, if any guarantor has spent the expenditures exceeding his/her burden, s/he may demand from other guarantors to pay for the exceeding part (Article 915 paragraph 1).

In the above example, X demanded Z1 for amount of $3000. In this regard, Z1 has spent money exceeding his burden which is only $1,000; on the other hand, Z2 and Z3 has not yet performed his burden, so Z1 is entitled to demand the exceeding amount that he's spent from Z2 and Z3. Specifically, Z1 may demand 1000 dollars respectively from Z2 and Z3.

4. Types of Guaranties

A-Normal Guaranty

It is referred to the principle form of guaranty of the debts and principal.

Example: A lends B US$ 20,000 and C is a guarantor. One year later, when the due date comes, the obligee A does not need to demand US$ 24,000 (principal and Interest) from the underlying obligor B. A may demand US$D 24,000 from C immediately if C does not agree to refund, the obligee A is entitled to carry out compulsory execution against C basing on monetary claim.

B- Security for loss

Generally, the guaranty obligation cannot be created when the underlying obligation does not exist as stipulated in the first paragraph of Article 904. The obligation of guarantor shall be reduced in accordance with the scope of the underlying obligation as stipulated in the second paragraph of Article 904 and the extinction of the underlying obligation shall operate to extinguish the guaranty obligation as well as stipulated in the third paragraph of Article 904. These reflect subordinate nature.

On the other hand, in case of security of loss, the guarantor assumes independent obligation. In this sense, security for loss is an exception to subordinate nature.

Example: X borrows money from Y and Z is a guarantor. In the case where a guaranty obligation is simple one and Z's obligation would not be created when underlying obligation is rescinded as stipulated in the first paragraph of Article 904. But Z shall still assume obligation in case guaranty is security for loss.

C- Floating Guaranty

In a simple guaranty contract, content and amount of underlying obligation is accurately clarified as stipulated in the third paragraph of Article 901. In this case, it can prevent a guarantor from assuming unexpected loss.

The floating guaranty is an exceptional case for a principle provision and a guarantor shall guarantee a performance of an unspecified obligation accruing from a certain continuing legal relationship.

This is also very risky contract for a guarantor. Therefore, the guarantor is given some protections.

Example: X and Y often operate a business transaction together and Z guarantees the obligation of X arisen from such business transaction.

1- In case where business transaction is accurately specified like a sale contract regarding food, floating guaranty is valid, while such a guaranty is void if Z guarantees all the obligations arisen from any kind of legal relationship between them (compared the first paragraph of Article 902). Floating guaranty requires specific legal relationship.

2- In case where the period is not specified, Z may terminate the floating contract after exceeding a proper duration. The proper duration shall be fixed case by case basis (compared the second paragraph of Article 902).

3- If X's economic situation has deteriorated substantially, Z can also terminate the floating contract for the future immediately (compared the third paragraph of Article 902).

4- To protect a successor, the floating guaranty does not bind successor. Only the floating guarantor's obligation regarding the underlying obligations in existence at the time of the guarantor's death shall be succeeded.

5. Indemnification

A guarantor shall demand indemnification in some cases, but the amount and time of indemnification differ according to the existence commission and other factors.

5.1. Requirement for Indemnification

5.1.1. Advance Notification

In the case where a guarantor does not notify to the principal obligor that the obligee demand performance from him/her, but that guarantor has effected the performance of obligation or otherwise procured the discharge at his own expense and the principal obligor has had any means of defense against the obligee, the principal obligor may set it up against the guarantor's demand for indemnification as stipulated in the first paragraph former part of Article 913.

5.1.2. Notification after Discharge

Example: X buys a car from Y. Z guarantees an obligation to pay a purchase price.

1- Z paid the purchase price without advance notification. Obviously, X has a defense of simultaneous performance because the car has not been delivered yet. In such a case based on the first paragraph of Article 913, X can reject the payment until s/he received the car.

2- Z notified X in advance and paid the purchase price, but Z has failed to notify X of the performance. X also paid the purchase price because X has not known about Z's payment (Y kept silent about that). In this case, X can reject indemnification according to the second paragraph of Article 913 because the X's performance has prior effect. Z has to demand Y that Y shall return the purchase price as unjust enrichment.

5.2. Scope of Indemnification

In case of a commissioned guarantor, the scope of indemnification includes the actual amount, interests and damages while a voluntary guarantor (guarantor without commission) may demand only to the extent that the principal obligor was enriched thereby.

Moreover, if the guaranty is against the underlying obligor's will, the scope of indemnification is limited to the extent that the principal obligor continues to be enriched.

5.3. Preemptive Indemnification

Commissioned guarantor can sometimes demand indemnification in advance according to Article 911.

Some cases where preemptive indemnification is possible are:

A- case where final and binding judgment has ordered the guarantor to pay to the creditor;

B- case where the underlying obligor has been bankrupted;

C- case where underlying obligation is due;

D- case where the deadline for performance is not fixed and the duration of five years has gone.

In this case, the principal obligor may demand that the guarantor furnish security or procure a discharge from the obligation for the benefit of the principal obligor (Article 911 paragraph 4) or may deposit with the official depository office, furnish security to the guarantor or procure a discharge from the obligation for the benefit of the guarantor (Article 911 paragraph 5).

5.4. Right to Indemnification of Co-guarantors

Art.915 is a rule regarding indemnification among co-guarantors.

The wording is complicated, but concrete result of application of art.915 is as follows.

Basic facts
X borrowed 1000 dollars from Y and Z1, Z2, Z3 and Z4 co-guaranteed the obligation of X. the burden is Z1 40%, Z2 30% Z3 20% and Z4 10%.
1) If Z1 paid all the amount of obligation, Z1, of course, may demand indemnification against X or Z1 also demand indemnification against other co-guarantors based on art.915-1. The amount of indemnification is 300 dollars from Z2, 200 dollars from Z3 and 100 dollars from Z4. In addition, Z1 can

demand interest based on art.915-2.

2) In case Z1 maid partial discharge such as 600 dollars, Z1may demand the indemnification from X or Z1 also may demand from other co-guarantors. The amount is 180 dollars from Z2, 120 dollars from Z3 and 60 dollars from Z4.

3) In case where there is an agreement to apportion, each co-guarantor shall pay more than their amount of burden. For example, if Z1 pays 600 dollars, Z1 can demand only 100 dollars against other co-guarantors according to art.915-3.

6. Subrogation

Subrogation is a legal system to secure the indemnification for the benefit of the guarantor. Cf.916-1

Practically, it is useful when the principal obligee has a security right against the principal obligor because the guarantor may subrogate such security right.

Annex

【Annex 4 Warranty Liability of the Seller】

	Subjectivity of the BUYER	Reduction of the purchase price	Termination by the BUYER	Demand damages	Demand delivery of substitute goods	Demand remedy	Period for exercise of rights	
When the whole of right belongs to a third party (531,532)	Good faith	N/A	O	O	N/A	N/A	No special limitation	
	Bad faith	N/A	O	X	N/A	N/A	No special limitation	・The SELLER in good faith has a right to terminate (532)
When part of right belongs to a third party (533)	Good faith	O	O※	O	N/A	N/A	Within 1 year from the time when the Buyer comes to know the facts (533-4)	※Only if the buyer wouldn't have bought the rights if the rights consisted only of the remaining portion (533-2)
	Bad faith	O	X	X	N/A	N/A	Within 1 year from the time of contract (533-4)	
When usufructuary right exists (534)	Good faith	N/A	O (Only if the buyer cannot achieve his purpose of the contract)	O	N/A	N/A	Within 1 year from the time when the Buyer comes to know the facts (534-4)	
	Bad faith	N/A	X	X	N/A	N/A	N/A	
・When real security exists (535)	Good faith	N/A	O (Only if the buyer lost the ownership)	O	N/A	N/A	No special limitation	・The BUYER can demand reimbursment costs if he/she expended to preserve the ownership (535-2)
	Bad faith	N/A			N/A	N/A		
When defect exists (540)	Good faith	O	O (Only if the buyer cannot achieve his purpose of the contract)	O	O	O	Within 1 year from the time when the buyer knew or should have known of the existence of defect (547)	
	Bad faith/ Gross negligence	X	X	X	X	X	N/A	

			Subjectivity of the BUYER	Reduction of the purchase price	Termination by the BUYER	Demand damages	Demand delivery of substitute goods	Demand remedy	Period for exercise of rights	
Spesial provisions regarding excess or deficiency in area of land (546)	The sale has been executaed based on both total price and a fixed price per unit area.	In case where the actural area is deficient (546-1)	Good faith	O	O (Only if the buyer cannot achieve his purpose of the contract)	O※2	X	O (Delivery of the deficient portion)	Within 1 year from the time when the buyer knew or should have known of the existence of defect (547)※2	※2 Article 482 shall apply to the right to demand damages
			Bad faith/ Gross negligence	X	X	X	X	X	N/A	
		In case where the actural area is exceeded (546-2)	Good faith	N/A	N/A	N/A	N/A	N/A	N/A	・The SELLER in good faith can demand an increase in the purchase price within 1 year from the date of conclusion of the contract (546-2)
			Bad faith/ Gross negligence	X	X	X	X	X	N/A	
	The sale has been executaed based on only total price	In case where the actural area is deficient (546-3)	Good faith	X (Except in case where the seller was in bad faith, the seller guaranteed the accurancy of the indicated seize or the deficiency exceeds five percent of the indicated area, 546-3 proviso)※2					(If the right is acknowledged according to 546-3 proviso, within 1 year from the time when the buyer knew or should have known of the existence of defect (547)※2)	※2 Article 482 shall apply to the right to demand damages
			Bad faith/ Gross negligence	X	X	X	X	X	N/A	
		In case where the actural area is exceeded (546-4)	Good faith	N/A	N/A	N/A	N/A	N/A	N/A	・The SELLER in good faith without negligence can demand an increase in the purchase price within 1 year from the date of conclusion of the contract only if the excess area exceeds five percent of the indicated area (546-4)
			Bad faith/ Gross negligence	N/A	N/A	N/A	N/A	N/A	N/A	