Textbook
on
Civil Code

Volume 1

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 1 covering **basic of general rules, real rights**, and **obligation**.

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).

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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.

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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

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Section 1 Introduction

1. What Is Civil Code?

Civil Code covers living and life of private person.

Code { property / family } of private person (Article 1 of the Civil Code)

Therefore, the code is private law.

- Beside private law, there is public law
- Beside general principle there is special principle or law.

Private law: covers the relationship among private entities and individuals (such as contract)

Public law: covers the relationship between public entity and private person (such as Criminal Code)

Private law sometimes has special law. Example: commercial code.

Where the provisions in Civil Code and special law stipulate the regarding same subject matter, the special law governs that. However, if there is no provision in special law, the application and the interpretation shall be made in accordance with Civil Code.

2. Creation of the Civil Code

There are 2 major fields in Civil Code including law on property and on family.

Law on property includes: law on obligation and law on real rights

Real rights include: title, possessory right.

Civil Code was created through Pandekten System in which the common principles are extracted and put front and specific rules are put later.

Example: Because termination of contract is basic and common rules regarding all the contracts and thus provisions regarding terminations are put in front of specific rules such as rules regarding of loan for consumption.

Exercising the rights: any abuse of rights shall not be accepted in the Civil Code (Art. 4) which is mentioned in general rule; therefore, abuse of rights shall be applicable in performance of obligation, real rights or law on family or contract or unjust enrichment or tort etc.

2.1. Law on Property and Family

Book 1-2 General Rules

3-6 Property

7-8 family

2.2. Law on Obligation and Real Rights

Either of claim right (obligation) or real right doesn't necessarily exclude another right. Therefore, sometimes both of obligation and real right can be a ground for some claim at the same time.

Example: A sold a car to B; B already paid A, yet A has not delivered the car to B.

Question:

- Can B file a complaint demanding a car against A based on ownership or claim?

➢ In this case, B may file a complaint against A based on:

① Ownership (Art. 133) based on the agreement that made B an owner.

② Claim (Art. 515 sale contract)

3. Functions of the Civil Code

There are 2 functions of the Civil Code as follows:

① Standard for decision (standard for judgment) refers to decision based on provision in the civil code.

➢ **Any decision made by the court shall always have the ground based on the code.** Even In case the court cannot extract the conclusion from literal wording of the code, judge shall make an interpretation in order to make the decision based on the code.

② Standard for action. Example: rights to demand in case of conflict. If parties would be aware that decision shall be made based on civil code in order to render judgment by the court, parties may follow the rules of civil code because the more he acts in accordance with the code, the more he is likely to get the benefit from that. Therefore, the civil code gives civil parties the standard for action. Moreover, for example, if a person knows that, he shall compensate the damages if he commits tortious act toward others, he dare not to act like that anymore. Another word, Civil Code is a standard for conducting an act for party.

4. Relation between Civil Code and Civil Procedure Code

Civil Code can be called "substantive law" while Code of Civil Procedure is be called "procedural law".

Substantive law: cover substantive-relationship whereas Civil Procedure Code stated rules to carry out an act of litigation. Having substantive law is almost useless unless it has a procedure to realize it. These two codes are inter-dependent so that there would have positive outcome over a dispute resolution

for party involved in the litigation as well as to get involvement from law practitioners such as judge.

Section 2 Basic principles

1. Basic principles of the Civil Code

1.1. Origin of the Civil Code

In feudal system in Europe in Middle Ages, only privileged class such as King and aristocracy where ownened land and farmers or slaves had only right to cultivate. They were under supervision from their master and their jobs could not be changed; they were sold without recognizing their personality.

In the middle of 17th century, there were civil revolution which abolished the feudal system and declare:

- Individual equity
- Freedom of ownership
- Individual freedom

From then, state power was only used to preserve smooth progress of civil life. In this process, the basic principles of the modern civil law such as follows were established.

- Equity of legal capacity
- Principles of absolutely inviolable of ownership
- The principle of private autonomy

These principle are provided by toth Constitution of Kingdom of Cambodia and the Civil Code.

1.2. Principles of Equity of Legal Capacity

All natural persons are entitled to have rights and assume obligations in their name. and legal entity also entitle to grand such rights (Article 6).

This entitlement to have rights and assume obligations is termed "legal Capacity".

The objects to the legal capacity other than natural persons are juristic persons (Article 46).

1.3. Principle of Absolutely Inviolable of Ownership

Ownership is the power which the individual has over the land cannot violated in principle. Some concept related to real rights are based on this principle:

Paragraph 1 of Article 44 of the Constitution of Cambodia provides that "all persons, individually or collectively, shall have the right to ownership". Also, the

Civil Code denotes that ownership is "the right of an owner to freely use, receive income and benefits from and dispose of the thing woned" (Article 138). The idea of ownership in modern civil law means the absolutely and inviolable power over land for its histrical background.

However, at the present day, ownership is no longer considered as absolutely inviolable. For example, Paragraph 3 of Article 44 of the Constitution states that the expropriation of ownership from any person shall be exercised only in the public interest as provided for by law and shall require fair compensation in advance.

Also, Article 138 of the Civil Code provides that ownership can be exercised "subject to applicable law and regulations"
Two principles below are derived from "the principle of absolutely inviolable of ownership".

- Principle of freedom of execution of rights
- Statutory nature of real rights (Article 131)

1.4. Principle of Private Autonomy

Article 3 stipulates that "under this Code, legal relations among private persons shall be equal and equivalent, with respect for the free intention of the individual".

In principle, a state should not interfere in legal relationship of private person as much as possible. And under this principle, every individual has right and freedom to freely create legal relationship based on their intention.

In society with market economy, individual is part of society involving in exchanging goods and services among others through contract. They are bound by contract to respect contract and implement the obligation in good faith. It is natural for people living in a law-governed coutry to obey the law.

In market economy including exchanging and providing service, law respects people's will and allows them to establish their own rules in accordance with their free will, in principle. An individual may make decisions regarding thier economic activities based on his will, such as what product to produce or sell. In this context, everyone is bouned only by their own will. This mean that a market-charactirised society is governed by the principle of private autonomy.

For example, private person may create contract with another person without interference from the state, court or government. This is the principle of private automony.

This principle has two aspects;

- all individuals are entitled to obtain rights and assume obligations by their free intention
- No one was forced to obtain rights or assume obligation without his or her own free intention

Moreover, this principle is applied not only the Civil Code but also law concerning private law. For example, the Code of Civil Procedure adopts "right of the parties to disposition" (Paragraph 2, Article 182 of the Code of Civil Procedure). Tha is to say, the right or legal relations, which are the subject matter in civil litigation, are, by their nature, freely disposable based on the intention of the parties. Therefore, remedies through litigation are sufficient within the scope and the time demanded by the parties.

Based on this principle, another principles can be derived:

- Freedom to make contract.
  Example: A person may create contract which is not mentioned in the law.
- Principle of liability arising from negligence
  It denotes that if a person caused damage without negligence (or intention), there is no necessity of compensation for damages.

2. Mandatory Provision and Optional Provision

2.1. Mandatory Provision

A mandatory provision means that the provision which deny the effect of the legal act which is against the provision itself. A mandatory prosvision modifies the principle of private autonomy because even if the parties made an agreement with their free intention, the Civil Code denies the effect of the agreement.

In the case where Paragraph 1 of Article 354 stipulates that even where the declarations of intention of both party are made without any defects, the contract shall be void if the content of the contract violate a mandatory provision of law.

2.2. Optional Provision

On the other hand, provisions other than mandatory provisions are optional provisions. The party may provide contents contradictory to optional provision by the contract.

For example: X and Y made a sale contract of a car. Where Y has not delivered the money, X can refuse to deliver the car. It is defense of simultaneous performance (Article 386) and it is the general principle of contract. On the other hand, the contract that X should pay the purchase price first and Y should

transfer the ownership after payment is valid. In this case, X who is required to perfrom in advance of Y may not assert defense of simultaneous performance.

2.3. Distinction between Mandatory Provision and Optional Provision

Whether a given provision is mandatory or optional is not always explicit in the Civil Code. It is considered that following three provisions are mostly mandatory provisions.

1. provision related to fundamental order of society

Example: law on family, law on real rights which most of provisions are mandatory provisions.

2. Conditions of private antonomy

Example: Provision related to validity of declearation of intention, legal capacity

3. Protection of the economic weak

Example: Prohibition against forfeiture agreement (Article 827) [1], limitation on interest (Aritcle 585).

Whereas provisions related obligations are considered optional provision due to the principle of freedom of execution of contract.

Mandatory provisons are stated in the law. Whereas optional provisions, parties can make agreement to conclude contract and the agreement can be made against optional provision.

Upon explanation, it can be noticed that many provisions using the word "may" are optional provisions whereas many of provisions using the word "shall" are mandatory provisions.

3. Restriction of Exercising the Rights

3.1. Prohibition of Abuse of rights

(1) Intention

As mentioned, principle of freedom of execution of the right is derived from the principle of absolutely inviolable of ownership. However, the term "right" in Article 4 means not only ownership but also other all rights.

The exercise of rights that unreasonably infringes upon another right can be regarded as abusive. Therefore, the Civil Code provides that the abuse of rights

[1] Art. 827 prohibitis forfeiture agreement which stipulates that the pledgee shall not acquire ownership of the thing pledged or dispose of it prior to the due dates in a manner other than that privided by law. For example, X delivered his property as security and Y paid money. They cannot agree that Y shall acquire the ownership of the property or dispose of it before the due date in a manner other than that provided for by law. This is a protection of X as the economic weak.

shall not be permitted and if a right is used beyond the scope of the protection originally anticipated, the exercise of such right shall not be valid.

Case study

Y, who lived in lower land, constructed a pipeline by their own cost to pipe hot spring water to his land from a spring in an upper land with an agreement from the owner of the spring. He has constructed a bathhouse to share the hot water among his neighbours. The pipeline is 800 meters long and 2 meter width and partly flow across A's land. Almost all parts of A's land is a waste land.

X heard about this pipeline and bought the land from A. And then, X requires Y to buy the land at a price 10 times higher than market price. When X's offer is rejected, X files a complaint against Y demanding the removal of the pipeline based on rights to demand abatement of hindrance to exercise of ownership.

According to Article 159, X's demand is lawful as it is based on ownership. However, in a similar case, the Supreme Court of Japan dismissed X's claim because of abuse of right.

because X has an intention to sell much higher than the market price despite the fact that only 2meter of pipe crossed X's land and mostly of X's land was waste land. Also, the pipe is not only important to Y but also his neigbor.

(2) Effects of Abuse of Rights

(A) The exercise of rights shall be considered as invalid (Sentence 2 of Article 4)

For example, a rejection of exercise of right to demand abatement of hindrance to exercise of ownership in above spring water pipe case, etc.

(B) In some case, a liability for tort arises.

For example, a person constructed a building which blocked neibours' house, resulting in low sunlight or wind to neibour's house. In this case, the neibours may demand compensation due to tort.

(C) The rigth exceptionally is deprived by law.

For example, Article 1048 provides that in the case where a parental power holder abuses his or her rights, the parental power shall be divestmented.

3.2. Principle of Good Faith

(1) Intention

The principle of good faith is a main principle stated in Article 5 of Civil Code. It provides that "rights shall be exercised and duties performed in good faith". This principle is aimed at ensuring a smooth transaction stability in society and trust on each other. When an act is undertaken such as formation of a contract, the relationship between rights and obligations will commence. Individuals shall exercise their rights and perform obligations in good faith in order to gain trust among people involved and in order for them not to breach the trust.

This principle was applied to only a case of relationship between claim and obligation historically. However, it has been commonly applied to the social contiguous relationship such as relationship of real rights and relationship of personal status.

(2) Derivative Principles

a. Doctrine of Estoppel

This doctrine denotes that when a person X, by using words or actions, gives another person Y to believe a certain set of facts upon which Y takes action, X cannot later, to X's benefit, deny those facts or say that he earlier act was improper, and he shall be responsible for it. This act is called doctrine of estoppel.

For example, this concept is covered in Article 372 of the Civil Code:

1. Agency by estoppel which is outside the scope of the agency authorization: It is an agency which agent exercises the right beyond the scope of the agency authorization which the principal provides to the agent. In this case, the principal is responsible for performing the contract if the other party believed without negligence that the agent was authorized to enter into the contract (Paragraph 1).

   Example: X gave an authorized right to Y to buy a Car worth 20,000 dollars. Based on this authorization, Y bought land worth 20,000 dollars from Z instead. This purchasing act is beyond the scope of authorization. However, Z entered into a sale contract of the land with Y because he thought that Y was the authorized agent of X. In this case, based on Paragraph 1 of Article 372 of the Civil Code, if Z was not aware that Y acted beyond the scope of authorization without negligence, X could not deny this agency authorization. Therefore, X shall be responsible to implement the contract with Z.

2. Agency by estoppel where after the extinction of an agency authorization: It means that the agency authorization was valid earlier but later it is extinguished, and agent without authorization acts within the scope of the previous agency authorization. In this case, the former principal is not responsible for performing the contract if the other party aware or wasn't aware with negligence the fact that the agency authorization of former agent has been extinguished (Paragraph2).

   Example: X is the owner of a car garage. He gave the agency authorization to Y to buy a car. Later, X terminated the contract which provides the agency authorization to Y and it was extinguished. However, Y still used the extinguished agency authorization to enter into a sale contract with Z by claiming that he was an authorized agent of X. In this case, based on Paragraph 2 of Article 372 of Civil Code, if Z was not aware of the extinction of the agency authorization without negligence, X cannot deny the agency authorization, so X shall be responsible for performing this contract with Z.

3. Agency by estoppel which showed the conferring of an agency authorization:
   It means that the principal has not given the agency authorization to a person, but showed the impression that he has given the agency authorization. In this case, the principal is obligated to make performance under the contract if the other party wasn't aware of the absence of an agency authorization without negligence (Paragraph 3).

   Example: Y has begun to negotiate with Z to buy a car as X's agent despite the fact that X never granted an agency authorization to Y. Then, Z inquired X whether Y was an agent of X or not. X answered that he granted an agency authorization to Y. In this case, X shall be responsible for performing the contract if Z wasn't aware of the absence of the agency authorization without negligence.

These are cases where the principal is responsible for making unreal appearance that the putative agent has the agency authorization. In such cases, if the other party believed the existence of the agency authorization of the putative agent without negligence, the principal cannot deny the absence of the agency authorization because of the Doctrine of Estoppel.

b. Principle of Clean Hands

This is a principle that any person who wishes to ask or partition a court for judicial action, he must be in a position free from fraud or other unfair conduct. Every individual shall respect the principle of clean hands when they exercise

their rights and perform obligations, especially when they deal with legal disputes through a court. They shall be honest, and mustn't bear any fraud intention otherwise the court will not allow to exercise their right. If the court has discovered that the person filing a suit is not honest, the court may dismiss the case based on Article 5 of the Civil Code.

Example: X entered into a contract dealing with illegal drugs with Y. On the day of formation of the contract, Y has made the payment and X gave the drugs to Y already. Later, X argued that this contract was null and void based on Paragraph 1 of Article 354.

In principle, when a contract is null and void, everything the party obtained will be returned to the situation prior to the formation of contract (Article 736). However, in the drug dealings, things are different. It means that Y cannot demand X to pay back the money, and X can't demand Y to give back the drugs (Article 741). This is because the contract goes against the principle of clean hands. If Y is allowed to demand money back and X is allowed to demanded drug from Y, it means that individuals would be able to exercise their illegal rights and it is against the principle of clean hands. Therefore, the court shall dismiss the case if they file a suit.

c. Principle of Changes of Circumstances

This principle is used to protect the interests of any party that suffers high risks in performing the contract by allowing that affected party to demand the change in the contents of the contract.

In principle, parties to a contract are obligated to perform according to the contents of the contract. For example, on 1st January 2010 X made a contract with Y selling 1000 kg of rice for the price of 1 dollar per 1kilogram. Y promised to pay money to X on 01 February 2010. On 23 January 2010, the price of one kilogram of rice suddenly and unexpectedly increased to 10 dollars. In general principle of a contract, whatever price rice increased to, X cannot demand Y to pay him for 10 dollars per kilogram. However, such a sharp increase in the price causes X to bear very serious risk. If the changes has become excessive and we forced Y to accept the change in this circumstance, Y would also bear very serious risks, so the court shall consider this carefully in order to protect the Y's interests.

In Japan, this principle is rarely used because it may affect the interests of parties and legal status of the contract. There is only one case that the Supreme Court in Japan allowed to change the contract in accordance with the principle of changes of circumstances during World War II. After World War II, Japanese Supreme Court has not applied this principle in a specific case so far because to

apply this principle easily and allow abolishing or changing the contract impairs the legal stability of a contract.

3.3. Points to Consider

Principles of legal status and predictability are general principles that can be used in both civil and criminal cases. However, some of them may apply only for civil matters.

Both "prohibition of abuse of rights" and "the principle of good faith" function to complement the lack of law or to avoid having an adverse consequence with formal application of law. However, the use of these above general principle' is the only last resort for the court to settle a dispute. It means that the judge shall look for any relevant article to apply before he/she considers using general principles, and if the relevant articles cannot be found, then the judge shall apply the general principle above. Judges should be careful not to abuse of "abuse of right".

Section 3 Capacity of Person

1. Legal Capacity

1.1. Intention

According to the situation to be a subject of right and obligation (Article 6), all kinds of people shall be entitled to have rights without exception. Rights under the Civil Code come in different forms such as: rights to form a contract, rights to receive succession property, rights to claim damages, etc. In principle, all natural persons regardless of whether they are Khmers or foreigners acquire the same personal rights. However, there are limitations to rights in the case of foreigners residing in Cambodia under Article 7. It provides that foreign nationals are not entitled to acquire or maintain certain rights if so provided by other law, treaty, or international convention. The limitation to rights is also provided under the provision of Paragraph 1 of Article 44 of the Constitution of the Kingdom of Cambodia. It stipulates that only natural persons or legal entities of Khmer nationality shall have the rights to own land.

The first section, Book 2 of Civil Code which stipulates the legal capacity is to determine a specific status of a natural person to acquire rights.

1.2. Commencement and End of Legal Capacity

Article 8 clearly stipulates the commencement and end of legal capacity. It states that natural persons shall acquire legal capacity by birth, and shall lose it by death.

The Civil Code does not stipulate the meaning of birth and death and it is open to interpretation of Cambodian practice. For reference, in Japanese Civil Code, birth means when a baby has been born out of the mother completely and is still alive. Also, in Japanese practice, death means when lung, heart, and brain stop functioning and it is proved by the fact that there is no breathing, heart stops beating, and the enlargement of iris of eyes as well as no reaction to light.

a- Commencement of Legal Capacity

Based on the content of Article 8, if the fetus is not born yet, it does not have legal capacity. However, it seems to be unfair if a fetus cannot be subject of rights although the fetus is expected to be born in a short time. Therefore, Article 9 provides for some exceptions. A fetus in existence shall have legal capacity to acquire following rights:

1. **Seeking Damages for Harm Arising Out of A Tortious Act:**

By nature, a fetus is going to be born in a short time, so if the fetus suffers any harm due to a tortious act at the time of pregnancy, the fetus shall be entitled to seek damages for the harm arising from such act after it is born (Paragraph 1 of Article 9) because, if the fetus was not entitle to seek damage for the harm, it would badly affect the fetus's interest. For example, the father was killed in a traffic accident, but the fetus later was born alive. In this case, the victim's wife (= the fetus's mother) has her own right to seek damages.

And after the fetus was born, she/he is entitled to seek damages against the person who caused the accident (perpetrator) for any harm through the mother as a legal representative of the fetus. It is noted that prior to the birth of the fetus, it seems that the mother cannot seek damages as a legal representative of the fetus because the fetus shall not be entitled to exercise his own right until he is born.

2. Inheriting Property by Succession:

Article 1156 states that children of the decedent shall become successors and all the successors shall have equal shares in the succession. In principle, a fetus before delivery is not a child yet. However, it would seriously affect the right and benefit of the fetus who is going to be born in a short time if the fetus was not entitled to receive the share of succession. Therefore, Paragraph 2 of Article 9 provides that the fetus in existence at the time of death of a decedent who dies intestate shall be entitled to inherit from the decedent after it is born.

3. Receiving Effect of Succession Property

As explained in point 2 above, to protect the right and benefits of the fetus in the name of successor, Paragraph 3 of Article 9 states that a fetus in existence at the time of death of a testator is entitled to receive the effect of testament.

Then, how can a fetus in existence later claim all the above rights?

The fetus can claim these rights through parental power holder or guardian. Those who have parental power and guardianship can use these rights on behalf of the fetus in existence.

b. End of Legal Capacity

The duration of acquiring legal capacity by natural persons is limited and does not last eternally. According to Article 8, a natural person shall lose his/her legal capacity by death.

2. Mental Capacity

Mental capacity refers to the capacity to recognize and understand the legal consequences of his actions (Article 14). "Actions" here refer to contracts or any unilateral act (Article 15).

Under principle of private autonomy, person can establish his legal relations based on his free intention. To that end, it is necessary for person to be able to indicate his or her intention in appropriately. In this mean, mental capacity is premised on the principle of private autonomy.

2.1. Intention

Section 3, Book 2 of the Civil Code stipulates mental capacity and means for protecting business transactions done by a person who does not have enough ability to recognize and understand the legal consequences of his actions.

2.2. Effect of Lack of Mental Capacity

Article 14 of the Civil Code states, "an act performed by a person who was unable to recognize and understand the legal consequence of his actions is voidable." It means any act performed by a person who stays under a situation where he loses capacity to recognize and understand the legal consequences of his action can be rescinded. For example, a person who has no ability to recognize and understand his action due to consumption of too much alcohol or drug affecting lacks mental capacity. If a person in question or his hair or general legatee rescinds his action, the action is deemed void from the beginning (Paragraph 2 of Article 358, Paragraph 2 of Article 359).

2.3. Criterion for Judging Mental Capacity

Every individual has freedom of expressing his intention, but in order to make this intention to be effective, it is necessary that he has a capacity which can recognizes and understands the legal consequence of his actions. To know whether a person has or lack this capacity, we shall look at the following criteria:

1- Can a person understand the legal meaning of his action?

2- Can a person recognize the legal consequence of his action?

For example, a person who is incapable of understanding the meaning and effects of his action with overusing of drugs may lack his mental capacity.

In addition, it is difficult to consider that an infant can understand the legal meaning of his acts. However, it depends on Cambodian practical judgment regarding at what age an infant shall be deemed to have mental capacity.

3. Capacity to Act

3.1. Intention

Section 4, Bok2 of Civil Code provided the system of capacity to act in order to prevent any damages arising out of business transactions done by a person who does not have enough capacity to act.

Even if a person had no capacity to act at the time of his action, it is difficult to prove it afterwards. Also, if such a person may rescind the contract due to lack of his mental capacity, it shall diminish stability of transactions of the counter party.

In consequence, it is necessary to categorize persons who don't have mental capacity and to limit their capability of action for protection of their rights and to maintain stability of transactions. In addition, those who has mental capacity but lacks ability to deal with complicated interest and system needs to be protected.

Based on this standpoint, the Civil Code has categorized persons who have inadequate ability to transact independently and established their guardians.

In other words, capacity to act refers to the capacity which (a) a person can make definitively effective declaration of intention (b) independently. In this sense, a person who has full capacity makes his intention valid by his own decision without any help from anyone.

A person who has limited capacity shall obtain consent from parental power holder, guardian or curator before his declaration of intention. If the person with limited capacity acts without the consent of his parental power holder, guardian, or curator, his act can be rescinded. It means that such person cannot act effectively and independently. Therefore, a person with limited capacity can be considered as a person with incapacity to act.

In practice, when an act performed by a person with limited capacity to act has been completed, sometimes it is hard for the other party to realize that the person didn't have full capacity. If an incapacity person may rescind the act due to incapacity without limitation, it would affect the stability of transactions. On the other hand, there is a necessity to protect a person who has a limited capacity. Therefore, the Civil Code categorized such persons into three patterns to balance between protections of a person who has a limited capacity and maintain the stability of transactions (Article 16). Persons who have a limited capacity are;

1- Minors
2- Person under guardianship

3- Person under curatorship

3.2. Minor

(a) Intention

Minors are persons under the age of eighteen. (Article 17)

However, the minors who are emancipated shall have the same capacity to act as an adult (Article 22).

(b) Guardian

Parental power holder or guardian of minor

(c) Scope of capacity

An act carried out by the minor without the consent of the parental power holder or guardian, in principle, may be rescinded (Article 18).

However, a minor may act without consent of the guardian in following cases;

***Acts Intended to Acquire A Right**

For example; to receive a gift without burden

*** Acts Intended to Be Relieved of A Duty**

For example: To enter into contract to get an exemption of the obligation

*** Acts In The Course of Daily Activity**

The reason why minors can act relating to daily life without consent of the guardian or parental power holders is because of respect to the right of self-determination of minors and stability of transactions especially in the case of substantial and typical transactions.

For example, to purchase of food or clothing, payment of water rate, lighting and heating expenses are considered act relating to daily life. It is necessary to decide whether an act corresponds to act relating to daily life while taking into consideration various conditions such as age of minors, the price or sort of transaction, etc.

*** Disposition of Property With Permission of Parental Power Holder or Guardian (Article 19)**

For example: To spend monthly allowance

*** An Act Concerning The Business Which Is Permitted The minor to Carry on by Parental Power Holder or Guardian (Paragraph 1 of Article 20)**

(d) Effect of an act by minors without consent of the parental power holder or the guardian

An act conducted by a minor without the consent of his parental power holder or guardian may be rescinded to protect the interest of the minor.

Persons who are entitled to rescind such act include:

- Minor himself
- Parental power holder (father or mother)
- Guardian of the minor (legal representative)

Example: X is 10 years old, entered into a contract to buy a mobile phone from Y at the price of 200 dollars without consent and knowledge of his parents. After he had already concluded the contract to buy the mobile phone, his parents knew and disagreed with such purchase of mobile phone.

In that case, X's parents may rescind the contract that X made with Y or X himself may also rescind the contract which he had made.

On the other hand, a daily purchase of thing such as pen, book, etc. that the minor had already created a contract, it is still valid and he may decide and conduct such act by himself.

Case Study

Can following acts which minor X has conducted without the consent of his parental power holder or guardian be rescinded?

(1) X was given money as a birthday present from his uncle.

(2) X sold his land to Y.

(3) X bought a motor-bike with accumulated allowance which was given from parents.

(4) X was permitted to sell fruits from his parental power holder. X purchased bananas for 500 dollars on deferred payment. Later on, X got discount of 50 dollars and paid 450 dollars to the seller.

(5) X bought a notebook at 1 dollar from allowance.

(6) X bought a used car at 400 dollars which priced 1000 dollars originally, and paid from X's inheritance.

【Conclusion and Grounds】

(1) No.

To receive gift without burden is an act merely intended to acquire a right (Article 18).

(2) Yes

In the case where X sold his land to Y, X has to bare the obligation to deliver the land. Therefore, if X acted without consent of his parental power holder or guardian, X's act can be rescinded.

(3) No.

This is a case that his parental power holder allowed to dispose of property without a specified purpose.

(4) No.

X is permitted by his parental power holder to carry on the business. In this case, X has the same capacity to act as a person of the age of majority, so, the act cannot be rescinded without reference to the discount.

(5) No.

This act corresponds to both disposition of property with permission of parental power holder without a specific purpose and an act relating to daily life.

(6) Yes.

X has to bare the obligation to pay 400 dollars even though the price was discounted. Therefore, the contract can be rescinded.

3.3. Person under General Guardianship

(a) Intention

Article 24 stipulates that:

1. With respect to a person who remains in a habitual condition of lacking the ability to recognize and understand the legal consequences of his actions due to mental disability, the court may declare the commencement of a general guardianship at the request of the person himself, the person's spouse, any relative within the fourth degree of consanguinity, the guardian of minor, the supervisor of guardian of minor, curator the chief of the Khum or Sangkat where the person's domicile is located, or a prosecutor. However, this provision shall not apply in case where the person is under 15 years old at the time of application.

2. In case where the court makes the declaration of Paragraph (1), and where the person is under the curatorship, the court must revoke the declaration of commencement of curatorship.

It means that a person under the general guardianship is the one who remains in a habitual condition of lacking the ability to recognize and understand due to mental disability.

As mentioned above, the person who remains in such a condition because of mental disability, the court may make a declaration of general guardianship which has two requirements in the following:

1. Remaining in habitual condition of lacking the ability
2. Being declared the commencement of a general guardianship by the court

Example:

① A person who may not be able to purchase daily merchandise and necessarily needs representative for transaction

② A person who cannot recognize his daily life such as his name, family, and place where he lives, etc.

③ A person who becomes a plant person (for example; in a situation of brain-dead)

A general guardianship is a system for a protection of rights of an impaired person such as life, physic, freedom, property, etc. because the person lacking of ability may not understand the legal consequences of his action.

For such a person, if there is an application for a commencement of general guardianship from himself or family, the court must examine with regard to situation in order to evaluate the commencement of the general guardianship and appoint an appropriate person for a general guardian.

With respect to the guardian of minor, the supervisor of guardian of minor is also entitled to request the commencement of the general guardianship, because the supervisor may conclude that it is necessary for impaired minor to be declared the commencement of general guardianship.

As for a person under curatorship, in the case where a person who has mental disability and has become lack of his ability to act, a curator or the supervisor of curator may request a declaration of commencement of general guardianship; however, because the person is already under curatorship, therefore, the court must revoke the declaration of commencement of the curatorship at discretion when the court makes the declaration of commencement of the guardianship.

Such requirement of revocation made by the court is because of the fact that where a person is under both curatorship and general guardianship, it will cause a complicated legal relationship.

Moreover, the declaration of commencement of general guardianship may be made if the person himself is 15 years up.

(b) Guardian

General guardian

(c) Scope of capacity

Any act conducted by a person under general guardianship may be rescinded. However, this shall not apply to an act necessary in the course of daily life (Article 26).

It means that an act conducted by a person under general guardianship can be rescinded by himself or general guardian. Moreover, although the act conducted by a person under general guardianship with consent from the general guardian, such act may be rescinded as well because a person under the general guardianship is in a habitual condition of lacking ability, so even if the guardian gives consent in advance, a person under guardianship doesn't necessarily act as expected.

However, the act of daily life that the person under general guardianship conducted may not be rescinded. The meaning of "daily life" and the reason of this provision is the same as in the case of minors.

Article 26 stipulates the limitation on the capacity of person under the general guardianship with respect to only the act concerning the property; whereas the act concerning the personal status of the person under the general guardianship needs another consideration.

For example, Article 954 provides that a person under general guardianship may marry if he or she has the minimum capacity required to recognize the effect of marriage. In such a case, the consent of the general guardian is not required.

In the event the major who remains in the habitual condition of mental disability without a declaration from the court has conducted the act, the said act may be rescinded based on the Article 14 (Lack of Mental Capacity)

3.4. Person under Curatorship

(a) Intention

Person under curatorship is required to be:

- the ability to recognize and understand the legal consequences of his actions is substantially impaired due to mental disability.
- a declaration by the court

Article 28 provides that:

1. With respect to a person whose ability to recognize and understand the legal consequences of his actions is substantially impaired due to mental disability, the court may declare the commencement of curatorship at the request of the person himself, the person's spouse, any relative within the fourth degree of consanguinity, the guardian, a guardian's supervisor, the chief of the Khum or Sangkat where the person's domicile is located, or a prosecutor.

2. In case where the court makes the declaration of Paragraph (1), and where the person is under the general guardianship, the court must revoke the declaration of commencement of the general guardianship.

It means that a person under the curatorship is the person whose ability to recognize and understand is substantially impaired due to the mental disability (except to a person who is the object of guardianship).

(b) Guardian

Curator

In the case where an application from the question person or a person entitled to file an application for the commencement of the curatorship, the court must examine with regard to situation in order to evaluate the commencement of the curatorship and appoint an appropriate person for a curator. (Article 29)

A curatorship is different from the guardianship because person who is the object of curatorship is substantially impaired but a person who is the object of guardianship lacks mental ability habitually. Therefore, the general guardian and the supervisor of the general guardian may file the application for the commencement of curatorship to the court by considering the case that the mental disability of person under the general guardianship. In the case where the court acknowledges the commencement of the curatorship for the person under the general guardianship, the court must revoke the declaration of commencement of the general guardianship.

(c) Scope of capacity

A person under curatorship can act without curator's consent in principle. However, he may not enter into the particular contract set forth in Article 30.

Any of the following acts conducted by a person under curatorship without the consent of the curator may be rescinded:

(a) receiving or using principal;

(b) incurring or guaranteeing a debt;

(c) acting with the intent of obtaining or losing rights pertaining to an immovable property or other valuable asset;

(d) conducting an act of litigation;

(e) donating [money or property], or entering into a settlement or arbitration agreement;

(f) accepting or waiving succession, or dividing a legacy;

(g) refusing a donation or bequest, or accepting a donation or bequest subject to a burden;

(h) building, remodeling, expanding or conducting major repairs to a building or structure;

(i) executing a lease agreement that exceeds three years for land, two years for a building, or six months for a movable;

(j) any other act that a court specifically declares, based on the application of a person listed in Article 28 (Declaration of commencement of curatorship), or a curator, or a curator's supervisor, requires the consent of the curator.

In the event that the person under the curatorship conducted the above-mentioned acts without the consent of the curator, the person himself or the curator may rescind the act that has conducted.

A person under curatorship can act without curator's consent in principle. However, in respect of certain important property act, a person under curatorship needs the consent of the curator as above.

However, in the case where an act above is conducted in the course of daily life, a person under curatorship can conduct the act without curator's consent. For example, a person under curatorship may withdraw the small amount of money from the bailment account etc.

4. Protection of a Party in Transaction with a Person With Limited Capacity

4.1. Intention of the System

In the case where a person with limited capacity acts out of the scope of their capacity, a person with limited capacity side can exercise the right of rescission. Conversely, the other party to transaction with a person who has a limited capacity is always at the risk for rescission of the contract even if the other party wasn't aware his counterparty was a person with limited capacity in good faith and without negligence.

Also, it is unfair that a person with limited capacity side has the right to rescind while the counter party is put everlastingly in the unstable privity of contract which can be rescinded.

Moreover, if a person with limited capacity has used fraudulent means to induce the belief that he is a person with full capacity, a person with limited capacity side shall not be allowed to deny his act because of the Doctrine of Estoppel.

Therefore, the Civil Code provides the right to demand (Article 32) and limitation of rescission in the case where a person with limited capacity has used fraudulent means (Article 33).

4.2. Right to Demand

A party to an act conducted by a person with limited capacity may notify certain person and demand a definite answer to whether or not the person ratifies the voidable act within a certain period (Article 32). Article 358 and Article 359 provides the right to rescission and the entitled person to rescind, while Article 360 through Article 363 shall apply to acts that can be rescinded.

Case Study

In following cases, may X demand to implement each contract against Y?

(Example)

Y is 15 years old. Y bought a car from X for 10,000 dollars without any consent from parental power holder A. X noticed A and demanded a definite answer whether or not A to ratifies Y's act within two months. The two month period has lapsed, but X has not received any answer from A.

(Answer) X can demand to implement the contract with A on the ground that A is deemed to have ratified Y's act based on Paragraph 2 of Article 32.

1. Y is a person under curatorship. Y made a contract with X to incur debts of 1 million dollars with an interest of 100 dollars per month. Y had not received any consent from a curator B yet prior to the contract.

(a) B was aware of Y's debt and paid a monthly interest of 100 dollars to X for 1 month. Then, the due date has come already.

(b) X informed Y and demanded Y to obtain B's ratification within two months, but Y did not give any answer within that period.

2. Y is 15 years old. Y inherited the land from his father. Y leased this land to X for a rent of 20 dollars per month without the consent of his mother C. X noticed

C and demanded a definite answer whether or not C ratifies Y's act within two months.

(a) Y notified to X that Y rescinds the contract between X and Y on her own intention. The two month period lapsed and there was no answer from C.

(b) Y notified to X that Y ratifies the contract between X and Y on her own. Then, 2 months has passed without C's answer.

3. Y is a person under general guardianship. Y bought X's watch on deferred payment with the consent of his guardian D. X delivered the watch to Y. After that, D sold the watch to E as the legal representative of Y. X did not receive any payment yet.

(Conclusion and Grounds)

1. (a) X can demand to implement the contract of loan for consumption with Y.

Y's act can be rescinded in accordance with Item (b) of Article 30 and B is a person who may ratify this act (Paragraph 1 of Article 361). B paid 100 dollars to X as interest, and it means that B performed the obligation arising due to a voidable act partially. Therefore, Y's act shall be deemed to be ratified as a constructive ratification (Item (a) of Article 362).

(b) X cannot demand to implement the contract of loan for consumption with Y.

X can notify Y and demand to obtain B's ratification within certain period. If Y fails to dispatch a notice to the effect that ratification has been duly obtained within such a period, the contract shall be deemed to be rescinded (Paragraph 3 of Article 32).

2. (a) X cannot demand to implement the lease contract with Y.

A rescission of act based on minority may be carried out by the person in question (Paragraph 2 of Article 359). Therefore, Y is a person who has a right of rescission without consent of his parental power holder or guardian. In contrast case (b) bellow, Y can rescind the contract by himself because a rescission discharges Y from the obligation for benefit of Y.

(b) X can demand to implement the lease contract with Y.

Ratification of a voidable act may be carried out by a person having a right of rescission. However, in this case, Y doesn't have this right because he is still minor. Where the rescission was based on an act performed by a person with limited capacity, the ratification may be carried out after the circumstances giving rise to the rescission no longer exist (Latter part of Paragraph 1 of Article

361). Then, the act shall be deemed to have been ratified because C didn't answer within a fixed time of the period (Paragraph 1 of Article 32).

3. X can demand to implement the contract with Y.

An act by a person under general guardianship can be rescinded even if he obtained consent of the guardian. However, in this case, D sold the watch to E as a legal representative (Article 1114). This act corresponds to the exercise of a right obtained through a voidable act, so voidable act shall be deemed to be ratified as a constructive ratification (Item (c) of Article 362).

4.3. Fraudulent Means Committed by Person with Limited Capacity

If a person with limited capacity has used fraudulent means to make the counter party believe that he is a person with full capacity and enter into the contract with him, that person cannot rescind the act.

4.3.1. Requirement

(a) A person with limited capacity had used "fraudulent means".

A "fraudulent means" is a deceitful measure to make the counterparty believe that a person with limited capacity has full capacity to act. Whether an act corresponds to a fraudulent means shall be decided while taking into consideration concrete conditions such as sort of limited capacity (minors, a person under general guardianship or curatorship), act (face-to-face contract or not, type or scale of the contract, etc.) and measure (using a false identification card, falsified document of the guardian's consent, etc.) and so on. Basically, if the protection of a person with limited capacity is emphasized, the scope of fraudulent means will be limited.

(b) A fraudulent means used with reference to "capacity to act".

For example, a minor told that he was 21 years old showing false identification card at the time of making a contract, it is considered that to correspond to a fraudulent mean relevant to his capacity. On the other hand, if a minor told that he has enough money with showing his father's account book, it is not a fraudulent mean relevant to his capacity to act.

(c) A person with limited capacity has used such means "on purpose"

(d) Counterparty has been made confided that a person with limited capacity is a person with full capacity (causal relationship)

A causal relationship between the fraudulent means and false belief is required. For example, a minor X pretended that he was his 21-year-old brother Z and entered into sale contract with Y. However, Y was aware that X

was a minor and not Z. In this case, X may rescind the contract based on a limited capacity though X used a fraudulent means because Y didn't mistake X for a person with full capacity (there is no causal relationship).

4.3.2. Effect

If a person with limited capacity has used the fraudulent means to make other party trust until entering into the contract, the effect of the act by the person with limited capacity cannot rescind the contract.

Chapter 2 Real Rights

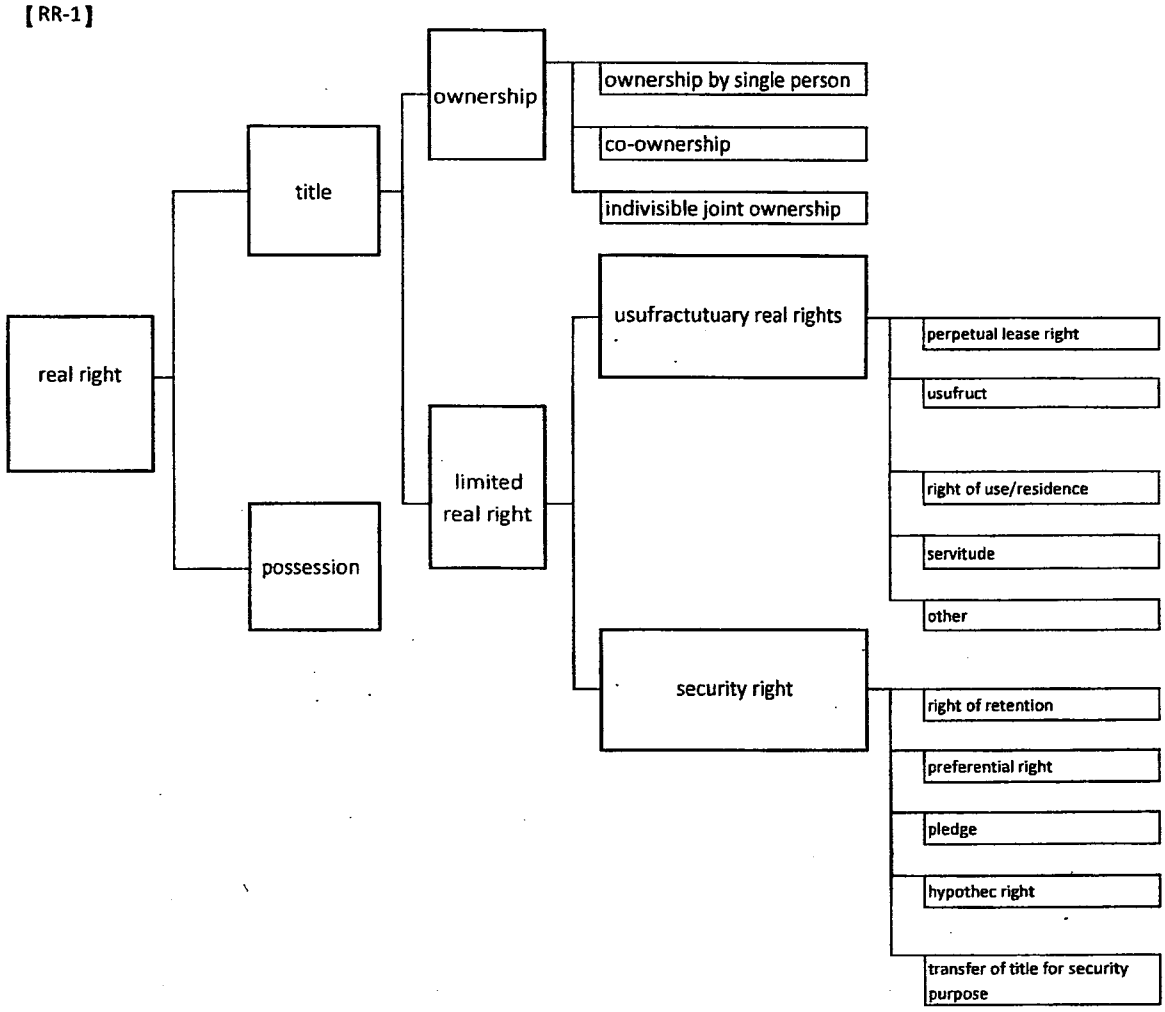
Section1 Concepts of Real Rights

1. What Is 'Real Right'?

1.1. Overview of Real Rights

The following chart is over view of real rights.

[RR-1]



1.2. The Feature of Real Rights

According to 130, a real right is the right to directly control a thing, and may be asserted against all persons.

(1) The 'direct controllable' nature of real rights

It is led by article 130.

(2) The 'absolute' nature of real rights

Absolute nature means that real rights may be asserted against all persons.

(3) The 'exclusive' nature of real rights

Because of the two aspects of natures mentioned above, identical real rights over same property is inconsistent with each other and therefore same real right can't be established if there is already one established. This is called exclusive nature of real rights.

1.3. Difference between Real right and Obligation

(1) Fundamental Principle

Real rights are right to control, use and get benefit from specific property but claim rights are right to demand a specific act or forbearance of act and content of which are fixed by agreement.

Real rights can be asserted against all persons and claim rights not. Because of this difference, real rights are called absolute and claim rights comparative.

This difference causes different conclusion when rights are infringed.

Real right holder can stop infringement against everyone but claim right holder can't.

Case Study

(i) X established a usufruct over his land for Y, Y registered and used X's land. May Y demand to return this land based on Y's usufruct against Z who seizes this land illegally?

(ii) Y entered a loan for use contract between the land owner X and used this land based on the contract. May Y demand to return this land based on the loan for use contract against Z who seizes this land illegally?

【Conclusion】

(i) Y can demand return of the land based on usufruct

(ii) Y can't, based on loan for use contract

【Relevant Article】 256 265 625

【Grounds】

Usufruct is a real rights but loan for use contract not,

In case 2, Y can demand only X to let Y use the land.

Please note that if Y already has possessory right, Y can demand return of land based on possessory right because it is a kind of real right.

(2) Adjustment by Law

Now the difference between real rights and claim rights are getting comparative. For example, lessee can't assert her right against new owner of leased property when ownership has been transferred according to principle.

Civil code, however, provides, in 598 paragraph 1 and 2, that a lease of an immovable property may be held up against a subsequent acquirer of any real right over the immovable property by virtue of the fact that the lessee has occupied, and continuously used and profited from the leased immovable property.

A lessee actually occupying a leased property may exercise the same rights as the owner to demand return [of a dispossessed thing], for removal of disturbance and/or for prevention of disturbance, against an infringement of the lease rights.

And also long-term lease for a term of not less than 15 years are called perpetual lease and regarded as a real right.

This is a one of famous adjustment by law because of importance of lease of immovable property.

2. Types of Real Right

2.1. Title and Possessory Right

(Ownership, perpetual lease, usufruct, pledge, lease, and other rights that legally justify the holding of a thing are referred to as "title" (241-1) and "Possession" refers to the holding of a thing as a matter of fact.

2.2. Ownership and Limited Real Rights

Ownership refers to the right of an owner to freely use, receive income and benefits from and dispose of the thing owned, subject to applicable laws and regulations. (138)

Ownership is inclusive real right and other real rights than ownership is limited regarding either use, reception of income and benefit or disposition.

For example, perpetual lease right holder can use or receive benefit but not dispose.

2.3. Usufructuary Rights and Real Security rights

Limited real rights can be divided into two usufructuary rights and security rights.

Usufructuary rights are rights to use and receive benefit and income such as perpetual lease or usufruct.

On the contrary, security rights are right to secure the debt.

There are two kinds of security rights. One is statutory security rights, which is arisen automatically when some requirements are fulfilled, such as right of retention and preferential rights.

Contractual security rights are rights to be established by agreement such as pledge and hypothec.

3. Principle of Statutory Nature of Real Right

3.1. Tenor

Because real rights is the absolute and exclusive rights which can be asserted against all persons in general, the Civil Code therefore has regulated the Article 131which says "no real right may be created except as permitted by this Code or under special law." The reason that the Code strictly regulates so is because if everyone is permitted to create and arbitrarily determine the meaning of real rights, it may impact on the people surrounding and the society can cause chaos. Therefore, a creation of real rights must be stipulated in the Civil Code and in the special law. Where any creation of real rights is not stated in the Civil Code and special law, such real rights will be subject to be null and void.

3.2. Real Rights Based on Customary Law

In principle, a creation of real rights must be set forth in the Civil Code and special law, but some of the real rights which is recognized under the Khmer custom is permitted to be created even though the Civil Code and special law does not state; more importantly, such real rights must be in compliance with the Civil Code or special law.

A borrowed B $10,000 on October 11, 2010, and promised to return on December 11, 2011 by furnishing his land L as security, and made a written contract. In the contract, it states that if December 11, 2011 elapses and A does not pay the money, land L owned by A belongs to the ownership of B.

An acquisition of ownership over land L of B via a loan contract between A and B is a kind of creation of real rights based on the Khmer custom since the beginning and such creation of real rights is not stipulated in both Civil Code

and special law. Therefore, if it is considered not to be in conflict with civil code or other special laws, it still can be enforceable.

Section 2 Things

Introduction

The Civil Code of the Kingdom of Cambodia dated 8th December, 2007, which is the result of the effort of the Royal Government of Cambodia under cooperation and support from Japan.

This Code indicates the general view which is clearly divided into two:

- Laws on Property related matters (Including Real Rights)
- Law on Family

For Laws on property related matters, the Civil Code states about rights of individuals provided therein by law. And such rights are divided into rights possessed by people over things and rights to demand from specific person, or we can call the former Real Right (Book Three), and the latter claim right or obligations (Book Four)

- Real Right: Right of people over specific things (Book Three)
- Obligation: right of any person over another specific person (Book Four)

Then, real right is the right of any person over things, and the term "thing" indicates the subject of real right and more specifically, one right is established over "one thing" and one thing can't be a separate subject of right in principle. Therefore, the single thing shall be defined to make it clear which thing is the subject of real right. Therefore, they must be determined what the single thing is, what things are, what their definitions are, How we shall distinguish things?

1. What Are Things?

1.1. Definition

Referred to Article 119 of the Civil Code, a thing is a corporeal object or substance comprising a gas, liquid or solid. Thus, a pen is solid or water/ orange juice is liquid, and gas or oxygen is gas; all of these are things.

In other words, a thing, which is subject to real right, refers only to a tangible thing.

1.2. Type of Things

Things are divided into two types: movable properties and immovable property (Article 120 Paragraph 1)

(1) Immovable property

An immovable property comprises land or anything immovably fixed to land, such as a building or structure, crops, timber, etc. Article 120 paragraph 2 means that an immovable property is fixed to the land and thing that is affixed to land considered as part of land. The immovable property is (land and building) tangible and do not include things that can be removed without causing damage to land.

Just for the reference, the definition of immovable property in Land law is introduced here.

In accordance with Land Law, immovable properties are divided into three:

a. Immovable property by Nature

An immovable property by nature means land, a house built on the foundation or constructed with concrete and bricks, building that if they are moved will produce substantial loss of value. Immovable property by nature includes all natural grounds, forest land, cleared land, land that is cultivated, fallow or uncultivated, land submerged by stagnant or running water and constructions or improvements firmly affixed to a specific place created by man and not likely to be moved or relocated.[2]

Based on the definition above, it can be noticed that immovable property includes land and all structure affixed to the land. For the structure, the change of structure cannot be considered as a normal use because land and the structure are connected so if there is a transfer of either one, the other one is automatically transferred. The legal issue is the permanence of the structure or any improvement affixed to the land created by man.

b. Immovable Property by Law

Immovable property by law means all rights in rem over immovable property and movable properties that are defined by law as immovable property. Based on this definition, the law does not determine other things defined as immovable properties besides real rights. At the meantime, things defined as immovable properties by law are things categorized in immovable property by nature though they are transportable. Those are ship with more than thirty (30) tons in capacity, floating houses with the same capacity and real rights over immovable properties.[3] This shows that immovable property by law includes ship and house whose capacity is stated above, besides right in rem over immovable property and movable property defined as immovable property by law. This explanation is a

[2] Article 2.2 of the Land Law 2001

[3] Article 9, Land Law 1992

basic overview about immovable property which indicates the different types of immovable property.

c. Immovable property by Purpose

Immovable property by purpose is movable property by itself but defined as immovable property because it is fixed to immovable property by nature.

For example, a tractor (movable property) is used to plough a plot of land (immovable property by nature) to serve a business at a farm.

Occasionally, immovable property by purpose is necessary or useful in business, agriculture, industry, and commercial foundation like in livestock for selling, for carrying or dragging, for transporting, racing, for ploughing and all other materials like fertilizer, seeds, and small plants.

In addition, immovable property is synthesized with immovable property by nature provided that if it is separated from immovable property to become a transportable thing, it will be damaged that affects the value or decorative attachments of immovable property attached hereto.

For example: following water tube, big mirror, fan attached to wall or ceiling...

In order to make movable property by nature become immovable property by purpose, the following conditions provides herein:

- Movable and immovable properties are owned by the same owner.
- The owner shall show the intention to attach movable property to that immovable property by nature.
  For example: the lessee whose mirror is hung to the wall may take that mirror away when he leaves the house.

(2) Movable Properties

A movable property is anything that is not immovable property (Article 120 paragraph 3). This means things that can be moved or removed to the other location like personal belongings, or movable properties subject to ownership that are not defined as immovable property. For example: book, pen, pencil and so on.

(3) Intangible Property (Intangible Thing)

Based on art.119, only a tangible thing is defined as a thing. Energy like electricity cannot be a thing according to the provision. But Article 120 Paragraph 4 which stipulates that provision of movable properties shall apply mutatis mutandis to intangible property that can be controlled because the

electricity can be under control as well as tangible thing and thus it is convenient that it can be dealt as if it were a thing.

Intangible property is intangible thing such as right, electricity, heat, light, etc. For intangible property but controllable is considered movable property art. 120-4 except provided otherwise by special laws.

(4) Ground to Distinguish Immovable property and Movable properties

It is crucial to distinguish immovable property and movable properties because different rules shall apply to these two. In order to know the point, you need to know two concepts of transactional safety and static safety. Static safety roughly means the precedence of the concerned party's benefit over the one of the third party and transactional safety means the precedence of the third party over the concerned party. For example, A sells something to B and then B sells it to C and the contract between A and B is defective and in this case, benefit of A (concerned party) and C (third party regarding the contract between A and B) is in conflict because the subject matter is only one and thus only one person can get the ownership of that. In this case, from perspective of static safety, A shall be protected and from perspective of transactional safety (dynamic safety), C shall be protected.

And about the immovable property, the static safety is likely to outweigh dynamic safety because the immovable property is relatively expensive property and less frequently become subject matter of transaction and thus the necessity of the concerned party is relatively high while the precedence of static safety may cause confusion in case of transaction of the movable property.

Please note that the explanation above is just a tendency. In actual cases, in order to determine who shall be protected based on some other factors such as subjective status (good faith or bad faith) based on specific provisions.

2. Component of a Thing

2.1. General Rule

The real right can be established over a single thing. It shall be read in two ways. First, just the part of a thing cannot be an independent subject matter of the right. For example, just the part of chair cannot be an independent subject matter of ownership. Second, one right shall not be established more than one thing. For example, one ownership cannot be established over 100 chairs. Therefore, it shall be determined whether something is just a component of a thing or independent thing. Most general rule of a component of a thing is art.121. And it says that a component of a thing that cannot be severed from the

associated thing without destroying the thing or changing its essential nature may not be the subject of rights separate from those applicable to the thing.

For example, pages from 4 to 10 are a component of a book while spare tire is not a component of a car.

And about immovable property, based on Article 122, things attached to land or comprising a part thereof may not be the subject of rights separate from those applicable to the land if they cannot be severed from the land (buildings or structures immovably constructed on land or seeds planted in the ground, etc.).

In case it is severed from the land (like rice is harvested from the field) may become movable property which is the subject of rights separate from those applicable to the land.

2.2. Exceptions

In accordance with Article 123, there is exception that buildings or structures constructed by right holder, grown timbers, plants by right holder, etc., on the land, in the course of exercising such right against others, shall not become components of the land. The same shall apply to those things that are attached on the land for a purpose of temporary nature. For instance, if holders of perpetual lease right, right to use, right to lease, etc. builds the construction or plants the seeds through exercise of such rights, such right holders acquire ownership of the building or timber and so on based on Article 124.

Article 124 refers to buildings and other structures built on land by a right-holder as well as grown timber, plants, etc., shall be deemed components of right on the land of another. This article is necessary in order for clarification about legal status of such buildings built and so on through exercise of his right.

Section 3 Special Relationship between Things

1. Principal and Accessory Things

Based on Article 126 of the Civil Code, "things" can be divided into principal thing and accessory thing. This Code does not provide the meaning of principal thing, but gives a notion of accessory thing that does not comprise a component of the principal thing and that is associated with a principal thing by the owner of the principal thing so that it can continuously serve the economic purpose. Based on the said definition, some examples can be raised as follows:

- A book: a cover of the book is associated with the book is termed the accessory thing.
- A house: a curtain that is decorated in the house is termed accessory thing.
- A car: a spare wheel is termed accessory thing.

It should be noted that the accessory thing shall not be confused with the component of the principal thing.

Example:

- A car: The steering wheel of a car is not an accessory thing; it is a component of the principal thing.

The consequence of the article is, when the accessory thing is determined, the creation and assignment of rights pertaining to a principal thing extend to the accessory thing unless they have specific agreement but it is possible for parties to make an special agreement to create or assign the right regarding the principle thing and the accessory thing separately. In the contrary, the component of the principal thing cannot be severed from the principal thing and a specific agreement cannot be made like the mentioned case.

2. Source Thing and Fruits

The Civil Code defines the meaning of thing in accordance with the Article 119 and 120 and the income derived from a thing is termed fruits. A thing that generates fruits is called source thing.

According the Article 127, fruits are divided into two:

- Natural fruits: products of or acquisition from a thing in accordance with the normal use of the thing like fruits, crop etc.

- Legal fruits: is the price for using something, like rental fee and other thing received as the price of using a thing.

Owner is entitled to receive both natural fruits and legal fruits. Persons are entitled to receive natural fruits when they are severed from the source thing. Legal fruits may be acquired in proportion to the number of days during which the rights to acquire then continues to exist.

In case the fruits have been created by another and the owner has received the fruits, that person having an obligation to return fruits may demand reimbursement of the normal costs for producing the fruits. The amount of such reimbursement shall not exceed the price of the fruits to be returned (Article 129).

Section 4 Creation, Transfer and Alternation of Real Rights

1. The principle of Creation, Transfer, and Alternation of Real Rights between Parties.

1.1. Principle

Art. 133 of Civil Code states that the principle of creation, transfer and alternation of real rights shall be made by the agreement between parties. That is to say the real rights are created, transferred and altered just with an agreement between parties. Therefore the parties are not required to obey the other forms.

1.2. Exceptions

However, the transfer of ownership of immovable property by agreement shall follow the requirements as stipulated in the article 135 of Civil Code. According the meaning of the article 135 of Civil Code, the requirements of execution are the following:

- The agreement between parties
- The transfer of immovable property
- The transfer of ownership

In case where the above-mentioned three requirements are met, the registration is a requisite of transfer of title by agreement pertaining to an immovable property. Note that the article 135 of Civil Code only stipulates the requisite of transfer of ownership by agreement pertaining to an immovable property, but it does not determine the conditions to make the contract effective. Therefore, if the transfer of ownership is made by sale contracts, the article 336's paragraph 2 of Civil Code requires that the contract shall be made by notarial document.

Beside this, it should be noticed that, the article 135 of Civil Code shall be applied for only transfer of ownership by the agreement of related parties. In contrast, if transfer of ownership of immovable property is made by law, the article 135 of Civil Code shall not be applied. In fact, transfer of ownership of immovable property by the reason of succession and so on, which is made by the provisions stated in laws, but is not made by the agreement of parties come into effect without registration. Furthermore, even if the succession is made by will, the transfer of ownership by will is the transfer of ownership by unilateral legal act and it is not the transfer of ownership by parties' agreement under the meaning of 135 of CC.

2. Perfection

2.1. Necessity of Perfection

The perfection is a condition related to public notification of creation, transfer, or alternation of real rights (les droit réel) for the sake of legal safety in transaction. At the same time of determination of requisite in accordance with the article 133, Civil Code also stipulates the perfection of creation, transfer and alternation of real rights under the article 134 of Civil Code. This article stipulates that:

1. Except for a right of possession, right of retention, right of use, and right of residence, the creation, assignment and alternation of a real right pertaining to an immovable property cannot be asserted against the third party unless the right is registered according to the provisions of the laws and ordinances related to the registration.
2. The transfer of a real right regarding movable property cannot be asserted against the third party unless the movable property has been delivered.

2.2. Distinction between Requisite and Perfection

The requisite is the conditions necessary to be fulfilled in order to make the creation, transfer and alternation of real right legally effective. On the other hand, the perfection is a condition for asserting the effect against third party regarding the creation, transfer and alternation of real rights. In other words, it is a condition to make the creation, transfer and alternation of a real right have an effect on the third party.

Let me give you the distinction by the following instance. Mr. A sold an item to Mr. B, and then Mr. A is still keeping that property. In this case, we will divide it into two hypotheses as follows:

- In the case where law determines transfer of possession as requisite.

In above mentioned hypothesis, Mr. B, who is a buyer, cannot assert that he is the owner of the said item against Mr. A who is the other party because Mr. A, the seller hasn't transferred the ownership of the item to Mr. B.

At the same time, Mr. B cannot assert that he is the owner of the sold item against Mr. C, who is the third party.

- In case where the law determines transfer of the possession as perfection.

In this hypothesis, Mr. B can assert the ownership against Mr. A, who is the other party, but Mr. B cannot claim the ownership against Mr. C who is the third party because Mr. B has not obtained the possession which is the perfection yet.

2.3. What Is Perfection?

The article 134 of Civil Code determines the two rules for perfection:

- For immovable property, the perfection of creation, transfer and alternation of real right is registration of property. At the same time, the rights of possession, rights of retention, rights of use, and rights of residence are not bound by the provision of the article 134 of Civil Code. That is to say, they shall be bound by the special rules of those three real rights.

Logically, the article 277 of Civil Code determines the actual use and residence as the perfection of rights of use and rights of residence.

- For movable property, the perfection is transfer of possession. According to the article 229 of Civil Code, there are four types of assignment of possession, including actual delivery, assignment of possession by agreement, summary delivery, and assignment of possession by direction. Beside this, please also be noticed that the possession is not just only the condition for perfection of real right, but sometimes, Civil Code also determines the possession as the perfection of claims. Logically, the article 598's paragraph 1 of Civil Code stipulates that a lease of an immovable property may be held up against a subsequent acquirer of any real right over the immovable property by virtue of the fact that the lessee has occupied, and continuously used and profited from the leased immovable property.

In fact, lease of immovable property stated in article 598-1 of CC is not real right, but it is claim arising from lease. However, Civil Code determines the possession and continuous use and profit of lease immovable property as the conditions for perfection of such lease.

2.4. Who Is A third Party?

Generally, the third party refers to the third person other than the concerned parties and the concerned parties' successors without regard to subjective status of his. The determination of a third party benefits to determine the conditions for perfection to assert the effect against the third party. In case where a person who is considered as the third party according to Civil Code's article 134, it is necessary to get a condition for perfection in order to assert it against the said third party; but in contrary, if that person is not a third party according to the article 134 of Civil Code, the condition for perfection is not required in order to assert real right against that person.

Regarding to the determination of the third party, there are three views which shall be raised for consideration: the view of ***no limitation*** on the third party, the

view of exclusion of ***bad faith person from third-party***, and the view of exclusion of person acting in particularly bad faith from the third-party.

For example, Mr. X purchased a movable property item from Mr. Y who is the owner of said item. Before the transfer of the possession of said item to Mr. X is made, Mr. Z also purchased it from Mr. Y. Supposed that Mr. Y still holds possession of the mentioned movable property item.

By reading the above-mentioned hypothesis, the view of no limitation on the third party, the third party here refers to a person who is neither the concerned parties nor successor of concerned parties. Therefore, Z is the third party if we compare the relationship between X and Y. By this meaning, X shall have a condition for perfection to claim that he is the owner of the movable property which he has purchased from Y. It means that, in order for X to be able to assert against Z that he is the owner of the movable property which he has purchased from Y, X shall obtain the assignment of possession in advance even if Z knew that X entered into contract with Y (bad faith).

For the view of the exclusion of bad-faith person from the third party, we shall examine whether Z has acted in the bad faith or not. If Z is a bad faith person, Z shall be not treated as the third party. In the case where Z knew the sale contract between X and Y, and he still purchases the said movable property from Y, it means Z is a bad faith person. In this sense, Z is not a third party, so X is not required to have a condition for perfection to assert his ownership against Z. In other words, in such a case, even if X hasn't obtained the assignment of possession of movable property from Y, X still has the rights to assert against Z that he is the owner of the said movable.

For the view of limitation of the third party acting in particularly bad faith, we shall examine whether Z has conducted the particularly bad faith act or not. In this case, if Z just knew the sale contract between X and Y, it is not sufficient to determine that he is excluded from the third party. However, if Z has conducted the particularly bad faith act, Z is not considered as a third party. Therefore, in case Z hasn't performed a bad faith act yet, Z is still determined as the third party. This means that X shall have a condition for perfection (obtain the assignment of possession of movable property from Y) so that he can assert the ownership against Z even if Z knew the existence of the sale contract between X and Y. By contrast, if Z has performed the bad faith act such as a case where Z intends to prevent Y from assigning the possession to X and Z purchased the movable property from Y by fraud, for instance, in this situation Z is not determined as the third party, so X is not required to have a condition for perfection in order to assert the ownership against Z. Easily speaking, even if X

hasn't obtained the assignment of possession of movable property from Y; X can still assert against Z that he is the owner of the said movable.

Even there are many views in determination of identity of the third party, Cambodian legal professional, especially the Cambodian courts have the obligations to determine views for executing principle by considering some important factors including safety of business transaction and the clarity of criteria and so on.

Section 5 Extinction and Registration

1. Extinction of Right by Merger of Rights

1.1. General Provisions

Art.136 states that where the ownership and other real rights created over one and the same thing have become vested in a single person, such other real rights shall be extinguished. If real rights besides ownership and other rights subject to real rights have become vested in a single person, such rights shall be extinguished. For basic example, if X is a hypothee on land owned by Y. X bought the land from Y. X would come to have the ownership without a hypothec right according to Article 136-1 because ownership and hypothec right created over one and the same thing have become vested in a single person.

The intention of this rule is that it is meaningless for person to have ownership and other real rights over the same thing because ownership is most inclusive real right and includes the function of other real rights.

1.2. Exceptions

This provision shall not apply if the thing or the other real rights constitute the object of a right of a third party (art.136-1 proviso). For example, if there is a hypothec right in the lower rank holder Z in above-mentioned case, hypothec of X would not be extinguished. This is because extinction of the other real right (hypothec right in this case) would lead to unfair conclusion. For another example, amount of secured claims of both hypothec are 1000 dollar each and Z enforces his right and the land is sold at 1400 dollars in the case. If hypothec of X had been extinguished by acquisition of ownership, 1000 dollars would be distributed to Z and remained money would be distributed to X as an owner while X would get 1000 dollars and Z would get 400 dollars if hypothec were enforced before acquisition of ownership by X. this conclusion is totally unfair because X would get less than before by acquiring more inclusive right and proviso of art.136-1 prevents such unfairness. For another example, if hypothec of X has been hypothecated to Z in basic example, hypothec of X would not be extinguished because hypothec of X is a subject matter of sub-hypothec right of Z and right of Z shall not be infringed.

This provision shall not apply to a right of possession. For example, if X is a possessor of land owned by Y and X bought the land from Y, X would have both ownership and possessory right at the same time because possession is a

protection of the actual status and it can be established independently from other real rights.

2. Presumptions Regarding Registration

2.1. Meaning of Presumption

It assigns the burden of proof to the party who shall deny the fact in accordance with registration.

2.2. Difference from Deeming

If something is deemed, it can't be reversed but if something is just presumed, it can be challenged.

For example, if X is the owner of land which has been registered, X files a lawsuit against a possessor Y by demanding the return of land based on ownership and Y acknowledges that Y possesses the land (D) but Y asserts that X is not the real owner of the land, Y shall have burden of proof about ownership.

2.3. Possible Derivative Function of Registration

If someone trusts the false status of registration made by fault of another, possibly, she could be protected.

For example, in case where X sold the land to Y and the transfer of ownership has been registered. The contract between X and Y was rescinded because of a threat made by Y. Z and Y agreed that Y shall sell the land to Z before registration of transfer of right from Y to X is cancelled and the transfer of ownership from Y to Z is registered.

According to general rule, X shall be still the owner of the land because Article 358-2 provides that the contract is null from the beginning which is called retroactive effect, so Z may not acquire ownership because Z is deemed to have bought immovable property from someone who was not the owner. On the other hand, based on Article 193, clearly, transfer of ownership of movable property with good faith and without negligence enables a transferee to have ownership on movable property even though a transferor has no ownership over such movable. Such difference comes from the difference of nature of movable properties and immovable property. That is to say, movable property is relatively cheap and becomes subject matter of transaction more frequently and thus transactional safety should be more important than the case of immovable property.

Such conclusion, however, may be a little bit severe on Z especially when Z trusted the status of registration without any fault. Possible remedy for this case

would be analogical application of art.353-2 proviso because the situation is similar. More specifically, if Z trusted the content of registration in good faith without negligence and acquired registration, Z shall be protected.

Section 6 Protection of a Third Party in Case of Prescriptive Acquisition

1. Introduction

What is prescription?

Prescription is a fixed duration defined by law. The overdue of this duration creates the effect of acquisition or extinction of rights.

To have a better understanding of prescriptive acquisition, the example below is provided:

1-1- X is the owner of registered land. Y has peacefully possessed the land for 20 years with the knowledge of the public and with intention of ownership without registration. Who would win the case if X demanded the return of the land and Y asserted the defense of prescriptive acquisition?
1-2- In the event that the registered land was hypothecated, what could Y acquire? The land with or without a burden of hypothec?

Conclusion

1.1 In the case provided above, X cannot demand Y to return the land, and Y can acquire ownership over the land by prescriptive acquisition.

1.2 The effect of prescriptive acquisition (Article 163) shall be retroactive to the date on which the period of prescription commenced. This is the theory that entitles the possessor to ownership by acquisition.

- In this case, Y is entitled to ownership over X's immovable property by prescriptive acquisition and what he acquires is the land without burden of hypothec because prescriptive acquisition is not succession from another but a new establishment of right and, principally, any right which is contradicted with the acquired right by prescription shall be extinguished.

The prescriptive acquisition of ownership over immovable property is set forth to protect a possessor for a period determined by law:

The intention of such protection is said to be as follows.

1. The protection of long lasting actual status ;
2. If the right holder does not make any effort in order to protect his own interest, such owner is not worth protection

3. In case where very old events are issues in the case such as case where existence of very old sale contract is an issue, it would be very difficult for the party to prove that because the evidence about that is likely to be scattered and lost. Prescription functions as a remedy for such a case.

1.1. Requirements

Basic requirements from the art.162 and 164 are as follows.

1. Peacefulness
2. openness
3. Possession with the intention of ownership
   Whether possessor has an intention of ownership or not shall be determined on the basis of objective nature of ground of acquisition of possession (art.232-1, 2)

4. 1 Possession for a period of 20 years even if it is a possession in bad faith or negligence

Or

4.2 Possession for 10 years in good faith and no negligence

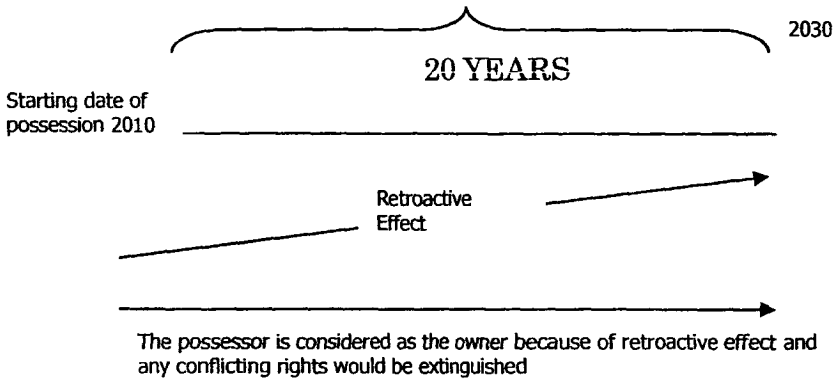
5. A person possessing immovable property is required to invoke prescriptive acquisition.

Prospective prescriptive acquirer needs to invoke the prescription. This is one of reflections of very basic idea of civil code; principle of autonomy. That is to say, prospective prescriptive acquirer may choose to invoke and acquire the right, or not to invoke and abandon the right.

Among those requirements, peacefulness, openness, intention of ownership and good faith are presumed according to art.234-1 and 2. In addition, continuance of possession between proved possessions at two different times are also presumed according to art.234-3. Therefore, what the prospective acquirer shall prove is that possession at two different times which are more than 10 years remote from each other and no negligence in case of short-term prescription or that possession at two different times which are more than 20 years remote from each other in case of long-term prescription.

1.2. Effect

Effect the effect of prescriptive acquisition is retroactive and the original owner or any other real right holders shall lose rights because they cannot continue to exist right on a same thing (principle of one right over one thing).



2. Prescriptive Acquisition and the Third Party

If a third person appears when there is a prescriptive acquisition of ownership over an immovable property which makes the issue complicated, in order to determine the status between a person asserting prescriptive acquisition and a third person, how are they protected under the law? The interpretation varies depending on situations in each country and whether it is acceptable or not on the basis of equity for the parties on this matter.

We will provide the following example and there are three possible interpretations:

2- X is the owner of registered land. Y has peacefully possessed the land and openly with the intention of ownership without fault since 2000 until such issue occurred. Could Y assert his ownership over the immovable property against Z in the following scenarios?

1. Z bought the land from X and registered the land in 2005. In 2011, Y has filed a complaint to demand the transfer of the land ownership based on the ownership by prescriptive acquisition.
2. Z bought the land from X and registered the land in 2011 (after completion of prescriptive period). Immediately upon that, Y has filed a complaint to demand the transfer of the right based on ownership by the prescriptive acquisition.
3. In case 2, Y has withdrawn the complaint before the service of written complaint to Z, but then Y re-files the complaint in 2021.
4. What if the time when Z bought the land is just a day before the 10 year passed since Y's starting the possession in case 1.

Note: assumed that the new civil code is applicable to all cases regardless of any timeline of the issue.

Conclusion:

No.	Japanese strategy	Possession-basis idea	Registration-basis idea
1	Y wins	Y wins	Z wins
2	Z wins	Y wins	Z wins
3	Y wins	Y wins	Y wins
4	Y wins	Y wins	Z wins

2.1. Issue

When there is a conflict between a person who acquires the ownership by prescriptive acquisition and a third person provided in the example above, how could we solve the problem? In the new Civil Code of the Kingdom of Cambodia, no provision is directly applicable but in principle, it depends on practice in Cambodia. In this respect, we would like to introduce some matters to consider and possible ideas.

2.2. Facts to consider

1. Consideration of safety of transaction:

If prescriptive acquirer always wins the case when a third party appears, the safety of transaction would be infringed because the third party may lose his right without compensation for damages.

2. The protection of prospective prescriptive acquirer:

In contrast, in case prescriptive acquirer always loses the case when a third party appears, the prescription system would not work properly because the owner can avoid loss of ownership just based on only the transfer of ownership.

3. Some Theories

There are some theories that could be used to interpret the case study above, and we can consider which theory is appropriate and can give justice for the parties. As you see below, each idea has merits and demerits and it depends on Cambodian situation which idea is most proper way of interpretation.

3.1. Possession-Basis Idea

Any person, in the possession of an immovable property within the period determined by law and in accordance with the conditions set forth by law, when the legal prescription period is due, could invoke prescriptive acquisition and acquire ownership by prescription fully against any third party even though third appears before or after the completion of prescriptive period since the date on which the period of prescription commenced because third party is deemed to buy the immovable property from non-right holder because of retroactive effect of prescriptive acquisition(Article 163). Therefore, in the case study given above, Y wins over Z in any scenario. This idea may be closest to the literal interpretation while this idea is criticized third party may suffer unexpected loss.

3.2. Registration-Basis Idea

In this idea, in order to protect the third party who acquires from the original right holder, registration before completion of prescriptive period is considered to be the ground for interruption, which makes prescriptive period from being completed and registration after completion of period is considered as perfection. According to this idea, in case 1 and 4, prescriptive period is interrupted by the registration and thus Z wins the case. In case 2, the registration would not interrupt the prescriptive period because it is already completed but Z still wins because the registration is considered perfection. In case 3, at 2021, prescriptive period is completed from the time of interruption at 2011 and thus Y wins the case.

This idea is advantageous to third party because prescriptive period is interrupted as transaction is registered or registration would function as perfection and anyway third party is more likely to win than the first idea. On the other hand, this idea is criticized because it is difficult to consider the registration as a ground for interruption according to wording of art.167.

3.3. Japanese Precedent

Japanese precedent analyzes this problem into two situations. One is a case where a third party acquires the right before completion of prescriptive period (like case 1) and the other is a case where a third party acquires the right after completion of prescriptive period (like case 2). Regarding former case, this idea doesn't think of registration as a ground to interrupt the prescriptive period. Therefore, like a possession basis idea, Y wins in case 1 and 4.

About latter case, Japanese precedent requires a prospective prescriptive acquirer to register the acquisition of ownership because situation is very similar to normal double-transfer case. Therefore, Z wins in case 2 but Y wins in case 3

because prescriptive period is completed again after the registration of transfer of ownership at 2011.

This idea is considered well-balanced but also criticized because the position of third party is too different depending on whether third party appears before or after completion of period. Case 4 makes this problem clear. That is to say, Z would win only if Z acquires the ownership one day after actual situation.

Section 7 Ownership

1. Nature and Scope of Ownership

1.1. Nature and Scope of Ownership

Ownership refers to the right of an owner to freely use, receive income and benefits from the dispose of the thing owned, subject to applicable laws and regulations as stipulated in Article 138 of the Civil Code. To use is the use of things owned. According to the Civil Code, there are two types of fruits, legal fruit and natural fruit; therefore, receiving income in this context includes both legal and natural fruits. Receiving legal fruits, for example, may refer to the owners of the things who lease such things to the other persons in exchange for rental fee, and receiving natural fruit may refer to things owned produce fruits of which can be owned. The dispose of things owned is that the owner uses such things to secure his own debt or of the third party or transfer them to the other person, etc.

Ownership is real right which is most inclusive so that the owner may transfer in parts to the other person the rights of use and benefit through perpetual lease, usufruct and lease, etc.

Even though Ownership is most inclusive real right, the scope of ownership may be somewhat limited by the Civil Code and other laws. Based on Article 139 of the Civil Code, the ownership of land extends to the areas above and below the surface of the land to the extent that the owner derives benefit therefrom, subject to applicable laws and regulations. In principle, connecting electrical wires above the surface and drainage system below the surface of the land by a third person shall be subject to the consent by the owner of the land; however, based on Article 139 of the Civil Code, a third person may fly a plane up in the sky or construct underground railroad without having to ask permission from the owner of the land.

Other than the above-mentioned limitation, one of a number of resources of such limitation is about the relationship between neighboring lands/properties. Due to the fact that there are many neighboring properties, it is necessary to have some principles to mutually adjust the relationship of using neighboring properties in order for as many right holders as possible to use the properties in coordination. The relationship of using neighboring properties is called *Relationship between Neighboring Properties* which is stated in the Civil Code from Article 143 to Article 154. These are some examples of the owner whose ownership is limited: the landowner must not block the water flowing naturally from the neighboring

land (Article 145 of the Civil Code); the landowner is entitled to drain off the water that remains after irrigation through lower-lying land in return for the payment of compensation to the owner of the lower-lying land (Article 149 of the Civil Code); the landowner who has planted the trees exceeding two (2) meters in height within two (2) meters from the boundary of an adjacent parcel of land shall be required to transplant the offending tree upon the demand of a neighboring landowner (Article 154 of the Civil Code).

1.2. Ownership Protection Method

Since ownership is exclusive right, the Civil Code sets forth three (3) rights to protect the ownership when it is violated to make ownership effective.

a. Right to demand return
b. Right to demand abatement
c. Right to demand prevention of hindrance

All these three rights are based on ownership and are not independent from ownership itself and are stated to protect ownership, thus it can be asserted that:

- The owner may not transfer the right to ownership independently from the said three rights.
- When the ownership exists, the three rights shall exist too.
- The effect of ownership extends to the three rights.
- The three rights are not extinguished separately from ownership.

Therefore, if the owner transfers ownership to the other person, all the three rights attached with the ownership are transferred automatically.

2. Right to Demand Based on Ownership

As explained, ownership is a real right which may be asserted against any person; therefore, the owner whose ownership is violated may demand the return of lost things or prevention of any violation or hinder such violation on the foundation of ownership. These rights are called **Right to Demand Based on Ownership**.

In the event of any violation which is contrary to the laws, the right to demand based on ownership may be exercised regardless of whether the violator did it intentionally or mistakenly or even without any fault.

2.1. Right to Demand Return

An owner may demand that a possessor return a thing based on right to ownership (Article 155 first sentence of the Civil Code). However, the right to demand of the owner shall be obstructed where the possessor is entitled to

possess the thing based on perpetual lease, usufruct, lease, etc. In such case, the owner may not be able to demand the return of the thing based ownership against the possessor.

In addition, when the possessor is justifying ground to possess such as lease or usufruct, there shall have been agreement on what kind of right possessor has over the subject matter of ownership. The problem may occur when there is no justifying ground for possessor to possess, but, during the period of possession, the possessor acquires and uses fruits s/he collected causes damage to or loss of the possessed thing, and sometimes in order to keep the possessed thing, the possessor expends on the possessed thing. Therefore, there shall be some rule to adjust in such a case. Here, the possessor shall be divided into a good faith possessor with the intention of ownership, a bad faith possessor, or a good faith possessor without the intention of ownership.

a. Fruits

A good faith possessor (with or without intention of ownership) is entitled to acquire fruits generated from the possessed thing without regard to lack of justifying ground to possess, thus where there is a claim to demand return of source thing later on, the good faith possessor is not required to return the fruits obtained regardless of whether such fruits has all or partially been used because the responsibility to return fruits obtained or compensate the same value in cash seems difficult for the good faith possessor (Article 156-1 of the Civil Code). In contrast, for a bad faith possessor, where there is a demand to return the source thing made by the owner, he must return the fruits obtained and provide compensation for the value of any fruits damaged or not collected due to the fault of the possessor. This is because the person who knowingly obtains fruits without ground to do so shall not keep the benefit while the person who obtains fruits without knowing lack of such right shall be protected to some extent. The demand to return of the owner is based on Unjust Enrichment.

b. Responsibility for Loss or Damage

Where a possessor is at fault for the loss of or damage to a thing, or for any other cause preventing the return of the thing, the possessor must provide compensation for all of such damage to the owner. However, how much the amount of damages shall be compensated depends on the intention of the possessor.

For a possessor with intention of ownership but in bad faith, he shall be responsible for all damages, while the good faith possessor is only responsible to the extent that he continues to receive the benefits therefrom. This provision means that the good faith possessor deals with the possessed thing as if he is an

owner, and he is different from the bad faith possessor who is careless about the possessed thing (main sentence of Article 157 of the Civil Code).

For a possessor without intention of ownership like lessee or bailor, regardless of good faith or bad faith possessor shall be responsible for damages like the bad faith possessor. This is because the possessor knows clearly that the possessed thing is owned by the other person (proviso of Article 157 of the Civil Code) without regard to the fact that he believes that he is justified possessor.

Case Study: X is the owner of a computer C which costs USD 1,000. Y at fault causes damage to the computer C while he is possessing. Is X entitled a right to claim damages in this case?

a. Y is a thief.

b. Y is a good faith possessor (Y gets confused that the computer C belongs to him for some reasons), assuming that after C is damaged, C's price has decreased to USD 300.

c. Y believes Y is a lessee of C.

Answer:

a. If Y is a thief, X may demand the computer back pursuant to Article 155 of the Civil Code. X is able to claim for damages to computer C from Y because Y is a bad faith possessor, based on the former part of Article 157 of the Civil Code.

b. According to Art. 155, X can demand the return of C without distinction of Y's good faith or bad faith.

According to Art. 157, X can demand only compensation only to extent that Y continue to receive the benefit from C because Y is a good faith possessor with intention of C's ownership.

Apply this rule to this case and consider damage Y has to compensate under 2 situations.

First, if Y can't return C to X for some reason, X can demand only $300 compensation because it can't be said that Y still continue to receive benefit of the decrease value, that is, $700.

Second, if Y return C to X, X can't demand compensation in addition to demanding return of C because damage that Y has to compensate does not exist any longer after the return for the above-written reason.

c. If Y is a lessee, X may demand the computer back based on Article 155 of the Civil Code and demand the damages in the amount of USD 1,000 from Y based on Article 157-2 of the Civil Code.

c. Possessor's Right to Demand Reimbursement of Expenditures

When returning a possessed thing, the possessor may demand that the owner reimburses the amount of necessary costs and beneficial expenditures based on Unjust Enrichment.

- Necessary Costs: refer to costs the possessor has made on the thing for maintenance or preservation thereof like the expense on repairing the thing, for example. Based on Article 158-1 of the Civil Code, regardless of whether he is good or bad faith possessor, he may demand such reimbursement; however, the possessor who use or obtain fruits from the possessed thing may not demand the owner to reimburse necessary costs.
- The reason why both good faith and bad faith possessor may demand the reimbursement is because such a cost is anyway necessary without regard to who the possessor is (it would be necessary even if owner himself possess it.). For example: X is the owner of a computer C. During the time Y possesses C, Y has spent USD 100 to maintain C. Thus, when returning C to X, Y may demand the return of USD 100 based on Article 158-1 of the Civil Code.
- Beneficial expenditures: refers to expenditure made by the possessor to increase the value of the thing or improve such thing such as painting a house for the other person. Based on Article 158-2 of the Civil Code, both good and bad faith possessors may demand reimbursement for such purposes. The reason why reimbursement is necessary is similar to the case of necessary cost but in case of bad faith possessor, the court may grant the owner the grace period in order to avoid the assumption of too much burden on the owner.
- Where a possessor is to return land to the owner, a good faith possessor may demand the owner to reimburse necessary costs or beneficial expenditure he has made on the building or crops which are not harvested to the extent that the increase in value continues to exist. A bad faith possessor, however, may not demand the owner to reimburse necessary costs or beneficial expenditure he has made on the building or crops collected to the extent that the increase in value continues to exist, unless the owner elects to assume the ownership of the building or crops and even in case the owner elects to assume and to reimburse, the court may grant the owner the grace period in order to avoid the assumption of too much burden on the owner (Article 158-3 of the Civil Code).

2.2. Right to Demand Abatement

Where ownership of an owner is prevented by the acts of the other person which hinders the exercise of such ownership, the owner may demand that the person abate the hindrance (Article 159-1 of the Civil Code).

For example: X is the owner of land L and Y parks his damaged car on the land L. Based on Article 159-1 of the Civil Code, X may demand Y to remove his car at his cost from the land L pursuant to ownership.

2.3. Right to Demand Prevention of Hindrance

This right to demand prevention of hindrance is in fact such hindrance has not been caused, but it is foreseeable which causes danger to the owner if the owner does not demand prevention of hindrance. Therefore, if the owner concerned that the exercise of his ownership will be hindered; the owner may demand that the person creating the danger of such hindrance prevent such hindrance (Article 159-2 of the Civil Code).

> For example: X is the owner of land L and Y is the owner of a tall building constructed next to land L. Because the construction is not well done, the materials of the building is about to collapse on L. Based on Article 159-2 of the Civil Code, X may demand that Y should take any preventive method to prevent the falling of material on L based on right to ownership.

Section 8 Acquisition of Ownership over Immovable property

1. Method to Acquire Ownership

Methods to acquire ownership vary, such as acquisition by contract, succession and bona fide acquisition etc.

These methods can be divided into two kinds: original acquisition and successive acquisition.

1.1. Successive Acquisition

This type of acquisition mostly typically results from sale. In a sale contract, the reason the buyer can receive the right is because the seller is the owner. In general, the buyer cannot acquire the right if the seller is not the owner because the buyer (mostly the contractor) possesses the right from the seller. So we can deduce two conclusions from such a nature of acquisition:

1. The successive acquirer cannot receive the right from anyone if that person is not the right holder because successive acquirer cannot possess anything that does not exist.
2. The successive acquirer can receive the right with burdens if any burden existed such as hypothec through succession of acquisition because the successive acquirer takes over the right as it is.

Temporarily, let's call it "successive acquisition" because its definition has been stated above.

1.2. Original Acquisition

In contrast with the above case, there is another method to acquire some rights not based on another person's rights.

For example: An island that forms in the middle of a non-navigable river shall belong to the owner of the riverbank on the side on which it forms. (Article 183)

In this case, the ownership of the riverbank on the side on which it forms does not based on any rights of another. It is more like the creation of new right.

So we can reach two conclusions below:

1. Original acquirer can acquire new rights as the law states.
2. If the previous right is in conflict with the original acquisition, the previous rights will be extinguished to the extent of conflict.

Let's call it "original acquisition". Theoretically, each currently existing right was acquired through original acquisition first and then it may be transferred through succession of acquisition.

Examples of original acquisition regarding immovable property are as follows.

1) Prescriptive acquisition
2) Ownership of alluvial deposit (179~)
3) Ownership of island (183~)
4) Affixture of movable property to immovable property (186)
5) Other laws (such as land law)

2. Prescriptive Acquisition of Ownership

2.1. Requirements of Prescriptive Acquisition of Ownership

The requirements of prescriptive acquisition of ownership are set in Article 162 that consists of a prescription for a long and short term.

Short Term:

A person who possesses the immovable property must fulfill the following conditions:

- good faith and without negligence
- Peace
- Open possession
- Intention of ownership
- 10-year possession
- Invocation

Long Term:

A person who possesses the immovable property must fulfill the following conditions:

- Peace
- Open possession
- Intention of ownership
- Possession in 20 years
- Invocation

2.2. Effect of Prescriptive Acquisition of Ownership

As described Article 163, when an acquisition of ownership is made, the retroactive effect exists from the date on which the period of prescription is commenced. Fruits that come into existence after that date shall belong to the person acquiring ownership via prescription.

Example:

Mr. X is the owner over a plot of land. Y has possessed over the land and 10 years has elapsed. As a result, Y is considered as the owner from the beginning of the prescriptive period due to the retroactive effect.

3. Details of Requirements

3.1. Presumption

General requirement of acquisition of ownership via prescription has three:

- Openness: Article 234-2
- With the intention of ownership: 234-1
- Peace: Article 234-2

In addition to these requirements, there is a requirement of 10 years with good faith without negligence or 20 years; however, According to 234,

Intention of ownership (234-1), good faith, openness and peacefulness (234-2) are presumed. Therefore, someone who wants to prevent prescriptive acquisition shall overturn such presumptions.

Continuity of possession is also presumed when there is proof of possession at two different times.

In short, primary fact(s) necessary to support the claim in case of prescriptive acquisition is (are)

1) proof of possession at two different times . and
2) in order to claim 10-year prescriptive period, proof of no negligence is also required.

3.2. Other Issues Regarding Requirements

3.2.1. Intention of Ownership

Read Article 234-1 and 2

Whether the possessor has such intention or not will be determined on the basis of the objective nature of the ground of acquisition of the possession. Article 232-1

Example:

The land is owned by Mr. X and Y possesses that land. In case Y is a lessee with Mr. X and then Mr. Y has intention of ownership in his mind covertly and invoke the prescriptive acquisition.

But it is unfair because Mr. Y is a lessee.

Therefore, the intention of ownership is determined on the basis of objective nature of the ground. However, based on Article 232-2, if a possessor without an intention of ownership declares the intention of ownership to the person who put him into possession such a possessor become a person with the intention of ownership.

Example:

Mr. X leases a plot of land from Mr. Y, and then told Mr. Y that he has an intention of ownership. Anyways, it is based on the ground of acquisition of new possession.

3.2.2. Continuity of Possession

Based on Article 230 says that Possession shall be extinguished when the possessor ceases to hold the thing provided that this shall not apply, where the possessor has been dispossessed of the thing, if the possessor repossesses the thing or the possessor brings an action for recovery of possession of the thing within one year of such dispossession.

Example:

X is the owner of the land and Y is a possessor. In this case X may be entitled to demand Y for a return of land based on the ownership.

Article 169 states that where a person having possession with the intention of ownership involuntarily loses such possession and possession is thereafter recovered within one year or is recovered through a lawsuit filed within one year from the loss, the prescriptive acquisition shall be deemed to have continued uninterrupted.

The Article 169 is an article that remedies the person having possession with the intention of ownership that has the following requirements:

A- must receive a possession within a period of one year

B- lose a possession besides its own intention

Article 235 says that a successor to possession may at his option assert his own possession only or his own possession together with that of his predecessor in possession.

Example:

X had possessed a piece of land for 7 years. Afterwards, Mr. X left the said land and Mr. Y continued a possession. In this regards, Y can assert his own possession with that of his predecessor, Mr. X, against the owner of the land.

However, if Y opts to assert the possession of his own and his predecessor, it may cause Y to suffer loss because Y needs to take over not only possession but also the defect of his predecessor.

Example:

The first predecessor of Mr. Y is Mr. Z1. Mr. Z1 had possessed peacefully and openly the land L for 9 years with an intention of ownership, but with negligence until Mr. Y came to continue a possession from Mr. Z1. How long does Mr. Y have to maintain the possession in order to receive the prescription of acquisition where Y does not have negligence?

The answer is that Mr. Y must maintain a possession in a period of 10 years because if Y opts to take over the possession of his predecessor, Y needs 11 more years because succession of possession automatically leads succession of defect of negligence. In this case, it is better for Y to assert only his own possession because Y needs only 10 years if Y is in good faith without negligence.

3.3. Invocation of Prescriptive Acquisition

3.3.1. Interpretation of Wording of Article 162 and 164

The relation between Article 162 and 164 is so complicated because Article 162 does not clearly define the invocation of prescriptive acquisition as a requirement, but Article 164 requires an invocation of prescriptive acquisition in the proceedings.

If interpreting that the requirement of prescriptive acquisition are items only described in Article 162 and the invocation of prescriptive acquisition is just "purely " procedurally necessary, prospective acquirer will become the owner without the invocation of prescription and such invocation of prescriptive acquisition is just the issue in the litigation only.

However, the result may seem strange where prescriptive acquirer did not invoke a prescriptive acquisition and lost the case because he is considered the owner, but such assertion may not be asserted in the procedure of litigation due to a substantial binding effect.

Therefore, it is better and logical to interpret that the invocation of prescriptive acquisition is also the requirement (condition precedent) for the prescriptive

acquisition, based on such interpretation, a prospective prescriptive acquirer becomes the owner since he invokes the prescriptive acquisition.

In Japan, the latter interpretation is normal.

Such grounds are in the following:

1) In former interpretation, it is possible that the substantive status of the right and the rights confirmed in the litigation may be different when the prospective prescriptive acquirer does not invoke the prescriptive acquisition, but it seems weird.

2) Judging from the principle of private autonomy, it is not fair that a person may acquire the ownership which is contrary to his own intention.

3) Due to the Article 182-2 of Code of Civil Procedure, not only the prescriptive acquisition, but also other measures shall be invoked in order to be the ground of judgment. Therefore, Article 164 will be meaningless if it is interpreted not to be one of requirement.

There are many interpretation of the invocation of prescription in Japan.

The interpretation in the following:

- Invocation of prescription in litigation seems to appear the requirements of acquisition of ownership.

In Article 162 and 164, Mr. X may acquire the ownership only when he invokes the prescriptive acquisition in the litigation.

- Prospective prescriptive acquirer (Procedural matter)

The Article 162, Mr. X may acquire the ownership without the invocation in the litigation.

3.3.2. Person Who Can Invoke Prescriptive Acquisition

Person invoking prescriptive acquisition includes prospective prescriptive acquirer, a person who has received a perpetual lease, usufruct, right of use/right of residence, servitude, leasehold, hypothec or pledge from a prospective prescriptive acquirer, or other person having a legal interest in the invocation of prescriptive acquisition based on art.164-2.

Example:

Mr. X is the owner of the land. Mr. Y is a possessor and Z2 is the right-holder over the pledge of the land by agreement with Y. This Z2 is the person who receives the pledge from the prospective prescriptive acquirer based on article 164-2.

4. Defense to Prescriptive Acquisition of ownership

4.1. Interruption Based on Article 167

1) loss of possession with the intention of ownership;
2) the filing of a lawsuit or equivalent exercise of legal right;
3) an act of execution or preliminary injunction; or
4) acknowledgment

This matter is related to the purpose of prescriptive acquisition that includes:

1) a protection of actual status which is a long term period from 10 years to 20 years
2) a person not exercising the right is not protected
3) a saving of difficulty in proving the evidence

4.2. Suspension

Suspension is different from the interruption as stated in Article 172.

The ground which causes a suspension is provided in the following:

1) A demand (Article 173), but once only (proviso)

Where the original owner makes a demand during the six months prior to the completion of the prescription period for prescriptive acquisition, the prescription period shall not be deemed to have been completed with respect to the person on whom the demand is made for a period of six months from the date of the demand.

Example

Mr. X is the owner of a plot of land. Mr. Y had possessed the said land for 9 years and 9 months. After that, Mr. X demanded Mr. Y to return his land. Therefore, the prescriptive acquisition that Mr. Y had not yet completed within only 3 months was not yet completed within the period of 6 months after a demand of Mr. X. But X's demand is made only once.

2) Minor or person under the guardianship (Article 174 and Article 175)

Article 174 states that where the original owner is a minor or a person under guardianship, and has no legal representative within six months prior to the completion of the prescription period for prescriptive acquisition, such period shall not be deemed to have been completed until six months after the minor or adult in guardianship attains capacity or obtains a legal representative.

Furthermore, Article 175 provides that where a legal representative is to obtain via prescriptive acquisition ownership of an immovable property owned by a minor or adult in guardianship, the prescription period for such prescriptive acquisition shall not be deemed to have been completed until six months after the minor or adult in guardianship attains capacity or obtains a new legal representative.

3) Spouses (Article 176)

Article 176 says that where one spouse is to obtain via prescriptive acquisition ownership of an immovable property owned by the other spouse, the prescription period for such prescriptive acquisition shall not be deemed to have been completed until six months after the dissolution of the marriage.

4) Natural disaster (Article 177)

Article 177 sets that where an original owner cannot invoke interruption of the prescription period for prescriptive acquisition due to natural disaster or other force majeure, such period shall not be deemed to have been completed until six months after the disaster or force majeure has ceased to exist.

A comparison between interruption and suspension

An interrupted period starts to run anew after interruption,

Concerning the suspension, the prescriptive period continuously runs from the suspended time after grounds of suspension cease to exist.

4.3. Renunciation

Renunciation can be made, but it is prohibited prior to the end of duration.

When Mr. Y has possessed the land owned by X for 10 years or more than this in good faith without negligence, Y can renounce the benefit of prescription. However, within 10 years, Mr. Y could not renounce his prescriptive acquisition based on Article 165.

4.4. Loss of Right

If prospective prescriptive acquirer express the recognition of ownership of another with being aware of completion of prescription, such an expression is considered to be a renunciation of benefit of prescription without doubt.

Then, what if prospective prescriptive acquirer recognizes the ownership of another without being aware of completion of prescription?

Concerning this issue, it is considered that even though the prospective prescriptive acquirer recognizes the ownership of another without being aware of the completion of prescription, not only it does not have an interrupting effect because the duration is already completed but also it cannot be considered as a renunciation because he can't have such an intention.

However, it is against the principle of good faith; more specially, it is contrary to the principle of estoppels that prevent any person from refusing or asserting something which converses to the principle which is created fairly by both the lawmaker or court or his own act directly, act, or representation via a presentation.

It is not deemed a renunciation of prescriptive benefit if he is not aware of a completion of prescription but prospective prescriptive acquirer may lose his right of renunciation (Principle of Estoppels)

5. Other Methods in Acquiring the Ownership over Immovable Property

Ownership over immovable property may be acquired via an affixture. It is also the original acquisition too. Therefore, in case the movable property is affixed to the immovable property and the said movable property is the subject to pledge, such pledge will be extinguished when it is affixed. However, the owner of immovable property may assume the burden of the unjust enrichment.

Section 9 Acquisition of Ownership over movable property

1. Methods to Acquire Ownership

The methods to acquire ownership vary such as acquisition via contract, succession, and bona fide acquisition, etc. (Article 187 of the Civil Code)

Such methods can be divided into two parts in below:

1.1. Successive Acquisition

Successive acquisition is an acquisition of real right that already existed or it can be said that the subsequent owner acquires the rights over movable property based rights of others. The successive acquisition mostly occurs in the sale contract; the ground that the buyer can receive the rights via a sale because the seller is the owner. Generally, the buyer may not acquire the ownership where the seller is not the owner the reason is because buyer (more normally the contractor) possesses such rights arising from the seller. Therefore, we can deduce two conclusions from such the nature of acquisition:

1. Successive acquirer may acquire the right which has already existed.
2. Successive acquirer will be entitled to the right under burden which already exists.

1.2. Original Acquisition

An original acquisition is a new acquisition of real rights over a movable property which is already existed or it can be said that the right holder is entitled to the right over the movable property without counting on other person's right.

Example: In case a person commences a possession of movable property which is not the ownership of another person, that possessor must acquire the acquisition over such movable property (Article 188 of the Civil Code).

With respect to the original acquisition, person receiving the acquisition may fully acquire the ownership over such newly movable property although such movable property created the rights or was previously under the burden. Thus, it can be drawn to two conclusions from the definition of the **original acquisition:**

1. Original acquirer may acquire the new right

2. Where the old rights are in dispute with the original acquisition, such disputing rights will be extinguished regardless of the fact that such disputing right exist before or after the subsequent owner has possessed.

The examples of original acquisition with respect to the movable property which is set in the Civil Code are below:

1. Ownership of movable property without owner (Article 188 of the Civil Code)
2. Ownership of escaped animals (Article 189 of the Civil Code)
3. Ownership of fish living in pond (Article 190 of the Civil Code)
4. Ownership of lost article (Article 191 of the Civil Code)
5. Ownership of buried treasure (Article 192 of the Civil Code)
6. Bona fide acquisition of ownership of movable property (Article 193 of the Civil Code)
7. Prescriptive acquisition of ownership over movable property (Article 195 of the Civil Code)
8. Attachment, mixture, consolidation of movable properties (Article 198 of the Civil Code)
9. Processing of movable property (Article 199 of the Civil Code)

2. Bona Fide Acquisition of Ownership of Movable Property

To maintain safety in the business transaction of movable property via a preservation of person creating a contract transferring the ownership with non-right holder by mistakenly believing that a possessor of movable property is a person who has the ownership over such movable; Article 193 of the Civil Code stipulates that even where the transferor does not have the ownership of movable, a transferee who commences in good faith and without negligence the possession of a movable property upon receiving the delivery of the movable property under a valid contract transferring the ownership of the movable property except where the transferee does not possess such movable.

Why does Article 193 of the Civil Code state only the movable, but not immovable property? It is because:

- On the market, movable property is more engaged in trade than immovable property and safety of business transaction is more important in case of movable.

- Movable is not more expensive than the immovable property and thus the importance of protection of actual right holder, who will lose the right by bona fide acquisition, is relatively low (actual right holder can demand monetary compensation from the seller).
- Immovable property has a system of registration; thus, before purchasing, the purchaser can check the registration to find the actual owner, but almost movable property are not registered which causes the buyer difficulty to find the actual owner.
- Possessor of movable, from the outside view, seems to be the owner while possessor of immovable property doesn't seem to necessarily be the owner.
- Another is due to the business affair that the immovable property is more important than the movable; therefore, the business affair of immovable property is more preservative.

2.1. Requirements

In order to acquire the ownership of the movable property in good faith, the following requirements shall be fulfilled:

A. Movable

B. Valid contract

C. A commencement of possession (except the possession via an agreement)

D. In good faith and no negligence

2.1.1. Movable

The subject matter of transfer shall be a movable. According to Article Paragraph 4 of Article 120 of the Civil Code, intangible property that can be controlled such as electricity, power, etc. except as otherwise provided by special laws that it may be the subject matter of acquisition of ownership based on Article 193 too because the intangible property is regarded as a movable property.

2.1.2. Valid contract

A valid contract transferring the ownership of the movable property shall be the effective one. Bona fide acquisition of ownership is a rescue only for the case where the transferor does not have the ownership for the sake of protection of business affair, but it is not a remedy to correct a defective contract. Therefore, where the contract is invalid due to one of any reason, for instance, the

incompetent transferor lacks a capacity, capacity to act or in case where a contract is concluded by a defective declaration of intention (mistake, fraud, duress, etc.) Article 193 of the Civil Code does not allow the transferee to acquire the ownership by repairing the defect of contract.

2.1.3. A commencement of Possession

The commencement of possession is the main point among all requirements of Article 193 to enable the transferee to acquire the ownership of the movable property in good faith even though the transferor does not have ownership of the movable property because Article 193 proviso of the Civil Code says the transferee may not acquire the ownership where he does not possess such movable.

In order to acquire the ownership of movable property in good faith, it is necessary to receive the commencement of possession, and to obtain the commencement of possession, it is necessary to have an assignment of possession in accordance with Article 229 of the Civil Code. However, 193 proviso says that transferee can't acquire ownership when transferor maintains the direct possession over the property. Therefore, among four of assignment of possession, possession by agreement doesn't fulfill the requirement for bona fide acquisition. Four types of transfer of possession consists are as follows.

- Actual delivery

  The assignment of transfer in a consuming situation of daily life is the actual delivery; after having already delivered, the commencement of possession is taken place; in this case it does not have the indirect possession, but only the direct possessor; the direct possessor assigns another direct possessor.

Example: A is the owner of the briefcase; then A delivered such briefcase to B via a sale and on a date of delivery, A delivered it directly to B.

According to this example, A is a direct possessor over the briefcase; after having delivered to B via a sale contract, B becomes the direct possessor thereof.

- Possession by agreement

For the form of assignment of possession, the delivery is not made in reality. The transferor transfers the movable property to the assignee through only agreement without actual delivery; obviously, the thing is in the hand of transferor, therefore the transferee becomes the indirect possessor over the movable; whereas the transferor becomes the direct possessor.

For example, A sold a house (H) to B. B delivered total money to A; and after selling the house to B, A said that he does not have a house to stay, so B agreed to rent the said house (H) to A. In this case, there are two types of contract: the sale of the house and lease between A and B. Consequently, B acquires the ownership of the house (H) and holds an indirect possession over the house (H) through A.

- Summary delivery

For the form of assignment of summary possession, the delivery is not made in reality. When the assignee has been already the possessor, only by an agreement, the assignor loses even the indirect possession. It mostly happens in the lease contract.

Example:

- A who is the owner of an apartment has leased a room of an apartment to B.

In this case, A maintains the indirect possession over the room of apartment whereas B maintains the direct possession over the room of the apartment.

- A (assignor) and B (assignee) has agreed to sell an Apartment. It has seen that before the agreement to create the sale contract of the room of the apartment, B has already possessed the Apartments; therefore, if A transfers his indirect possession to B by summary delivery, when a certain time will arrive to return the room of the Apartment, A does not need to return because B has been possessing.

- Assignment of possession by direction

For the form of such assignment of possession, a delivery is not made in reality. When the assignor holds the indirect possession, the assignor can transfer the indirect possession by an agreement between the assignee and assignor and notice the transfer to the direct possessor.

Example:

- A, the owner of house (H), leased his house (H) to B.

  In this case, A holds the indirect possession whereas B has possessed directly.

- A sold the house H to D. A (assignor) has also notified to B (the possessor) that he sold his house (H) to D (the assignee); therefore, when the lease is

completed, B has to return the house (H) to D. In this way, D will become the indirect possessor whereas B still directly possesses the house (H).

2.1.4. Good faith and no Negligence

According to the provision of Paragraph 2 of Article 234 of the Civil Code, the possessor is presumed to be in possession in good faith; thus, based on this presumption, any person in the possession who wants to assert a bona fide acquisition of ownership of the movable property does not need to assert the good faith because the law already presumes that the possessor is in good faith.

However, the Civil Code does not presume that the possessor has no negligence; therefore, any person who wants to acquire the movable property in good faith needs to prove the no-negligence.

3. Exceptional Case of Stolen or Lost Property

3.1. In Case of Stolen or Lost Property

Even though the conditions in the provision of Article 193 of the Civil Code are fulfilled, the Civil Code stipulates the exceptional rule related to stolen or lost property, the owner of the lost property may demand the return of the property from the transferee within two years; it means that if the object of bona fide acquisition based on Article 193 is a stolen or lost property, a person whose property is stolen or lost may demand from a person who acquires, according to Article 193, to return such property within a period of two years after the property is stolen and lost. Other party who is demanded, not only limit the person who originally acquires in good faith, but includes the subsequent acquirer from another.

Party who can demand to return is limited only to the person whose property is lost and stolen in case the original owner loses the property due to fraud, deceit, or duress, and such property is acquired by the third party based on Article 193, this point cannot be applied.

3.2. Further Exception to 3.1

Paragraph 2 of Article 194 stipulates the further exception to paragraph 1 of this article saying that in case person who acquires the ownership based Article 193 bought a lost or stolen property via public auction, sale on the open market, or from a merchant who sells items of the same type, the injured party or the owner of the lost property cannot demand return of the property without paying the transferee compensation for the price paid by him.

Example: A lost a W watch and B picked up this watch then sold to D who is a merchant selling the watch. Z bought the watch W from D in the price of $1,000 according to Paragraph 2 of Article 194; if A wants to get back the W watch, in this case, A can demand, but has to pay Z $1,000.

4. Prescription

"Prescription" refers to the period determined by law, the elapse of which may result in the effect of acquisition or extinction of rights.

There are two types prescription of acquisition of ownership: prescriptive acquisition of ownership over immovable property (Art. 162) and prescriptive acquisition of ownership over movable property (Art.195). Although there are difference between a duration of prescriptive acquisition of ownership over immovable property and movable, they both share common concept. Prescriptive acquisition of ownership over immovable property is more important than prescriptive acquisition of ownership over movable property since Bona fide acquisition plays important role in case of movable.

5. Attachment, mixture, consolidation of movable properties and processing movable

Case study:

1. X possesses a boat which attached Y's machine. Without any specific agreement, who shall be the owner of the boat?

Answer:

It depends on which one of boat or machine is a principle thing. **(Art. 198, paragraph 1, attachment)**

2. X, who is a constructor, has mixed sand and cement together; however, he found out that sand belongs to Y, another constructor. Without any specific agreement, who shall be the owner of mixed cement?

Answer:

X is still the owner of cement because cement is considered to be a principle thing. However, X shall compensate Y, the sand owner. **(Art.198-3, Consolidation)**

3. X had mix Gin and tonic water together. Gin was provided by Y. Without any specific agreement, who shall be the owner of this cocktail?

Answer:

Y is considered to be the owner of this cocktail because Gin is considered to be a principle thing in this case. However Y shall compensate X who is the owner of tonic water. **(Mixture,)**

4. X had mixed two types of Whisky. First type belongs to X and another type belongs to Y. who shall be the owner of the blended Whisky?

Answer:

X and Y are owners. **(Art. 199 Paragraph 2) (Consolidation)**

5. X made a cloth from fabric provided by Y. if there is no specific agreement, who shall be the owner of clothing?

Answer:

X is the owner of the clothes. **(Art. 199 Paragraph 1) (Processing of movable)**

6. X painted the unvarnished kennel black. The kennel was owned by Y. if there is no specific agreement, who shall be the owner of this painted kennel?

Answer:

Y may be the owner of kennel because just painting is not considered to be processing yet but just attachment.

7. X made a diamond ring and diamond which cost $1,000 was given by Y. Materials other than diamond was provided by X and the price of that is $500. The price of the ring is $2,000. Who shall be the owner of this ring?

Answer:

Y is the owner because X, processor provided 500-dollar-worth material and added value is 500 dollars. Sum of these two (1000 dollars) doesn't exceed the value of material provided by Y. **(Art 199 paragraph 2) (Processing of movable)**

Art. 198 Paragraph 1 is the provision about attachment which refers to case that two or more movable properties are attached to each other so that they cannot be separated without causing damage thereto or in case such separation would be unreasonably expensive, it is extremely detrimental if original ownership continues to exist. Thus, this provision acknowledges that ownership of the composite thing shall belong to the owner of the principal movable.

Which movable property is principal and subordinate is shall be determined by general concept of society, but price is not an absolute standard.

It is sometimes difficult to determine who the owner is. If a principal movable property among attached movable properties cannot be distinguished from other movable properties, ownership of the composite movable property shall be shared among the owners of the component movable properties in proportion to the respective values thereof at the time they become attached (Art. 198 Paragraph 2).

Art. 201 (attachment and compensation therefore) states that a person who loses rights as a result of attachment, mixing, consolidation or processing of movable properties may demand compensation from the person acquiring such rights and benefiting therefrom, in accordance with the provisions relating to unjust enrichment. However, no demand for restoration of the status quo ante shall be permitted.

The meaning of this provision requires the person acquiring ownership pay compensation.

5.1. Purposes

5.1.1. Purposes of Art. 198 (Attachment, Mixture, Consolidation)

If two or more movable properties are attached to each other such that they cannot be separated without causing damage thereto or where such separation would be unreasonably expensive or where two or more movable properties become mixed or consolidated with each other such that they cannot be separated, it is detrimental to such separation for the benefit of the original owners of the attached or mixed movable. It is better that only one person own an attached, mixed, consolidate movable properties as a new movable properties instead of all the original ownership continuing to exist..

Art. 198 determined the relationship of real rights to find out who's the owner. Attachment, mixture, and consolidation refer to composing two or more movable properties.

5.1.2. Purposes of Art. 199 (Processing of Movable)

Art. 199 mentioned about processing of movable. In fact, there is controversial idea between the original owner of movable property and processor of movable. The purpose of this article is to avoid losing of benefit of restoration when processing of movable properties is made again.

In Japan, the original owner of movable property becomes owner of movable property in principle. In Cambodia, the processing party becomes ownership of movable.

5.2. Conditions

5.2.1. Attachment

A. Two or more things are attached.

B.1. Two movable properties cannot be separated without causing damages.

Or

B.2. The separation of movable properties is unreasonably expensive.

5.2.2. Mixture, Consolidation

A. Two or more movable properties are mixed to each other.

B. The consolidated movable property cannot be separated.

5.2.3 Processing of Movable

A. Creation of new movable property through creation or processing.

B. Material belongs to another party

5.3. Effects

5.3.1 Effects of Ownership over Attachment, Mixture and Consolidation

In General principle, owner of principal movable property shall acquire ownership over attached movable property (Art. 198 Paragraph 1).

The exception is that co-ownership over movable property shall be created among the owners of each movable property in proportion to the respective values of attached movable property at the time they became attached (Art. 198 Paragraph 2) when the principle thing may not be determined among attached movable properties.

Between the principal and the subordinate movable, it can be determined by the common sense and value of movable property would be one of the standard.

5.3.2. Effects of Ownership over Processing of Movable

General principle: a person who creates a new movable property shall acquire ownership of the processed thing (Art. 199 Paragraph 1)

Exception 1: Owner of materials shall acquire ownership over processing movable property if the added value attributable to the processing or reworking is substantially less than the value of the materials (Art. 199 paragraph 1).

Exception 2: Owner of movable property is determined based on whether added value of processing and of materials provided by the processor exceeds the value of materials by others or not.

The term of "substantially" less value is not quantitative, but an abstract criterion.

5.3.3. Effects of Rights that Exists over Component

A. Where ownership of a thing is extinguished due to attachment, mixture, consolidation, all rights that exist over such thing are also extinguished (Art. 200 Paragraph 1).

B.1 The rights of another already established over a thing held by a person who acquired the ownership of a composite, mixed, consolidated or processed thing shall continue to exist over the newly created thing.

B.2 In case that the newly created thing is held by co-owners, such rights shall continue to exist over the person's share of ownership.

5.3.4. Compensation

A person who loses rights as a result of attachment, mixture, consolidation of movable properties may demand compensation from the person acquiring such rights and benefiting therefrom, in accordance with the provisions relating to unjust enrichment.

Demand in restoration shall not be permitted as it is against the purpose of attachment.

Section 10 Co-ownership

1. Introduction

Co-ownership is an exceptional form of Ownership which is an ownership over a single thing by multiple persons wherein the size of each owner's ownership interest is limited to such owner's share of the thing **(Article 202)**. In some case, co-owner may not exercise freely his ownership. In this regard, it is different from the ownership because ownership is an exclusive right which is a type of real rights.

According to the above definition, firstly co-ownership is an exception to the principle of one right over one thing. Secondly, the co-ownership is a very limited because each co-ownership over same thing limits one another, while normal ownership is said to be the real right which contains right of an owner to freely use, receive income and benefits from and dispose of the thing owned **(Article 138)**.

Basic philosophy of co-ownership and normal ownership is as following.

First, co-owners can exercise (in the broad sense) their partition freely unless it affects the share of other; however, if this exercise of right has an effect to other co-owners, it is not neccesarily free.

Second, rights of co-ownership over a single thing shall be limited when it affect the share of others.

According to the original comtemplation, co-ownership is considered to be an economically disadvantageous status. It means co-owners cannot use or cannot improve the co-owned thing to full extent; therefore, co-owners may not be as enthusiastic about improvement or utilization of co-owned thing as of his singly owned thing. This is why demand for partition is widely acknowledged.

For example: A, B, and C co-owns a piece of land. D had offered to purchase the whole land, but C did not agree while A and B agreed.

Answer: This sale of the said land cannot be made unless A, B, C all agreed .

For example: There are 100 co-owners on a land, and if there is one co-owner does not agree to sell the whole land, of course that land cannot be sold.

As a consequence, co-ownership is economically disadvantageous problem because co-ownership is limited in utility.

2. Share

2. 1. Share

Share is unit of equal value into which a thing is divided. Genearlly, demand for partition is possible unless there is an agreement among all co-owners. According to Article 203, the shares of co-owners are presumed to be equal. Of course, every co-owner may share the thing in a different proportion besides the presumption. Share can be renounced, and that renounced share is devolved to other co-owner (first principle).

> For example: A, B, C, and D are the co-owners on a land. According to Article 203, every co-owner has 25% share (presumption). It means that equal shares of co-owners in Article 203 are just the presumption. Nevertheless, A, B, C, and D can make a special agreement; for instance, it states that A has 40% share, B has 20% share, C has 20% share , and D has 20% share. Moreover, B has two children i.e. B1 and B2, where B dies, they will continue the partition. Therefore, B1 will receive 10% share, and B2 will receive 10%. The administration of co-ownership is determined based on majority of the shares not a numbers of co-owners.

2.2. Disposal of Share

Each co-owner can transfer or provide his share as security (Article 204) because it does not have an effect on others. Besides, Article 210 (Renunciation of co-ownership) has provided that a co-owner can renounce his share without the consent from other co-owners. Obviously, the co-owners can waive his share without any consent from other co-owners. The co-ownership shall be transferred to other without the consent from other co-owners. It means that although a co-owner renounces his share or dies, it does not have an effect on other co-ownership but provides benefits to other co-ownership instead.

> For example: A, B, C and D are co-owners on a land. A, B, C, and D have agreed in the share in this following; A has 40% share, B has 20% share, C has 20% share, and D has 20% share. Furthermore, while B dies without an heir or renounces his share, then A, C, and D will receive B's share in equal proportion of share of A, C and D. Specifically, 10% of B's share will go to A, 5% to C and 5% to D. On the other hand, if B has transferred his share to A, B does not need the consent from C or D to renounce and transfer it, and the death of B does not have an effect on other co-ownership. Hence, in any disposal of B co-owned thing does not require consent from others.

2.3. Use

A co-owner can use the entire co-owned thing in accordance with his share (Article 205, second principle).

> For example: A, B, and C are co-owners of a car; A has 5 share, B has 1 share, and C has 1 share. A has 5/7 share, B has 1/7 share, and C has 1/7 share; as a result, A, B, and C can use this car in accordance with his share.
>
> The use of co-owned thing can be counted as following.
>
> - ❖ A can use the car 5 days per week.
> - ❖ B can use the car 1 day per week.
> - ❖ C can use the car 1 day per week.
>
> However, upon the agreement, this means that the use can be 5 hours per day or 1 hour per day. If any of co-owners doesn't like such share, demand for partition is a solution. Even if C keeps the car in custody in excess of his share, which sometimes can cause damage, A and B cannot necessarily demand to return the car back based on their co-ownership because C also has a right to keep in accordance with his share. However, they can demand for compensation due to the proportion of their share.

2.4. Preservation

Each co-owner can individually perform acts of preservation on the co-owned thing (Article 206, first principle). The preservation of co-owned thing includes repair, etc. Every co-owner can preserve his co-owned thing without consent from others because it doesn't affect rights of others.

2.5. Disposal of Co-owned Thing (the Entire Disposal)

To dispose or alter the co-owned thing, it is significant to get the consent of all co-owners. (Article 207, second principle)

> For example: A, B, and C are co-owners of a car. A wants to sell the car in a high price to D. However, B and C do not agree with A. Therefore, the car cannot be sold unless other co-owners agree in the purpose to protect other co-ownership.
>
> *Disposal of co-owned thing may have an effect on other co-ownership.*

2.6. Administration

All matters relating to the administration of a co-owned thing shall be determined by a majority. Administration may have more effect than

preservation. Moreover, administration is limited less than disposal of co-owned thing.

Here are examples of administration of co-owned thing.

1) Any activities to earn money within the range of original use such as temporary lease. On the other hand, long term lease may fall in disposal because it exceeds the range of original use.

2) Any activities to increase the price of co-owned thing such as land leveling or renovation (not significant).

For example: A has 75% share, B has 20% share, and C has 5% share on a car which is the co-owned thing. (Please see the following list.)

	Example	Requirements
Using	Driving a co-owned car	Invidual
Preservation	Repair or abatement (Article 159)	Individal
Administration (Increase of value)	renovation (minor change)	Majority (of share)
Administration (Earning money)	Temporary lease	Majority (of share)
Disposal	Sale, creation of hypothec, cutting/sawing	All

3. Burden

Not only the benefit, but also the burden such as expenses of administration, and taxes is born by the co-owner in proportion to his share (Paragraph 1 of Article 209).

Example: A, B, and C are the co-owners over an vehicle as to **A, 60%; B, 30%;** and **C, 10%.** But **A** spent 100 dollars for repairing fee. In this case, each co-owner may take the vehicle to repair whic falls under the situation of preservation.

With respect to the cost of repairing a car, where A did not pay the repairing fee $100, the craftsman may keep the car in custody in order to demand for money for repair of vehicle.

Finally, all owners must jointly pay the repairing fee of the car $100 to the repairing man although **B** and **C** do not agree because it is the **obligation of perseveration**.

The co-owners may seek compensation from the other co-owners for such excess expenditure in accordance with their respective share **(Paragraph 2 of Article 209)**.

Example: **A, B** and **C** are the co-owner over the vehicle to **A, 60%; B, 30%;** and **C, 10%.** But **C** spent 100 dollars for repairing fee. In this case, **A** and **B** must pay in proportion his share.

Moreover, the co-owner can be made against a successor in interest to the share of another co-owner **(Paragraph 3 of Article 209)**.

Example: A, B and **C** are the co-owner over the vehicle to **A, 60%; B, 30%;** and **C, 10%.** But **C** make an expenditures for an act of preservtion $100 and if **A** sells his share of the co-ownership to **D.** Therefore, **C** can demand **B** and **D** to to bear the expense.

In case each co-owner make an expenditure for an act of their share, they can demand reimbursement against the other co-owner.

4. Partition

Co-ownership is considered to be an economically disadvantageous and provisional form of ownership; therefore, demand to partition is recognized massively.

Agreement to prohibit partition of co-owned thing is possible but limited.

4.1. Demand for Partition

Article 211 states that each co-owner may demand at any time a partition of the co-owned thing.

The co-ownership partition depends on agreement of all co-owners, but where co-owners cannot reach agreement regarding the partition of a co-owned thing, an each co-owner may file an action for partition. In this case the court may order

a- the partition of the physical thing

b- the thing be sold by compulsory sale and the proceeds be allocated to the co-owners

c- that one or more co-owners transfer their shares to the other co-owners in exchange for payment of compensation. (Art. 212)

4.2. Non-partition Agreement of Co-owned Thing

Each co-owner may demand at any time a partition of the co-owned thing, but the co-owners may agree to prohibit partition for a period of time not to exceed five years.

The non-partition agreement can be renewed, but the duration of the renewed agreement cannot exceed five years due to Art. 211- 2. If this agreed duration is expired, the co-owners can demand the partition again unless the agreement is made again.

4.3. Method of Partition

There are three methods of partition of co-owned thing.

1- Partition of the physical thing: In case the co-owners concern where there is a danger that the partition of the physical thing will cause a significant loss, the court may order the other two methods

2- Sale of the co-owned thing and the allocation of the proceeds to the co-owners by compulsory (compulsory sale): Co-owners may file an action for partition to the court that the thing be sold by compulsory sale and proceeds be allocated.

3- Transfer of the shares of one or more co-owners to the other co-owners in exchange for payment of compensation; within these three methods, the first method is the principle way. However, the second and third methods shall be taken when there is a danger that partition of the physical thing will cause a significant loss in the value thereof, or where proper grounds exist. The following are some specific factors to be considered whether partition of.

- Nature of a co-owned 1 thing (whether there is something such as a car which is improper for physical partition.)
- Intention of parties (what kind of partition concerned parties want)
- Other conditions under which either of method is considered to be proper

4.4. Effects of Partition

The partition itself is not a transfer of ownership but a dissolution of the state of co-ownership. Therefore, it is not Art. 135 but Art.134 that applies to the partition of co-owned thing and the registration is not a requisite but a perfection in this case. Specifically, the partition can be asserted against the third party only when the partition is registered but the partition itself without registration is still effective among concerned parties.

The partition of co-owners shall not violate a third party's rights as such hypothee and pledgee, etc. Even though there is agreement from co-owners in

partition, hypothec of a third party regarding the partitioned thing would not be extinguished as long as hypothec is registered (subordinate nature of hypothec). Hence, if any co-owner has acquired the ownership of property with the burden of the third party's rights, that co-owner shall not cut off the third party rights over that thing. The co-owner has to accept the thing with the burden of rights of the third party.

5. Indivisible Joint Ownership

Basically, indivisible joint ownership is almost the same as normal ownership; however, the most important difference is indivisible joint ownership does not allow co-owners to demand partition.

Especially:

First, seeking partition of the partnership property prior to the dissolution of the partnership shall be prohibited unless where all the partners agree (701-2). This is because if there is no the dissolution of the partnership, the partnership property shall not be partitioned.

Second, a debtor of the partnership cannot set off his debt against a claim that the debtor holds against a partner because it is due to protection of partnership property. Providing that setting off debt against a partner is possible, the partnership is not satisfied towards debt on his debtor.

Return of share is possible only when partner withdraws. This is the result of balancing of the protection of property of partnership and of individual partners.

Section 11 Possessory Right

1. Introduction

It is mentioned that the Possessory Rights is so complicated concept. Possessory Right is stipulated in a part of Real Rights, but it is very different from other Real Rights in many parts.

Other Real Rights such as Ownership give a right holder to do something regarding subject matter and those are created not necessarily having something with circumstance of possession. The owner can have the ownership over the thing without having to have actual possession.

In contrast, Possessory Right which is created based on the fact that an individual directly or indirectly possess a thing.

The Civil Code has stipulated some effects of possessions; but, those effects seemed largely different in light of its meaning thereof. Such differentiation is because of the fact that the Possessory Right of Cambodia is derived from "Gewere", which is German legislation system and the Roman legalization of "Possessio" through Japan.

2. Possessory Right

2. 1. Definition of Possession

From now on, let's strictly distinguish fact of possession itself and possessory right.

Possession is evidently distinguished from the Possessory Rights henceforth.

Possession refers to the holding of thing either indirectly or directly.

Holding means the state of controlling a thing as a matter of fact (See Art 227-1, 2).

A direct possession means that a person directly holds a thing and an indirect possession refers to possession through another (See art. 228-1, 2).

In case of the indirect possession, there are two possessors: direct possessor and indirect possessor.

The examples of the direct possessor and indirect possessor are lessee and lessor.

Both indirect and direct possessors are possessors. Therefore, both of them are able to exercise their possessory rights separately.

2.2. Assignment of Possession

There are four types of the assignments of possession based on Art. 229

- Actual Delivery
- Assignment of Possession by Agreement
- Summary Delivery
- Assignment of Possession by Direction

In this part, please clearly distinguish between "transfer" and "delivery".

Transfer means "the transfer of ownership", but it is not the transfer of "possession".

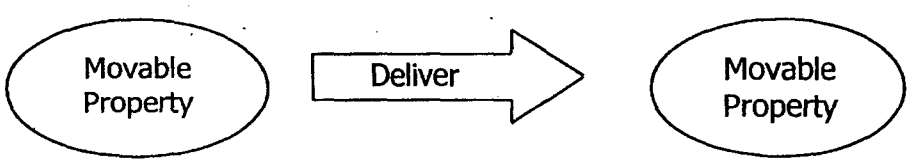
Delivery means the assignment of possession.

2.2.1. Actual Delivery:

This is the assignment directly from the possessor to the recipient of possession in reality.

Example: By the sale contract, ownership of object is transferred from seller to buyer. In addition, if a seller delivers the object of sale contract in reality, the seller is the assignor and the buyer is the assignee. By the assignment, the seller loses her possession and the buyer acquires the (direct) possession.

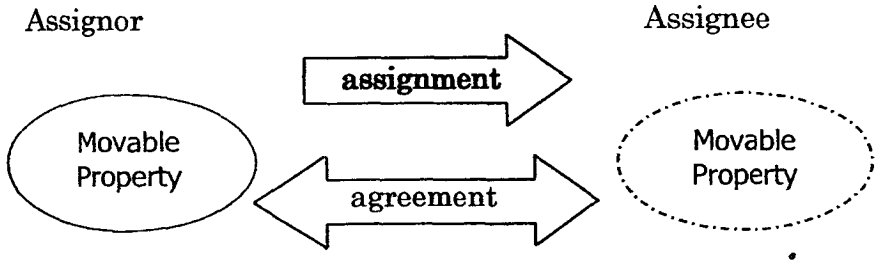
Seller (the assignor of possession) Buyer (the assignee of possession)



2.2.2. Agreement on Possession (Assignment of Possession by Agreement)

Such assignment will be valid if there is an agreement. In this assignment, there is an agreement but there is no actual delivery.

Example: By the sale contract, ownership of object is transferred from seller to buyer. In addition, if a seller and a buyer agree that the seller continues to hold the thing for the buyer from the time of agreement, this is considered to be assignment of possession by agreement, the seller is the assignor and the buyer is the assignee.

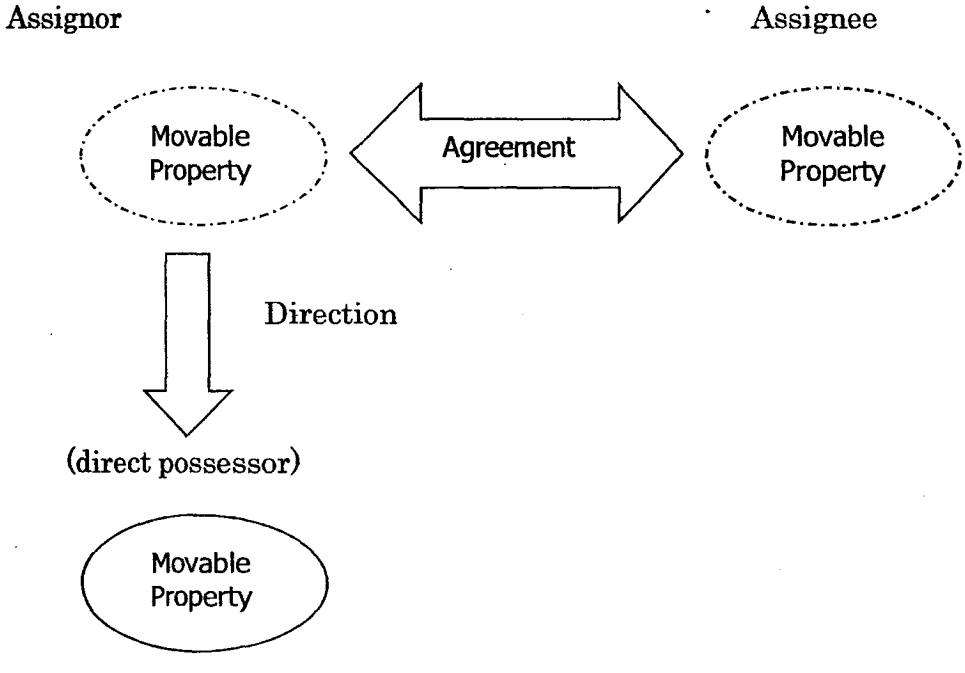


2.2.3. Summary Delivery

In the form of assignment of possession, the delivery is not made actually. When the assignee is already the (direct) possessor (e.g. lessee) and the assignor is only indirect possessor, by this assignment, the assignor will cease even her own indirect possession.

For example, A (direct possessor) rented B (indirect possessor)'s house for a residence. After that, A bought B's house; therefore, A would be the owner of the house automatically. Regarding possession, B doesn't need to get the house back only to deliver it to A if they assign the possession by summary delivery. They only need to agree that.

2.2.4. Assignment of Possession by Direction



In delivery of such possession, the delivery is not actually made. When the assignor indirectly possess through another person, assignor may deliver the

indirect possession through the agreement between assignee and assignor and the direct possessor shall be informed to deliver the thing.

For example, A leased his car to B. Next, A sold his car to C through the agreement of sale; therefore, according to the **assignment of possession by direction**, A, the owner of the car, didn't need to deliver his car by his own, he just only told B to transfer his car to C.

2.3. Extinction of Possession

2.3.1. General Reasons of Extinction of Possession

Possession shall be extinguished when the possessor ceases to hold the thing (See Art. 230).

But in the case where the possessor has been dispossessed of the thing, *possession will be not extinguished if* the possessor repossesses the thing or lodge a complaint for recovery of possession of the thing in the period of one year after the possession is dispossessed.

Example: A possesses a piece of land which B, who asserts himself the owner of the land. B took the land from A violently. In this case, if A files a lawsuit to claim a delivery of the land that he possessed within one year from the time of possession, he won't cease his possessory right. On the other hand, if A does not bring an action for recovery of possession of the thing within one year of such dispossession after B seized his land, A will cease his rights of previous possession. Therefore, even if B is an actual owner, if she seizes the possessed thing, the possessor can take it back based on the possession (prohibition of self-help). Therefore, B needs to take some lawful measures such as filing a lawsuit.

2.3.2. Reasons of Extinction of Possession of an Indirect Possessor

The possession of an indirect possessor will be extinguished in the following cases:

a- If the duty and authority to possess extinguish: means that the indirect possessor has no any legal grounds to maintain possessed thing anymore.

Example: A leased his house to B. After that, A sells his renting house to B; therefore, A, the indirect possessor, has no any legal ground with regards to the indirect possession anymore.

b- In case the direct possessor has not agree with the possession of the indirect possessor; or

c- If the direct possessor ceases to hold the thing (See Article 231-1) this means that **if there is no direct possession, it will be no indirect possession as well.** But in case where possessor has been dispossessed of the thing but the possessor repossesses the thing or brings an action for recovery of possession of the thing within one year of such dispossession (See Art. 231-2)., the possession by the direct possessor and indirect possessor shall not be extinguished.

2.4. Succession to Possession

A successor to possession may at his option assert his own possession only or his own possession together with that of his predecessor in possession.(See Art. 235-1 and 2).

It depends on which is better to assert the succession or to assert only his own possession.

For specific example, based on Article 162, the period for prescriptive acquisition of ownership over immovable property is different depending on the subjective status of the possessor (20 years for the possession in bad faith and 10 years for the possession in good faith without negligence). In this case, if the predecessor in possession is a bad faith person and the successor who may assert his succession also receives a bad faith possession too, even though the successor is in good faith. But if the predecessor in possession is in bad faith whereas the successor is in good faith and denies succession to possession; he is considered as good faith. As a result, if the period of possession of bad-faith predecessor is 5 years and the period of possession of the possessor's own is 10 years, it would be better for the possessor to assert her own possession while it would be better for the possessor to assert the succession if the period of possession of predecessor is 13 years and the period of possession of the possessor's own is 7 years.

2.5. With or without Intention of Ownership

The Possession with or without Intention of Ownership Shall Be Examined on:

- *The possession shall be divided into two; the possession with intention of ownership and the one without intention of ownership. The objective nature of the ground of acquisition of the possession:* for example, if the seller transfers the object of sale contract to buyer, buyer acquires the ownership and the possession with intention of ownership while lessee can get only the possession without intention of ownership based on the ground of acquisition of ownership. This means that if the possessor possesses the thing without intention of ownership, that person, even though with a long period of possession, doesn't fulfill the condition of prescriptive acquisition. For example, lessee of the house doesn't

have an intention of ownership and thus lessee may not fulfill the condition of prescriptive acquisition even he has lived in more than 100 years.

Exceptional Case

- *A declaration of intention of ownership:* If possessor possesses thing without intention of ownership, but declares the ownership later on, the possession from that time would be one with intention of ownership. For example, if the lessee declares the intention of ownership in the course of lease contract, he starts to possess the object of lease contract with intention of ownership and thus conditions of prescriptive acquisition of ownership on the immovable property (could) be applied (the lessor may, however, take measures to demand the return in such a case before completion of the prescriptive period.).

- *New grounds of acquisition of possession* such as sale, gift, or present...etc.

2.6. Flaw and Presumption

Flawed Possession: Article 233

Possession in bad faith, possession in a good faith but negligent, possession that is not peaceful and possession that is not open are called the flawed possession.

2.6.1. Bad or Good Faith

Possession that is acquired with knowledge that one has no right of possession to it is referred to as "possession in bad faith" and possession acquired without knowledge that one has no right of possession to it as "possession in good faith".

2.6.2. With or without Negligence

Based on article 233-1, if the lack of knowledge results from negligence, the possession is referred to as **negligent possession**, but if without negligence of knowledge it is called **possession without negligence**.

2.6.3. Peaceful or Violent Possession

"Peaceful possession" refers to possession acquired without violence ; provided that it will still be peaceful possession if a person who has initially acquired possession peacefully uses violence to protect such possession against unlawful infringement by a third party.

2.6.4. Open Possession or Concealment

See Art.233-3. Open possession refers to possession without concealment, so that other parties can know or see the fact of such possession.

2.6.5. Presumption

Based on article 234, Possessors are presumed to be in possession with the intention of ownership of the thing in good faith, peacefully and openly.

If there is proof of possession at two different times, possession is presumed to have been continuous throughout the intermediate time.

The possessor is presumed to hold lawfully a right to possess the relevant thing.

3. Rights to Demand Protection of Possession

Roughly speaking, three kinds of protections are guaranteed and those three correspond to protection of ownership. And these rights can be exercised even by a flawed possessor.

You may think it is unfair to protect flawed possessor such as bad faith or violent possessor or thief. But it is necessary or almost essential for prohibition of self-help, which is one of the most important doctrines

Without these protections of possession, people can recover the original possession without judicial procedure as self-help.

But if it is possible, who will guarantee if asserting original possessor is really a possessor or not, the means to recover the possession is proper or not and so on. Or what if original possessor has done too much such as using violent means?

Not only due result but also due "process" shall be protected instead of self- help.

3.1. Right to Demand Return of Thing in Possession

Like the right to demand return based on ownership,

Possession also can be a ground for demanding return.

But there are some restrictions.

First, this demand can be exercised against

1) dispossessor or

2) bad faith or negligent person who has acquired the thing from dispossessor, pledegee or other successor in interest (237-2).

And this demand shall be made no later than one year from the disposition. (237-3).

3.2. Right to Demand Removal of Disturbance

Where a possessor's possession has been disturbed, he may demand removal of such disturbance. The execution of the right to demand must be brought during the continuance of the disturbance or within one year after it has been over.

3.3. Right to Demand Prevention of Disturbance to Possession

In that case, disturbance has not yet happened; but possessor has a danger of disturbance that the disturbance will occur to him in the future possession; so, the possessor may demand prevention of such disturbance. The court, in lieu of preventing the disturbance, may require the other party to post the guaranty of the obligation to pay compensation of future damage in order to prepare for the case where the damage by any actual disturbance exists.

3.4. Provision on Limitation

An exercise of right to demand protection of possession doesn't interrupt the prescription.

4. Damages

Where dispossession or disturbance to possession with negligence or intention of the dispossessor or the disturbing man, person who has been dispossessed or disturbed may demand the damages; however, even though there is no provision, person who has been disposed or disturbed may also demand damages in tort.

The demand for damage must be brought not later than one year from the dispossession.

5. Adjustment between Possession and Title

5.1. What Is Title?

Title is the rights that legally justify the holding of a thing whereas possession is the holding of a thing in actuality.

Examples: Ownership, perpetual lease, usufruct, pledge...

5.2. Adjustment and Conclusion in Dispute Possession and Title

Possession may demand to be legally recognized although such possession is either legal or illegal; but, other party is protected by bringing the counter-action.

Example: X owns a piece of land that Y declares his intention to possess the land; and then Y enters into the possession of the land. In this case, X gets Y out by himself without proceeding of the court

procedure. Then Y filed a complaint against X based on possession (Article 237 (1)), in this case, because Y has a possessory right and the ownership cannot be a defense, so that the court shall issue the judgment in favor of Y. However, X is also entitled to demand Y a return of the said thing based on the ownership; as a result, X must bring the counter-action in which Y lodged a complaint against himself (Article 241 (2)). Then, X can win the counter action. As a result Both X and Y win the respective cases. Then, Theoretically, Y can execute the return of the thing first and then, X can also get it back based on his ownership.

6. Protection of Special Occupants of Immovable property

In light of the actual situation in Cambodia, the occupancy of immovable property by party is the occupancy by using and profiting, but the occupants of said thing haven't yet registered properly; however, such occupancy is the legal possession that the occupant has not yet completed the formality of immovable property.

6.1. Occupant of Immovable for Which a Certificate of Occupancy Has Been Issued

The registration required for the occupancy of immovable property has not been effected and the occupant has been continuously using and profiting a piece of immovable property; furthermore, the occupant has only received the certificate of occupancy of immovable property. This shall be deemed legal occupancy and the occupant shall be considered to be the owner in respect of claim based on the real rights.

6.2. Occupant of Immovable Prior to the Enforcement of the Land Law

It is the incident happened prior to the enforcement of Land Law which means the occupant has occupied by peaceful and undisputed occupancy for a period of five years to the coming into force of the Land Law. As a result, the occupant may become the owner and may exercise the rights asserting against the third party. As for the exercise of right to demand the protection of possession is 3 years more than normal occupancy as set forth in law.

Chapter 3 Obligation

Section 1 Introduction

1. What is "Claim" and "Obligation"?

A claim is the right to demand the obligor to perform a specific act.

An obligation is the duty of a person toward the other.

1.1. Definition of Obligation

An obligation is a legal relationship that connects a particular person with a specified person by having the particular person to assume a certain duty with respect to the specified person.

1.2. Differences Between Obligation and Real Right

	Real Right	**Obligation**
Content of right	Direct control over property	Demanding an performance of a specific obligation against a specified person
Exclusive nature	Real rights with the same content cannot exist on the same property	A person may have same obligations.
Scope of claimable persons	Any other person	A specified person (obligor)
Nature of right	absolute	Relative

1.3. Overview of Claim and Obligation

☞ See Annex 1

2. Occurrence of Obligations

2.1. Optional Obligation

It is an obligation arising from a contract or a unilateral legal act (Paragraph 2 of Article 309).

1) Contract (Article 311): is the matching of intentions held by two or more parties to create, change or extinguish an obligation.

2) Unilateral legal act (Article 312): is an act that creates, changes or extinguishes an obligation

a) Through the unilateral expression of an intention to dispose of property

or

b) Through the exercise of a right granted by i) Contract or ii) Provision of law

Regarding a unilateral legal act, it is not necessary to have consent from other party.

Examples of a)

- Release of obligation (Article 473): an obligation is extinguished when an obligee expresses to the obligor an intention to release the obligor from the obligation without obligor's consent.
- Testamentary gift (Article 1199): the testator gives the succession property by will without donee's agreement.

Examples of b)

- i) Agreed-upon termination (Paragraph 1 of Article 414)
- ii) Declaration to set-off (Paragraph 1 of Article 465)

2.2. Statutory Obligation

- Management of affairs without mandate (Article 729 through Article 735)
- Unjust enrichment (Article 736 through Article 741)
- Tortious act (Article 742 through Article 765)

➢ Provisions of law (For example, Tax liabilities)

3. Subject Matter of Obligation

3.1. The Transfer of Ownership or Right to Possess Property or Money

For example, X sold a motorbike to Y.

1) X has the obligation to transfer the motorbike or the ownership of the motorbike.

2) Y has the obligation to pay the price of motorbike.

3.2. To Perform A Certain Act

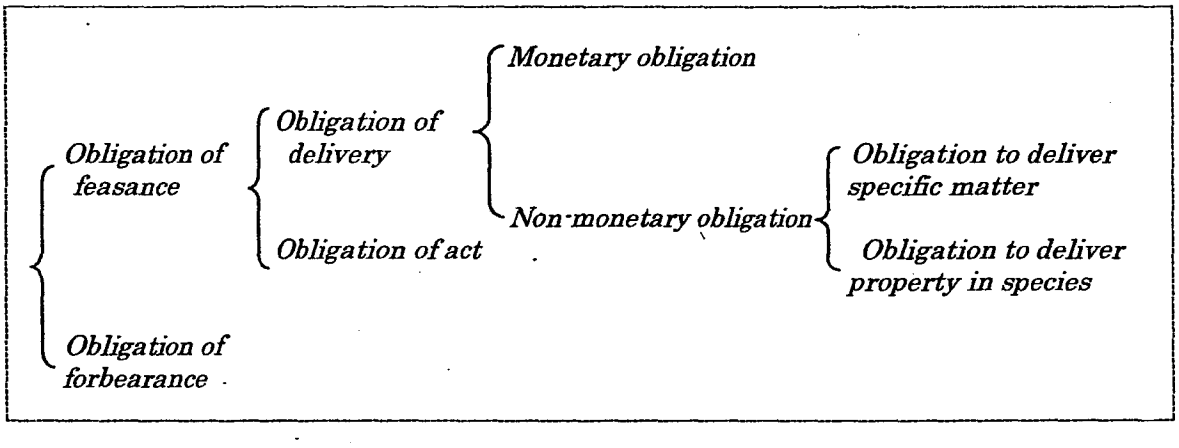
This is an obligation whose subject matter is to perform an act. For example, mandatary's duty (Article 640).

3.3. Not to Perform A Certain Act

It is the obligation which subject matter is not to act is called "obligation of forbearance". The Civil Code does not stipulate this provision, but it is valid based on the principle of freedom of contract.

Example: Under a contract between a singer, and any production company, it prohibits the singer to sing for other production companies.

4. Types of Obligation



4.1. Obligation of Feasance / Obligation of Forbearance

Obligation of feasance is an obligation to perform a certain act while obligation of forbearance is an obligation not to perform a certain act.

4.2. Obligation of Delivery / Obligation of Act

Obligation of feasance can be divided into two obligations, obligation of delivery and obligation of act. Obligation of delivery is an obligation to deliver something such as a thing. Obligation of act is an obligation whose subject matter is obligor's act or work itself.

4.3. Monetary Obligation / Non-monetary Obligation

4.3.1. Monetary Obligation

Monetary obligation is obligation to pay money (Article 316)

In the case of monetary obligation, it can't be asserted of impossibility of performance to avoid performing the obligation under Article 399-1.

4.3.2. Non-Monetary Obligation

It is an obligation to deliver property other than money.

Non-monetary obligation is divided into obligation to deliver specific property and obligation to deliver property in species.

4.4. Obligation to Deliver Specific Property / Obligation to Deliver Property in Species

4.4.1. Obligation to Deliver Specific Property

Specific property refers to a thing of which character the party pays attention to. One of examples of specific property is an antique watch. If the subject matter of an obligation comprises delivery of a specific property, the obligor shall preserve such property with the care of a good manager until the delivery thereof.

4.4.2. Obligation to Deliver Property in Species

Property in species means that the subject matter of delivery is described only with reference to its class or type. Designation of type of property can be done in two methods:

1) Unspecific property (Article 315 Paragraph 1): where the property to be delivered under an obligation is described only with reference to its class or type, if different levels of quality exist with regard to such property to be delivered, the obligor shall be obligated to deliver property of the quality that was designated by the parties. If there is no such designation of the quality of the property to be delivered, the obligor shall be obligated to deliver property of medium quality.

2) Specified property (Article 315 Paragraph 2): with regard to obligations to deliver property described only with reference to its class or type, where the

obligor has specified the property to be delivered and has completed all acts required for delivery of that specified property, the obligor shall has the duty to subsequently deliver only that specified property.

4.5. Relationship Between Obligation and Compulsory Execution

The method of compulsory execution against an obligation depends on the type of obligation such as:

1) An obligation of feasance

a) Monetary Obligation: the compulsory execution having an obligation to make payment can be done through auction of immovable or movable property.

b) Non-monetary obligation: the execution can be done through the direct enforcement.

c) Obligation to act: the execution can be done through indirect enforcement in general. However, obligation to act cannot be implemented either by indirect enforcement or substituted execution when enforcement or substitution breaches the spirit of obligation.

Section 2 General Rules of Contract

1. Intention of Contract

Contract is the matching of intentions held by two or more parties to create, change or extinguish an obligation (Article 311).

2. Category of Contract

2.1. Contract for Value / Gratuitous Contract

1) Contract for value: Contracting parties have the obligation to provide equivalent value mutually. For example, in a sale contract, the seller has the obligation to deliver the thing while the buyer is obligated to make payment.

2) Gratuitous contract: This contract denotes that only one party provides consideration while the other party has no obligation or nonequivalent burden. A typical example of this contract is a gift. With regard to gratuitous in the case of gift for example, contract, the donor's obligation is not stringent. It means that, in principle, the donor shall not be liable for any defect in the contract according to Article 574.

2.2. Bilateral Contract / Unilateral Contract

1) Bilateral Contract: The two contracting parties have the obligations of the equivalent value.

2) Unilateral Contract: Only a party to the contract has the obligation while the other party is not obligated or just has burden but nonequivalent value. If the other party has burden but nonequivalent value, the Code provides similar article to bilateral contract such as warranty liability of seller, defense of simultaneous performance, termination of the contract (Paragraph 2,3,and 5 of Article 576)

For example, X gave a house to Y as a gift, but Y was obligated to permit X's children to live in a part of house. In this case, Y has a burden to let X's children to use a part of the house, but it is not equivalent to X's obligation. Also, this contract is a gratuitous contract.

2.3. Typical Contract / Atypical Contract

1) Typical contract: any contract which is provided in the Civil Code.

For example, Sale contract, Contract for work, Lease contract...so on

2) Atypical contract: this kind of contract is not stipulated in the Civil Code. This kind of contract is formed as the result of combining different kinds of contracts

such as combination of atypical contract and atypical contract, or typical contract and typical contract. Therefore, this contract cannot be determined its classification. When interpret an atypical contract, it is important to make clear what real intention of the parties is.

For example, a contract between a tailor and a client which stipulates that the tailor provides the fabric. We can see that this contract is not classified clearly. It is formed by the combination of two contracts:

a) Contract for work: The tailor has an obligation to complete his work and deliver it while the customer has to pay the remuneration.

b) Sale Contract: The customer has to pay for fabric.

2.4. Consensual Contract / Real Contract / Formal Contract

1) Consensual Contract: According to paragraph 1 of article 336, a contract comes into effect when an offer and an acceptance thereof conform to each other in general.

2) Real Contract: This contract comes into effect when the delivery is made. For example, contract of loan for use (Article 626).

3) Formal Contract: it refers to the contract which comes into effect by specific formalities. For example, the transfer of the ownership by contract comes into effect when it is made by notarial document (Paragraph 2 of Article 336).

2.5. One-time Contract / Continual Contract

1) One-time contract refers to a contract that requires only one time performance. For example, a sale contract is concluded when the delivery is made and money is paid in general.

2) Continual Contract refers to a contract in which the performance extends over a long period. It means we can prolong performance. For example, a lease contract, mandate contract are continual contract

- Difference between one-time contract and continual contract

One-time contract has retroactive effect when the contract is terminated (Paragraph 1 of Article 411) while continual contract does not necessarily have retroactive effect. For example, a termination of a lease contract shall be effective only for the future (Article 617).

2.6. Classification of Typical Contract

(1) A contract transferring property right

Examples: Sale, Gift, Exchange

(2) A contract for using of property

Examples: Loan for consumption, Lease, Loan for use

(3) A contract for supplying services.

Examples: Mandate, Contract for work, Contract of employment

2.7. Character of Typical Contract

☞ See Annex 2

3. Requisite of Contract

☞ See Annex 3

3.1. General Requirement Regarding Parties

1) Having legal capacity

2) Having mental capacity

3) Having capacity to act

4) Without defective declaration of intention

3.2. General Requirement Regarding Content

There are four requirements regarding the content:

(1) Definiteness

If a contract is not clear, it will lead to nullity because the court cannot execute the content of the obligation in the contract.

For example, X promised to give something good to Y when Y reaches the age of 18. For this content of contract, the court cannot render a judgment, or cannot execute the obligation because the content of the contract is not definite. However, it is not necessary to decide all of the contents of contract for definiteness. It is enough to definite if the main part of the contract can be manifested by interpretation.

For example, a sale contract between X and Y does not state a price. Such a contract is not necessarily invalid, if they agreed the method to decide the sale price in the future (Article 521). In other words, the parties can determine the purchase price at the time of implementation of the contract; not at the time of formation of the contract. If there was an agreement about the method to decide the price but they cannot reach to the agreement the price at the time of implementation of the contract, the parties can file a complaint to the court. The

court shall decide the purchase price with taking into consideration the real intention of parties, fair market price or custom of transaction, etc.

(2) Legality

If the contents of the contract violate a mandatory provision of law, it shall be void (Item (a), Paragraph 1 of Article 354). A mandatory provision refers to the provision which denies the effect of legal act against the provision. For example, in a case where the parties agreed that "a party cannot rescind the contract even if he made a declaration of intention because of duress", the agreement shall be void because it is against the mandatory provision.

(3) Social appropriateness

This condition is stated under Item (b), Paragraph 1 of Article 354 of Civil Code. It means that even if the parties express intentions without defects, this contract shall be void as long as the content of the contract violates social status, good customs.

(4) Without fictitious declaration of intention:

For example, X sold land to Y for the purpose of avoiding the attachment from the creditor in collusion with Y. Then, X transferred the registration of the land to Y. This is called the fictitious declaration of intention. In the case of fictitious declaration of intention, the contract between X and Y shall be void (Article 353).

Among the four requirement, conditions from 2-4 are important because they are clearly stated in the Civil Code, while the first requirement is not stated in the law. However, the definiteness of the contract is acknowledged from the nature of the obligation.

Section 3 Formation of Contract

1. Principle of formation of Contract:

According to Paragraph 1 of Article 336, a contract shall come into effect when an offer and an acceptance thereof conform to each other. Also, a contract shall be formed when the notice of acceptance is received by the offeror (Article 340).

1.1. What is "Offer"?

An offer is an invitation to enter into a contract based on the offeror's intention to be legally bound by the other party's acceptance thereof (Paragraph 1 of Article 337).

An offer shall take effect when it reaches the other party (Paragraph 2 of Article 337).

The word "reach" means that, for example, it is not necessary as offeree receive or read the offer as long as it has arrived. For example, a person living with the offeree has received or an offer has reached the mailbox of offeree's house (other party).

1.2. What is "Acceptance"?

An acceptance is an expression of intention by the party who receive an offer, to agree it (Paragraph 3 of Article 337).

Case Study

X entered into contract with Y to sell X's antique watch. At which time, from a) to e), was this contract formed?

a) X dispatched a letter for offering to sell this watch for $1,000 on 1st August.

b) Y received X's letter and red it on 3rd August.

c) On 4th August, Y called X and told X that he will deliver cash to X's house to buy the watch for $1,000.

d) Y visited X's house and paid $1,000 on 5th August. However, the watch was broken so Y requested X to fix it and deliver Y's house. X accepted it.

e) X delivered the watch to Y's house on 8th August.

(Conclusion and Grounds)

This contract was formed at the time of c).

A contract comes into effect when an offer and an acceptance thereof conform to each other (Paragraph 1 of Article 336) and an offer shall take effect when it reaches the other party (Paragraph2 of Article 337). Therefore, X's offer took effect on 3rd August. Then, Y called X and told that Y accepted X's offer. In other words, Y's acceptance was reached X immediately. At this moment, the contract between X and Y came into effect.

1.3. An Offer With or Without Acceptance Period

An offer may or may not be subject to an acceptance period.

1.3.1. An Offer with Acceptance Period

In Article 338, an offer may be made subject to an acceptance period. Where it is unclear whether the offeror set another date, it shall be computed from the day of dispatch of the offer. This offer is made just for the benefit of the offeror himself because an offeror can make an offer to other people if he didn't receive the acceptance within the period. The offeror doesn't need to revoke his offer after the acceptance period. The determination of this period is to show intention of the offeror to wait for an acceptance, and if the offeror can revoke it at anytime he wants, the offeree might suffer unexpected damages Therefore, Paragraph 2 of Article 338 does not allow an offer to be withdrawn. If there is no response to an offer or the offeree refuses to accept the offer within this period, the offer will lose its effect (Paragraph 3 of Article 338).

1.3.2. Offer without Acceptance Period

If the parties are negotiating inter praesentes, for example, the parties are talking face to face or on the phone, and the offeree doesn't respond immediately and state the acceptance (Paragraph 1 of Article 339).the offer will lose its effect.

Example: X offered a sale of an ordinary pen and talked to Y. If Y didn't respond immediately, the offer will lose the effect.

An offer that is not made inter praesentes, the offeror cannot revoke it within a reasonable period of time (Paragraph 2 of Article 339). The offeror can revoke the offer only when such notice of revocation reaches to the other party before the offeree notifies the notice of acceptance to the offeror (Paragraph 3 of Article 339).

- Reasonable period of time: This is an interpretation according to the concrete situation, content of the contract, and scope of subject matter.

Example 1: X offered a sale of golden pen by a letter, and Y didn't respond. X, however, cannot revoke the offer and has to give reasonable time for Y.

2. Exception: Transaction of immovable

A contract comes into effect when an offer and an acceptance thereof conform to each other (Paragraph 1 of Article 336). This is a general principle. Notwithstanding the provisions of paragraph 1 of Article 336, a contract in which one of the parties bears a duty to transfer or to acquire ownership on an immovable, shall come into effect only when such contract is made by notarial document (Paragraph 2 of Article 336).

The reasons why the Civil Code stipulates that notarial document is required to transfer of acquisition of ownership of an immovable follows:

1) Protection for a person who has less well understood of the transfer

2) Protection for buyer or a less well understood person

3) Method of showing existence and contents of the contract

Section 4 Validity of Contract

Sub-Section 1 Invalidity and Rescission

1. Introduction

A contract comes into effect when an offer and an acceptance thereof conform to each other (Paragraph 1 of Article 336).

However, in cases where the declaration of intention was defective or the contents of the act are against legality or social appropriateness, the effect may be denied by the Civil Code. The "act" here means a contract or a unilateral legal act.

There are two systems to deny the effect of such an act; the invalidity of the act and the rescission of the act.

2. Invalidity

2.1. Intention of Invalidity

Article 357 (Definition of nullity) stipulates that any person may assert the nullity of the act where 1) the contents of the act are not consistent with the mandatory provisions of law or public order and good customs, or 2) not consistent with the forms required by this law or other laws.

For example, in the case where a sale contract of humans would be null and void because it is against the law which prohibits human trafficking. Also, wills that doesn't conform to one of the forms prescribed in the Civil Code shall be null and void in principle (Paragraph 2 of Article 1170). In these cases, any person can assert its nullity.

Also, the Civil Code provides that a contract formed by fictitious declaration of intention made in collusion with the other party shall be void (Article 353).

Moreover, there is a similar concept to null and void in the Civil Code. Article 369 stipulates that in the case of an agency without authorization, the act by the person as an agent shall not be attributable to the principal. The reason is that no one shall assume the obligation without his own intention. If a person acted as an agent but he didn't have any authority, there are no legal grounds to attribute the effect of the acts to the principal. In such a case, the act of a person who acted as an agent can be called "null", but the principal can ratify the act. Therefore, Article 369 provides the nullity of the acts in the case of agency without authorization, but its concept is different from "nullity" in Article 357.

On the other hand, the Civil Code stipulates that the declarer may rescind the contract in some cases. In the case where an act can be rescinded, it still effective until the person having a right of rescission exercise it (Paragraph 1 of Article 358). The difference between invalidity or voidable act is that the invalidity has no effect from the beggining. Moreover, in the case of invalidity act, anyone can assert the nullity at anytime and there is no extinctive prescription. On the other hand, in the case of voidable act, only a person who has a right of rescission can rescind or ratify the act and he has to exercise the right within three years (Article 363).

2.2. Person who Can Assert The Nullity

The purpose of the nullity is to prohibit the contract or unilateral legal act (testament, etc.) which is not consistent to the mandatory provisions of law or public order and good customs. Therefore, any person can assert the nullity of the act at anytime. The nullity is no affected by the lapse of time.

2.3. Effect

The null acts don't come into effect from the beginning of the acts. If a party has performed based on a null contract, the other party has to return it as unjust enrichment in general. However, in the case where a demand by the person who has suffered loss for the return of unjust enrichment would be in breach of public order and good moral or any law regarding public order, such a demand shall not be allowed (Article 741).

On the other hand, nullity due to the fictitious declaration of intention cannot be asserted against a third party who has the interest in contract based on fictitious declaration of intention in general (Paragraph 2 of Article 353). This is one important exception.

Moreover, it is possible to ratify the null act. However, even the ratification is possible, in the case where the mandatory provision which is the reason of the nullity of the act still has an effect, or it is evaluated that the inconsistency with public order and good customs has been not changed when the act is ratified, the act shall be null.

2.4. Partial Nullity

Paragraph 2 of Article 354 stipulates that "if a part of a contract violates a mandatory provision of law or public order and good customs and if the remainder of the contract would not affect the reasonable expectations of the parties, only the part of the contract in violation of provision of law or public order and good customs shall be void." It is called "partial nullity"

For example, Paragraph 3 of Article 585 stipulates that if the agreed interest rate exceeds the maximum interest rate, such an agreement shall be invalid but the borrower is obligated to pay interest calculated on the basis of the maximum interest rate. In this case, the whole agreement of the interest rate shall not be null.

3. Rescission

3.1. Intention

In cases where the acts are voidable, it can be rescinded. If a person declares a defective intention due to mistake, fraud, duress, etc., he can rescind the contract (Article 345).

3.2. Effects of Rescission

A voidable act is still effective until the person having a right of rescission exercises it (Paragraph 1 of Article 358). And if a person having a right of rescission rescinded the voidable act, the act would be deemed void from the beginning (Paragraph 2 of Article 358). In other words, the act comes into effect once even if the act is voidable, and a rescission is a declaration of intention to deny such an effect.

For example, X sold his car and delivered it to Y because Y caused duress to X. Y hasn't pay the purchase price yet. After X's rescission of this contract, the contract between X and Y shall be void from the beginning. Consequently, Y has no legal grounds to possess the car and it shall be unjust enrichment. Therefore, Y has to return the car with interest based on Paragraph 2 of Article 737.

A rescission is a unilateral legal act. Therefore, the rescission shall be effectuated when the notification thereof reaches the other party (Article 360).

3.3. Persons who Can Rescind The Contract

3.3.1. In Cases of Defective Declaration of Intention

In cases of defective declaration of intention, the person who made the defective declaration of intention, his legal representative can rescind the contract. Also, his heir or the person who has succeeded him in the contract can rescind the contract.

3.3.2. In Cases of An Act Based on Lack of Capacity or Limited Capacity

In cases of acts performed by a person who lacks capacity or has a limited capacity, the person in question, his legal representative, his heir, general legatee or curator of such a person can rescind the acts. A rescission by a person

who lacks capacity or has a limited capacity himself shall not be a "voidable rescission" because, in general, to deny the effect of act shall contribute to protect such persons.

3.4. Ratification of Voidable Act

3.4.1. Intention and Effect

If the person having a right of rescission ratifies the voidable act, the act is definitively deemed valid (Article 358). Once the person having a right of rescission ratifies, the voidable act cannot be rescinded anymore.

Ratification is also a unilateral legal act and it shall be effectuated when the notification thereof reaches the other party.

Please note that there are some special provisions which deem ratifications under certain conditions in cases where a person with limited capacity acted without consent of the legal representative or curator (Article 32).

3.4.2. A Person who Can Ratify The Voidable Act

According to Paragraph 1 of Article 361, a person having a right of rescission can ratify a voidable act.

However

(a) in the case of defective declaration of intention, the ratification can be carried out after the person learns of the cause of rescission, and

(b) in the case of limited capacity, the ratification can be carried out after the circumstances giving rise to the rescission no longer exist.

For example, in a case where a minor made a contract with another person, he can ratify after becoming an adult. On the other hand, the legal representative or the curator of a person with limited capacity also has a right to rescind, but they can ratify the act by the person with limited capacity even before the circumstances giving rise to the rescission no longer exist.

3.4.3. Constructive Ratification

A voidable act is effective until it is rescinded, but the other party of the transaction shall be forced to remain in an unstable condition. Therefore, the Code stipulates that in cases where a person who has the right to rescind performed actions which can be identified as a ratification, the act shall be deemed to be ratified.

(1) The performance or giving of security

If the person who has a right to rescind performed full or partial obligation which has arisen due to a voidable act, or provides a security which secures such an obligation, he cannot rescind the voidable act anymore.

For example, X made a sale contract of his car with Y by mistake. After making the contract, X realized the mistake but delivered the car. In this case, X's voidable act shall be deemed ratified, so he cannot rescind the contract anymore.

(2) The exercise of a right or demanding for performance

In the above case, in spite of X realizing his mistake, X demanded Y to pay the purchase price before delivery. In this case, X's voidable act shall be deemed ratified as well.

(3) The transfer or disposition of a right

This is similar to the case of the exercise of a right which is obtained through a voidable act. Once a person who has a right to rescind transfers or dispositions the right which was obtained through a voidable act, he cannot rescind the act anymore. For example, in the above case, if X transferred his claim for payment to the third party, he cannot rescind the contract.

3.4.4. Extinctive Prescription of Right of Rescission

According to Paragraph 1 of Article 363, a person who has a right of rescission has to exercise his right of rescission and demand the return of the unjust enrichment within three years from the date on which ratification can be performed. In this case, the provisions regarding interruptions of prescription shall not apply. Also, Paragraph 2 of Article 363 stipulates that a right of rescission shall be extinguished upon the expiration of ten years from the date of the act subject to rescission. After an extinctive prescription is completed, the person who has a right to rescind cannot rescind the voidable act anymore, thus the act shall be deemed to be valid definitively. For example, X sold his land to Y due to fraud by Y and he realized the fact 12 years later. He exercised the right of rescission within 3 years from the date on which he can rescind the contract, but his right to rescind is extinguished already because 10 years has passed from the date of the act based on Paragraph 2 of Article 363.

The reason why the Civil Code provides these two kinds of limitation to exercise the right to rescission is that the conditions under a voidable act makes the legal relationship unstable, so it is necessary to fix such an unstable relationship. However, on the other hand, there is a necessity to protect a person who enacted avoidable act. Therefore, the Civil Code demands that in a case where the person

who has the right of rescission is under the condition which he can rescind the contract at any time, he must exercise his right as soon as possible.

Also, according to Paragraph 3 of Article 363, if multiple persons have a right of rescission, each person's right of rescission shall be extinguished individually.

For example, in a case where X, aged 17 made a contract with the third party without the consent of Z, his parental power holder. After that, Z realized it just after the conclusion of the contract between X and Y. In this case, Z's right to rescind shall be extinguished at the date when three years has past. However, as to X, he cannot ratify his act before becoming an adult, the commencement of the extinguish prescription shall be the date of his 18th birthday.

Case Study

(1) X sold his car to Y due to a fraud by Y and delivered it to Y without acknowledging Y's fraud. After that, X received the purchase price from Y. Four years after from the contract, X became aware of Y's fraud, and he rescinded the sale contract immediately. Can X demand return of the car against Y?

(2) X, a person under general guardianship sold his land to Y without the consent of his guardian Z. Later on, X rescinded this contract without Z's consent. Then, Z realized this contract and noticed that Z ratified this contract to Y. Shall Y be obligated to return this land?

(3) X sold his land and delivered it to Y due to a fraud by Y. 5 years later, X died and Z succeeded X as the only successor. Z realized that X sold the land because of Y's fraud just after the succession. Can Z rescind the contract and demand return of the land against Y?

(4) A minor X bought a motorbike from the bike shop Y without consent of his parental power holder Z. Y demanded payment against Z because X didn't pay the purchase price. Then, Z gave the motorbike as the pledge so that he could pay the purchase price. After that, X was offended that he could not ride the motorbike, so he gave a notice that he would rescind the sale contract to Y. Shall Y return the purchase price?

(Conclusion and Grounds)

(1) Yes.

In this case, X rescinded the contract within three years from the date on which ratification could be performed (Paragraph 1 of Article 363).

(2) Yes.

A person under a general guardianship can rescind his act without the consent of the guardian (Paragraph 1 of Article 359).

(3) Yes (Latter part of Paragraph 1 of Article 359).

(4) No.

Z's act shall correspond to "disposition of a right obtained through a voidable act" in Item (c) of Article 362. Once the act was ratified by constructive ratification, the act is definitively deemed valid. Therefore, X cannot rescind the contract anymore.

3.5. Protection of a Third Party

Protection of third party in case of rescission of contract is necessary in case a third party acts in good faith and without negligence.

In principle:

In case of rescindable contracts the third party is protected if he acts in good faith without negligence in general.

The exception is the contract arising from duress: the third party is not protected.

Please see the case study:

A- Mr. X sold the land (L) to Mr. Y, and the transfer of ownership is registered. Then, Mr. Y also sold the said land (L) to Z and the transfer of ownership is also registered. After that, Mr. X rescinded the sale contract on the ground of fraud (duress or abuse of circumstance).

Who shall be the owner of the land (L)?

B- Mr. X sold the land (L) to Mr. Y, and the transfer of ownership is registered. After that, Mr. X rescinded the sale contract on the ground of fraud (duress or abuse of circumstance). However, the registration is not yet rescinded. Before rescission of registration, Mr. Y sold the said land (L) to Z.

Who shall be the owner of the land (L)?

In these cases, the position of Z is a bit different. In case A, Z appears before rescission and Z in case B appears after rescission. Does it make difference to the conclusions? Let's think about that.

3.5.1. Protected Third Party

According to Paragraph 3 of Article 347, a rescission of a contract on the ground of the fraud may be asserted against the third party. However, if the third party has acted in good faith and without negligence, the rescission of the contract may not be asserted against such party.

Example

Mr. X deceived Mr. Y to enter into the sale contract of jewelry in an inexpensive price. Then Mr. X resold such jewelry to Mr. Z and after that, Y rescind the contract based on fraud.

In that case Mr. Y may rescind the contract made with Mr. X and assert the effect of rescission against Mr. Z if Mr. Z is aware of ground of fraud or if Z is unaware of fraud but is negligent concerning such unawareness. However, it cannot assert against Mr. Z if Mr. Z is not aware of the ground of fraud and without negligence.

Then, what if rescission is made before resale to Z? That is to say, what if Y sold jewelry to X by fraud, Y rescinded (but not got the jewelry back yet) and X sold it to Z? Is Z protected in this case? This issue is related to the effect of rescission and would be explained in the next item.

3.5.1.1. Effect of Rescission

Once rescinded, the act deemed void from the BEGINNING. This effect is called "retroactive effect". Therefore, in principle, it is deemed that Z bought L from someone who was NOT the owner even at the time of transfer of property from Y to Z and thus Z can't get ownership in principle.

But it may seem unreasonable in some cases and that is why 347-3 is stipulated to protect the third party in good faith without negligence from the retroactive effect of rescission.

Then, third party who shall be protected is the party who has got the legal interest based on the legal relationship which was formed by rescinded legal act and then became void retroactively before rescission.

Subsequently, the third party to whom third party protection provision is applied is limited to the party receiving the legal interest based on the legal relationship which is created from the act that is rescinded and the nullity of retroactivity prior to a rescission.

Therefore, the third party who appears after the rescission is not protected by the third party protection provision in principle. There is, however, another provision which can be applied to him.

3.5.1.2. The Protection of the Third Party Appearing before Rescission

As mentioned above, there are two conditions for protection at least. One is good faith and the other is without negligence. Problem is whether registration is necessary for the third party to have "legal interest".

Japanese construction does not require the registration but because registration is requisite for transfer of ownership of immovable property in Cambodia, It may be possible or maybe more suitable to require the third party to have registration as balancing.

3.5.2. Is the Third Party Who Appears after the Rescission Protected?

In the case above, comparing Y, who rescinded the contract but neglected to get the registration back, with Z, who came to have a legal effect and the diligently get the perfection, it may seem not very unreasonable to protect Z. the problem is how he would be protected.

3.5.3. How Shall the Third Party Be Protected?

In that case, we must consider the method to protect the third party. Where Mr. Y registered the transfer of ownership, so that it caused Mr. Z to believe and decided to purchase; therefore, Mr. Z should be protected. There are two methods for a protection of Mr. Y: first, the perfection and second, the analogical application of Article 353-2 (Fictitious declaration of intention).

3.5.3.1. Perfection (Article 134-1)

Perfection is the condition to assert the effect of legal conduct against third party. In the case above, the registration is a perfection for Y to assert his transfer of ownership because of rescission. It means because Mr. X rescinded the contract, so the ownership is transferred to Mr. X but Mr. Y sold the land to Mr. Z too. Therefore, the ownership of Y was transferred to X as well as Z; as a result, Y asserts the ownership against Z who also asserts against Mr. X too.

Therefore, Mr. X, in order to assert his ownership, must have a perfection which is registration. Furthermore, Mr. Z also needs a registration because the registration is a requisite for him. Consequently, any person who first registers may become the owner. The subjective status of the party (negligence, good faith or bad faith) doesn't matter in general (more accurately, it depends on interpretation concerning perfection and it is explained in relevant part.).

3.5.3.2. The Analogical Application of Article 353-2

Second, it relates to the provision which applies analogically and determines whether the third party acting in good faith is protected by virtue of Article 353-2. For example, Mr. X is in many debts and he owns a land; in order to avoid the

compulsory execution by the creditor, he agreed to sell his land to Y but such sale is a fictitious declaration of intention. Based on Article 353-1, the creditor could assert that Mr. X is the owner of the land and the creditor could attach from the debtor, Mr. X. In accordance with Article 353-1, if Y sold the land to Z and Mr. X asserts that he is the owner over the land, transfer of ownership between Mr. Y and Mr. Z looks invalid. Based on Article 353-2, however, if Z acts in good faith and without negligence, it seems unfair with respect to Mr. Z because he believes the sale between Mr. X and Mr. Y and thus Z is protected.

As for the above case study, Mr. X sold his land to Mr. Y and then he rescinded the contract, and Mr. X does not allow Mr. Y to rescind to registration; besides, Mr. Y also sold to Mr. Z because he has his name in the ownership title which the reason causing Mr. Z, the third party, to believe and decide to purchase. Therefore, even though Article 353-2 only stipulates the fictitious declaration of intention, this Article shall be applied analogically with respect to the aforementioned case study in order to protect the third party acting in good faith without negligence because the situation is very similar to the case of fictitious intention.

3.5.4. What Is the Requirement for those Applications?

3.5.4.1. Perfection

As to which transfer of ownership over immovable property is more effective. In that case, in order to assert against the third party, it must be registered; thus, any person who first registers will be entitled to the ownership.

3.5.4.2. Analogical Application: Article 353-2

1) Good faith: Based on Article 353-2 applies analogically regarding the case where the third party acting in good faith even though the case study is matched with the issue as set forth in Article 353-2 (fictitious declaration of intention).

2) Without gross negligence: The third party must establish the specific act to be aware that the land is the ownership of the seller prior to a purchase of immovable property; otherwise, it will be not protected.

3) Registration: in respect of registration is not stipulated in Article 353-2, but it has to consider that if Mr. Z did not register, how it would be protected when Z registered according to Article 135 that this is a problem. Therefore, although Z acted in good faith, Mr. Z must register in order to assert against the third party based on Article 134.

As mentioned above, there are two methods to protect third party who appears after the rescission of contract and it is up to the Cambodian practice to choose one from those or to choose another idea.

Sub-Section 2 Defective Declaration of Intention

In general, the contract that is made by agreement of parties with lawful subject matter, and by competent persons, such contract will be effective to be implemented. However, in some cases, contract follows the above conditions but it can be rescinded due to defect in some view such as mistake, fraud, or duress, act of making excessive benefit, etc. (Article 345). Such acts with defects are called the voidable act (article 358).

The Civil Code also stipulates about a mental reservation and fictitious declaration of intention. In cases of a mental reservation and fictitious declaration of intention, the declaration of intention is, so to speak, defective because it doesn't reflect his true intention. Of course, the declarer cannot assert that his declaration of intention is defective and null because he knew that his declaration is not true. Therefore, if a person declared his intention in spite of the fact that he knew it is not his true intention, he cannot assert its nullity in principle. Also, in a case where a person colluded with the other party and made a fictitious contract, they cannot assert its validity.

1. Mistake

1.1. Intention of Mistake

Mistake denotes that in the case where the declarer declared intention which is different from his or her own intention and he does not know the difference when he declared the intention.

Example

What is the difference among the following four cases?

(Case 1)

X offered to sell his car to Y by a letter. X wanted to sell the car at the price of 1,000 dollars, but he wrote the price "1,000 riel" by mistake. Y accepted the offer and the acceptance reached X.

(Case 2)

X wanted to buy a ruby for his wife. But he told a jeweler Y that "I want to buy a garnet" because X thought a ruby and a garnet are the same stone. Then Y sold a garnet to X.

(Case 3)

X heard that some land will be developed as a luxury resort. Then X bought the land from the land owner Y with intent to resell it to the developer at much a higher price. However, there is no such a development plan in fact.

(Case 4)

In Case 3, Y also believed that his land will be developed as a luxury resort and he sold his land to X at higher price than the market price because both X and Y expected that X will be able to sell the land at a much higher price. However, there is no such a development plan in fact.

The following is the graph representing stage of the declaration of intention of each person which any individual who wants to express the intention in general shall follow each step as following:

Stage 1: Occurrence of motivation: "I want to buy that book"

↓

Stage 2: Decision to act: "I will buy that book"

↓

Stage 3: Decision to declare the intention: "I will say that I want to buy that book"

↓

Stage 4: Act according to the intention: Said "I will buy this book"

The following is the example for each stage above:

Case 1- It is a mistake between stage 3 and stage 4 of declaration of intention. In this case, X might want to rescind the contract, however, from Y's perspective, it shall prejudice the stability of a transaction because it is very difficult to recognize such a mistake for Y.

Case 2- It is a mistake at stage 2 and stage 3 of declaration of intention. X believed that a ruby and garnet are the same stone. It means that X misunderstood the meaning of his declaration of intention.

Case 3- It is the mistake between stage 1 and stage 2 of declaration of intention. X wanted to buy the land, and he decided to buy the land, but he was motivated based on wrong information. It is called "mistake in the motive"

Case 4- This is a mistake at Stage 1 and stage 2 of declaration of intention. In this case, both parties were motivated based on wrong information. It is called "a common mistake". The point of this case is that there is no necessity to consider the other party's safety of transaction.

1.2. Mistake on The Substantial Term of Contract

A contract can be rescinded if the contract is made (1) where a party makes a mistake on the substantial term of contract and while (2) if the other party could have been aware of such mistake (Paragraph 1 of Article 346).

1.2.1. Contents of "Substantial Terms of the Contract"

How can they identify "substantial terms of the contract"?

It is difficult to determine the substantial term of contract which is the ground for party to rescind the contract that was made by mistake because there is no article stated clearly about the substantial term. It shall be decided while taking into consideration the contents of the contract. Usually, if it can be said "if he did not commit such a mistake, he did not declare such an intention", it shall be the "substantial terms" of the contract.

For example, X negotiates selling 10 trees of Keo Romeat mango trees to Y within 10,000 Riel per tree. But the mango tree that X wants to sell is Keo Chin mango trees and this kind of mango tree shall cost 20,000 Riel. Can Mr. A rescind this sale contract? The answer shall be yes because if X was aware of the mango tree was Keo Chin mango tree, X would not sell at this price.

On the other hand, X knew that he sold Keo Chin mango trees and stated a date of delivery which was different from his real intention, it cannot be said that it is a substantial term of the contract.

Also, "substantial terms of the contract" shall be decided objectively and typically. As compared with Paragraph 2 of Article 346 which stipulates that "a party makes a mistake on term of the contract, that such party deems important or important for the formation of the contract", Paragraph 1 of Article 346 provides that "a party makes a mistake on the substantial terms of the contract" which doesn't consider the subjectivity of the parties different from Paragraph 2 of Article 346.

To rescind the contract, possibility of awareness of the other party is required as follows.

1.2.2. Possibility of Awareness of the Other Party

Possibility of awareness of the other party is required strongly to rescind the contract based on mistake. If the declarer may rescind the contract without reserve, the safety of the transaction shall be diminished because it is very difficult to appreciate whether the declarer declared his intention with or without mistake.

Therefore, Paragraph 1 of Article 346 stipulates that only if the other party could have been aware of the mistake, the declarer may rescind the contract.

For example, in the case 1 above, if X and Y negotiated about the price already and X sent the letter to Y after the negotiation, Y could have been aware of X's mistake very easily. Moreover, if it can be said that "it is against the generally accepted notion of transaction to sell a car at a price of 1,000 Riel", Y could have been aware of X's mistake. In these cases, X can rescind the contract based on Paragraph 1 of Article 346.

1.3. Mistake on Term of Contract that Party Deems to Be Important

In article 346 paragraph 2, it states that in the case of mistake (1) on term of contract that he deems important or (2) on a term of contract that such party deems to be important for the formation of the contract, the declarer may rescind the contract.

What does "term of contract that the party deems important" mean?

The point that the party considered as important may not be involved in main subject matter of the contract and it is not important for both parties, but it is important for only one party.

For example, in general, the content of the book is substantially important when someone buys the book. However, for a collector of the first edition of the books, whether the book is the first edition or not is much more important than its contents. On the other hand, the seller cannot easily be aware whether or not the buyer wants to buy the first edition of the book. Therefore, for example, in the case where a buyer, who is a collector of the first edition books, bought a book which was not the first edition, the buyer can rescind the contract only if the seller could have been aware that the buyer wanted to buy the first edition of the book and that the buyer mistakenly would buy a book which was not the first edition book by mistake.

Regarding (2), it shall be a "mistake in the motive". The reason why a party decided to make a contract is also difficult to recognize for the other person. In the case 3 above, if Y could have been aware that i) X intended to buy the land

because he expected that he could obtain the resale benefit due to the development plan and that the price of the land would rise sharply, and ii) X mistakenly believed the existence of the development plan which was unreal, X can rescind the contract.

1.4. A Common Mistake

A mistake such as in case 4 is called "a common mistake". According to Paragraph 3 of Article 346, in a case of a common mistake, the declarer can rescind the contract even the other party could not be aware of such a mistake. In this case, both parties committed a mistake so the necessity to protect the other party is relatively low different from the case where only one party committed a mistake. Therefore, it is not necessary to consider the possibility of awareness of the other party.

1.5. Protection of Third Party

Protection of third party is very necessary to protect the benefits of third parties arising from the contract with defect. If the contract can be rescinded based on a mistake, the third party who entered the contractual relationship based on the contract which can be rescinded might suffer from unexpected loss.

For example, X sold his car to Y by mistake and Y sold this car to Z. If X rescinded the contract, the effect of the contract will be deemed void from the beginning (Paragraph 2 of Article 358). In this case, it can be considered that Z shall come under two kinds of influence. There are some theoretical considerations.

1.5.1. Third Parties Before Rescission

Rescission of contract on the ground of mistake may be asserted against third party other than the other party (Paragraph 4 of Article 346). However, if the third party acted in a good faith without negligence of mistake, the declarer shall not assert the rescission against the other third party (Proviso of Paragraph 4 of Article 346).

In the above case, Y bought a car from X and sold it to Z, then X rescinded the contract between Y due to a mistake. In this case, Z shall be deemed to buy from Y who had no ownership because the effect of the contract between X and Y was deemed void from the beginning. Y shall lose the legal ground to possess the car and he has to return the car. However, it shall diminish the safety of transaction of Z. Therefore, if Z acted in good faith without negligence, X cannot assert the effect of the rescission of the contract. The meaning of "acts in good faith without

negligence" here is that Z didn't know the fact that X sold his car to Y due to a mistake.

1.5.2. Third Party After Rescission

Then, how about in the case where Y sold the car to Z after X rescinded the contract? In this case, the subject matter of the contract is movable, so Z can assert a bona fide acquisition based on Article 193 if Z acted in good faith without negligence.

In case where the subject matter of the contract is immovable, there are some ideas to protect the third party.

For example, X sold his land to Y by his mistake and X rescinded this contract. Then during Y held the registration, Y sold this land to Z and Z registered his ownership.

(1) An idea that denies application of Paragraph 4 of Article 346 to the third party after the rescission

This idea is that the third party after rescission shall not be protected by Paragraph 4 of Article 346. According to this idea, the aim of Paragraph 4 of Article 346 is to protect the third party who entered into the contractual relationship before the rescission from the retroactive effect. Therefore, Paragraph 4 of Article 346 is applicable only for the third party before the rescission.

The next problem is how to protect the third party who entered into the contractual relationship after the rescission.

There are some possible ways of thinking.

(a) An idea which acknowledges as double transfer

The first idea is that due to the rescission of the contract, ownership shall be returned to X automatically. On the contrary, Y sold this land and Z already obtained the registration. This is a similar situation as when Y sold his land to X and Z.

According to this idea, there are two transfers of the ownership from Y like a double sale. Also, Article 135 shall not apply because this transfer of the ownership isn't based on the agreement of X and Y. Therefore, the party who obtains the perfection can assert his ownership based on Article 134. However, this idea is criticized that it is contradictory if the recovering transfer of the ownership is admitted while neglecting the retroactive effect when a subsequent buyer appears after the rescission, on the other hand, rescission becomes retroactively effective when a subsequent buyer appears before the rescission.

Based on this idea, it is possible for Z to assert his ownership against X even if he acted in bad faith, but it depends on the interpretation of the scope of "the third party" in Article 134.

(b) An idea to apply Paragraph 2 of Article 353 theoretically

This idea is apply Paragraph 2 of Article 353 theoretically to this case, this article provides that a contract formed by fictitious declaration of intention made in collusion with the other party shall be void, but it cannot be asserted against the third party who has interest in the contract based on the fictitious declaration of intention in good faith without negligence. In the case of mistake, the declarer doesn't collude with the other party, so Paragraph 2 of Article 353 cannot apply directly. However, X's fault that he left the registration which doesn't reflect the real condition of the ownership can be identified as the fault of the declarer in the case of fictitious declaration of intention.

According to this idea, Z can be protected only in the case where he acted in a good faith without gross negligence.

(2) An idea which Allows the Application of Article 346 Paragraph 4

Based on this idea, there is no difference between the third party who appear prior to the rescission and third party who appear after the rescission and both third parties shall be protected Paragraph 4 of Article 346.

This idea is criticized in that it is not appropriate to equally deal with the third party prior to the rescission and the third party after rescission because Paragraph 4 of Article 346 intends to protect the third party that created contractual relationship before rescission from the retroactive effect.

2. Fraud

2.1. Intention

A declaration of intention as a result of fraud means that a person or a third party makes the declarer to commit a mistake by the fraudulent means, and the declarer declared his intention which is different from his real intention because he was not aware of this discrepancy when he declared his intention.

Fraud is similar to a mistake to a point in that a real intention and declaration doesn't correspond to each other. However, the discrepancy arises from a fraudulent act by the other party or the third party in the case of fraud, which is different from a mistake.

2.2. Requirements

The requirements to identify whether any act is considered as fraud does not stipulate clearly in the Civil Code, but we can notice some requirements as following.

1. The other party or a third party has intention of fraud.
2. The fraudulent act is considered as illegal.
3. The declarer commits a mistake due to the fraudulent act.
4. The declarer declared his defective intention due to such a mistake.

2.2.1. The Intent of Fraud

The intent of fraud refers to the other party or a third party has intention to make the declarer commit a mistake and declare the defective intention by such a mistake. "intent to make the declarer commit mistake" denotes that the other party or the third party knew that his act is a fraudulent act and the declarer might commit a mistake by his fraudulent act

For example, a seller declared that "this is an antique plate which is worth 1,000 dollars" and sold it to a buyer at the price of 1,000 dollars despite the fact that he knew it was not an antique plate but a mass-produced plate which is worth 10 dollars. In this case, it is necessary to consider this as fraud because the seller knew the plate was not an antique and isn't worth 1,000 dollars. If he didn't know these facts, it doesn't constitute a fraud, but is actually a mistake.

Also, the intent to make the declarer declare a defective intention by mistake is required. For example, in the case where someone wrote a fake article which said that a huge gold mine was found in the country, it cannot be a fraud because there was no intent to make someone declare a defective intention. However, if the writer tried to attract an investment by writing such a fake article, it shall be considered fraud.

2.2.2. Illegality of Fraudulent Act

Illegality means that a fraudulent act of the other party or third party is contradictory to the law and cannot be accepted in the society. For example, if the seller declared that he sells a product which he bought 10 dollars for 15 dollars in a market, it isn't necessarily a fraud because it is an ordinary negotiation.

Also, those acts are illegal not only in the case where provide fake information, but also hide the information, or keep silent while he is obligated to show the information, etc.

2.2.3. Existence of mistakes

In order to construct a fraud, it is required that the declarer committed a mistake by the fraudulent act from other party or the third party. Therefore, in the case of fraud, necessity to protect the declarer is higher than in the case of mistake. So, even if the other party acted in good faith about fraud, the Civil Code allows to rescind the contract.

2.2.4. Causal Relationship

It is required that there is a causal relationship between the fraudulent act of the other party or the third party and the declaration of intention of the declarer.

For example, X has sold an ancient plate to Y in the amount of 1000 dollars. X told Y that this plate was the ancient plate but the actual price was only 10 dollars and it was not an antique. In this case, if Y believed that this was really the ancient plate, it shall construct a fraud. However, if Y was aware that it was not an antique plate and has less worth, there is no causal relationship between X's act and Y's intention. In such a case, there is no necessity to protect Y

2.3. Effect

2.3.1. Principle

There are some effects when a declarer made a declaration of intention because of the fraud of the other party or the third party.

1.) The person who declared his intention by fraud can rescind the contract on the ground of defective declaration of intention (Paragraph 1 of Article 347).

2.) On the other hand, the declarer cannot assert the rescission of the contract on the ground of defective declaration of intention where the third party who has acted in good faith without negligence.

For example, X had a car. Y defrauded X to sell his car in a low price. After buying the car, Y sold the car to Z. Later, X realized that Y had defrauded him; hence, he rescinded the contract between Y and him. In such the case, it can be:

a) X can assert the effect of rescission of the contract between X and Y on the ground of fraudulent act of Y which makes his declaration of intention defective.

b) However, if Z has acted in good faith without negligence, X cannot assert the effect of rescission against Z. X can only assert the effect of rescission against Y since Y's fraudulent act makes his declaration of intention defective. Therefore, X cannot demand return of the car.

3) The relationship of the third party before and after rescission of the contract is the same as in the case of mistakes.

(1) Relationship of the third party before rescission

In this case, Paragraph 3 of Article 347 shall apply. For example, Y defrauded X to sell his car in a low price. Y resold to Z. Later on, X rescinded the contract. According to Paragraph 2 of Article 358, if the contract is rescinded, the act deemed void from the beginning. In the case above, Z shall be deemed to buy from Y who had no ownership. However, it shall diminish the safety of transaction of Z. Therefore, the Civil Code provides that the rescission cannot be asserted against the third party if the third party acts in good faith without negligence.

(2) Relationship of the third party after rescission

In the case where the subject matter is a movable, the third party can assert a bona fide acquisition based on Article 193 if the third party fulfilled the requirements.

On the other hand, there are some possible ways of thinking in the case where the subject matter was an immovable.

The first idea is that the third party after rescission shall not be protected by Paragraph 3 of Article 347 because it aims to protect the third party who entered into contract before the rescission from the retroactive effect. Regarding to protection of the third party based on this idea, there are two opinions here. The first opinion is that due to the rescission of the contract, the ownership shall return to the declarer automatically. This is a similar situation as double transfer of the ownership. The second opinion is to apply Paragraph 2 of Article 353 theoretically to this case. According to this idea, the third party can assert his ownership against the declarer only if the third party acted in good faith without gross negligence.

Also, there is an idea that acknowledges of the application of the Paragraph 3 of Article 347 as well as the relationship of the third party before rescission. This idea is criticized in that it is not appropriate to equally deal with the third party before the rescission and after the rescission.

2.3.2. Fraud by A Third Party

Fraud by a third party refers to a person other than the other party uses fraudulent mean to make the declarer commit a mistake due to this fraudulent mean and the declarer declares his intention which is contradictory from his real intention.

In the case of a fraud by a third party, the declarer may rescind the contract only if the other party know or could have known of the fraudulent contract (Paragraph 2 of Article 347). Because there is no necessity to protect the other party in such a case.

On the other hand, in the case where the other party has acted in good faith, the declarer is not allowed to rescind his contract in order to protect the other party.

For example, X had a land and Z told Y that the land L of X was in a developing area. As heard so, Y bought the land from X. In this case, Y commits a mistake due to Z's fraud. Therefore, Y can rescind the contract if X knew or could have known Z's fraud.

Case Study

Can X rescind the contract due to the fraud of Y in the following cases?

(1) X bought land from Y. Y didn't tell X that the land has been encumbered with a hypothec.

(2) X bought a mango from a fruit seller Y. Y told X that "this mango is very seet", but it was not very sweet.

(3) X asked to be Y's gurantor when Y made a loan for consumption with Z. Y told X that he had land and he would establish a hypothec for Z and the the contract of guaranty was just a formality. X believed Y and made a contract of guaranty with Z. However, Y didn't have land and became insolvent. Then, Z demanded payment of Y's debt against X.

(Conclusion and Grounds)

(1) Yes

A seller of a land is obligated to provide an explanation about the state of the title, encumbrances, boundaries, etc (Artiele 529). So, if the seller sold his land without an explanation of the fact that the land has been encumbrered with a hypothec, it shall be considered fraud.

(2) Yes/No

In general, such a declaration is called a "sales talk" and it is considered socially acceptable. However, it should be decided by Cambodian practice whether it is "socially acceptable" or not.

(3) If Z knew or could have known of Y's fraud, X can rescind the contract.

This is a case of fraud by the third party (Y is the third party in this case). Therefore, X can rescind the contract only if Z knew or could have known of Y's fraud (Paragraph 2 of Article 347).

3. Duress

3.1. Intention

A declaration of intention by duress denotes that a declarer declared his intention that was against his will through fear of the other party or a third party (Article 350).

The declaration of intention is defective and the provision of law permits the declarer to rescind the contract.

How are the mistake, fraud, and duress different?

Please see the brief point in the following:

Mistake: The declarer declared his intention due to mistake

Fraud: The declarer declared his intention due to mistake which caused by the other party or the third party

Duress: The declarer declared his intention without mistake but against his will because of fear which caused by the other party or the third party

3.2. Requirements

Requirements of duress are as follows:

1) The other party or third party has an intention to make a declarer declare his intention due to fear.

2) The compulsive act is recognized as illegal

3) The compulsive act makes the declarer fear

4) A declarer declared his intention because of such fear.

3.3. Effect

A person who made a declaration of intention due to duress may rescind the contract (Article 350)

On the other hand, there is no provision to protect the third party even though he entered into the contractual relationship based on the contract that can be rescinded. Therefore, the declarer can assert the effect of the rescission against any third party even if the third party acted in good faith. The reason why there is no provision to protect the third party regarding duress is that the declarer

declared his intention without mistake, which is different from a mistake or fraud, so the declarer must be protected more than in cases of a mistake or fraud.

4. Misrepresentation

4.1. Intention

A misrepresentation denotes that in the case where a fact that was asserted by a party in the course of the formation of the contract was not true. Also, if a declarer had known such fact was not true, he would not have made a declaration of intention (Article 348).

Consequently, the declarer may rescind the contract on the ground of the defective declaration of intention.

In the case of misrepresentation, it is required that the other party didn't know the fact which he asserted was not true. If he realized that the fact was not true, it shall be considered to be fraud.

4.2. Requirements

Requirements are as follows:

1) The fact asserted by other party asserted in the course of the formation of the contract was not true.

2) If a declarer had known such fact was not true, he would not have made a declaration of intention.

3) The other party did not know the fact he asserted was not true.

4.3. Effect

The party who made a declaration of the intention due to misrepresentation may rescind the contract. The declarer may rescind the contract even if the other party who made the misrepresentation acted without negligence (Paragraph 1 of Article 348).

On the other hand, if the person who made the misrepresentation committed a mistake on the misrepresentation, such person is liable for compensation for damages (Paragraph 2 of Article 348).

For example, an antique dealer X sold a painting as an authentic work of a famous painter to Y at the price of 1,000 dollars. However, the fact that there is a signature of the other painter who was obscure was found. Then, Y rescinded the contract based on X's misrepresentation. In this case, it was very easy for the antique dealer X to realize whose signature was on the painting, and it can be

considered it was X's mistake because he failed to find such a signature. Therefore, if Y suffered from damages, Y may demand damages against X.

With respect to the relationship with a third party who appears before or after the rescission are the same as in cases of mistake.

5. Abuse of Circumstances

5.1. Intention

An abuse of circumstances denotes that a party made a contract by taking advantages against the other party who is facing the economic or social difficulty, or unfairly used other circumstances so that the other party cannot contest (Article 349). In this case, the party who abused the circumstances was not considered as committing duress because he didn't use compulsive measure. However, to constitute an abuse of circumstances, it is necessary that the other party took advantage of the declarer's weak position. For example, in the case where an employer used his position and made an employee buy something from the employer, the employee can rescind the contract because he could have been forced to buy it even he didn't want to do.

In the case of abuse of the circumstances, it is similar to an act of making excessive benefits to a point in which the other party took undue advantage of the economic difficulties. However, it is required that the other party made excessive benefits from that contract in the case of an act of making excessive benefits, which is different from the case of an abuse of the circumstances.

5.2. Requirements and Effect

Requirements are as follows;

1) The declarer was under the circumstance which is difficult to refuse a demand from the other party because the other party used his/her economic or social position, etc. that is better than the other party.

2) The other party used his position to take undue benefit.

3) The declarer declared his intention because he could not refuse a demand from the other party because his position is weaker than the other party.

The party who made a declaration of intention because of abuse of circumstances may rescind the contract. However, such rescission may not be asserted against a third party who has acted in good faith and without negligence (Paragraph 2 of Article 349).

With respect to the relationship with a third party who appears before or after the rescission are the same as in cases of mistake.

6. Act of Making Excessive Benefits

6.1. Intention

An act of making excessive benefits denotes that in the case where a party enters into a contract while taking advantage of the other party's economic difficulties, ignorance or inexperience, and making excessive benefits from that contract (Article 351).

For example, a drug company advertised that their diet pill has effects which are splendid for everybody despite the fact that the effect varies according to constitution of individuals, and many consumers bought the diet pill and the company made excessive benefits. In this case, the act of the company cannot be consisted fraud because it was effective for some of consumers. However, in this case, it can be considered that the company took advantage of the consumer's ignorance or inexperience, so the contract shall be an act of making excessive benefits.

The purpose of this provision is to protect the other party such as consumers from prolific producers which attempt to make excessive benefits with taking advantage of ignorance or inexperience of the consumer.

How are the duress, abuse of circumstances, and Act of making excessive benefits different?

Please see the briefing notes in the following:

	Duress	Abuse of circumstances	Act of making excessive benefits
The declarer declared his intention from the fear	Necessary	Not necessary	Not necessary
The other party took undue advantages of the economic difficulties of the declarer	Not necessary	Necessary	Not necessary*
The other party made excessive benefits	Not necessary	Not necessary	Necessary

* In the case of act of making excessive benefits, it is not required that the other party took undue advantages of economic or social position. However, it is very similar to "circumstances so that the declarer cannot contest" in Article 349 and "economic difficulties, ignorance or inexperience" in Article 351. Therefore, it can be considered that it is possible to apply both articles in the case where the other party made excessive benefit with taking undue advantage of circumstances so that the declarer cannot contest.

6.2. Requirements and Effects

Requirements of an act of making excessive benefits are;

1) The declarer was in the economic difficulties, ignorance or inexperience

2) The other party entered into contract while taking advantage of the declarer's economic difficulties, ignorance or inexperience

3) The other party made excessive benefits from that contract

Party who made a declaration of the intention due to act of making excessive benefits may rescind the contract.

This provision assumes the declarer is the general consuming public and the other party is the mass-producer. Therefore, there is no provision to protect the third party prior to protecting the general consuming public.

Remark on the point which must be taken into account: "Private autonomy"

Even if one of the parties made an excessive benefit from the contract, it cannot be considered that all such contracts shall consider to be an act of making excessive benefits. It is required that the other party entered into the contract while taking undue advantage of the declarer's economic difficulties, ignorance or inexperience.

On the other hand, the Civil Code expects people to act rationally. If the consumer bought something disvalued through carelessness, he shall not necessarily be protected by the Civil Code.

In the case of act making excessive benefits, the rescission of the contract shall be allowed under obscure criteria such as the declarer's economic difficulties, ignorance or inexperience.

Therefore, whether the act corresponds to the act of making excessive benefit or not must be strictly judged for the sake of private autonomy.

Sub-section 3 Mental Reservation and Fictitious Declaration of Intention

0. Introduction

(1) Necessity to protect other party in the case of defective declaration of intention

In principle, a declaration of intention shall reflect a true intention of the parties to make an offer or an acceptance effectively. This principle is derived from the private autonomy which declares "a person shall assume an obligation based on his intention alone".

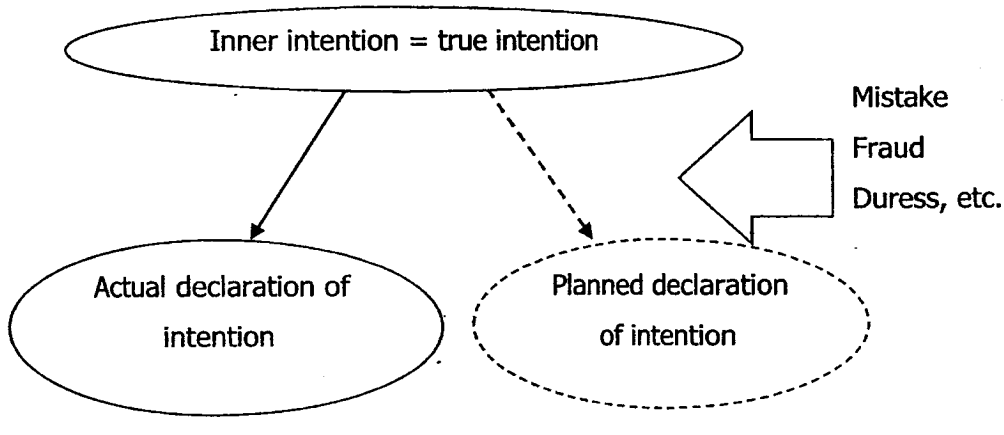
For example, in the case where X declared "please sell your land to me" but X has no mental capacity, there is no effective intention because he cannot declare his intention appropriately. So, X can rescind his declaration of intention.

Also, where there is defective declaration of intention such as mistakes, fraud, duress, etc., the real declaration doesn't correspond to the intention which made by the declarer.

For example, if X declared "please sell your land to me" by a seller Y's fraud, X's intention is caused by Y's fraudulent means. In this case, X's declaration of intention is defective because he would not have declared it if X knew that Y deceived him. Therefore, X can rescind the contract. In these cases, the declarer shall be protected. .

However, if only the declared person shall be protected, the safety of transaction of the other party or the third party who acted in good faith without negligence shall be diminished. Therefore, the Civil Code provides some protection for the other party or the third party under certain conditions.

<Defective declaration of intention>

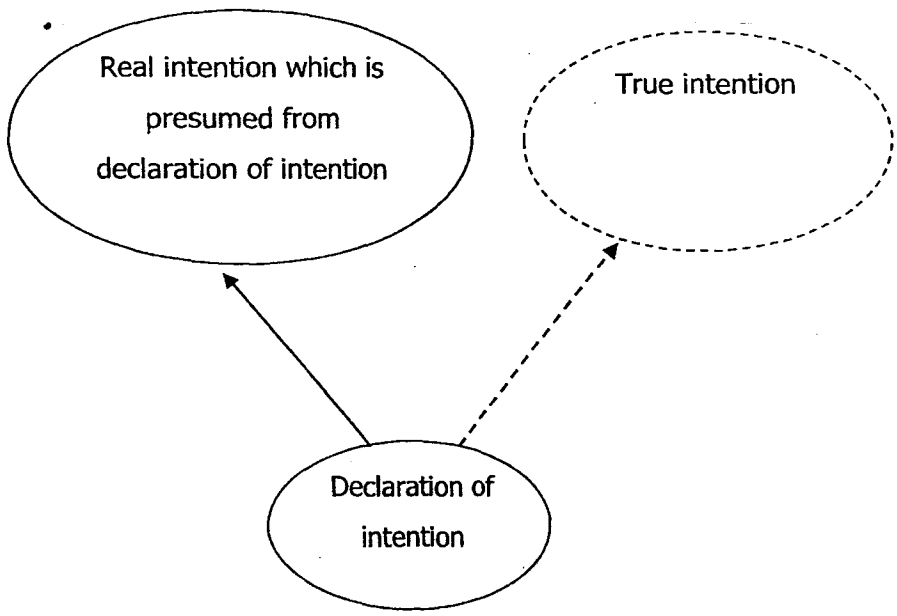


(2)Necessity to protect the other party in the case of mental reservation and fictitious declaration of intention

It is difficult to recognize what the real intention of the declarer was from the other person. If Y prepared to sell his land because he believed X's declaration, "please sell your land to me", but X rescinded the contract due to a mistake without reserve, Y might suffer from unexpected damages. Therefore, the

possibility of awareness of the other party is required to restrict an execution of the right to rescission (Article 346).

Then, how about cases where there is no real intention which corresponds to a declaration of intention?



In such a case, the person declaring intention was aware that the declaration of intention is not his or her true intention. A mental reservation and fictitious declaration of intention are categorized as this case. In these cases, it is not necessary to protect the declarer because he knew that his actual declaration of intention differs. On the other hand, where the other party has realized and agreed about it with the person declaring the intention, it is not necessarily to protect the other party because he or she has realized that it is not a true declaration of intention.

1. Mental Reservation

1.1. Intention

Mental reservation is the cases where the declarer is aware that his actual declaration of intention differs from his true intention (Article 352). This means that the person declaring intention clearly knows that it does not reflect the true intention of the declarant, but he or she decides to declare it.

1.2. Effect of Mental Reservation

In principle, if a contract is formed by a declaration of intention made by a party who knows that it does not reflect the true intention of the declarant, the

contract shall not be void. Because it is impossible for the other party to recognize whether the declarer declared his intention based on true intention or not. Therefore, it is not necessarily to protect the person declaring the intention who has mental reservation.

For example, X told Y "please sell your land to me" despite the fact that he has no intention to buy Y's land. In this case, if Y accepts X's offer, the contract shall be established effectively and X shall assume the obligation to pay the purchase price.

However, if the other party is also aware that such declaration of intention does not reflect the true intention of the declarer, the declarer may reject his or her performance (Proviso of Article 352). In this case, the contract was established effectively, and the fact that the other party was aware that X's declaration of intention didn't reflect the true intention shall be a defense. Therefore, the declarer who wants to reject the performance needs to prove the other party's bad faith.

2. Fictitious Declaration of Intention

2.1. Intention

A fictitious declaration of intention denotes a declaration of untrue intention which is made in collusion with the other party (Article 353).

In the case of a mental reservation, only the declarer declares an untrue intention. On the other hand, in the case of a fictitious declaration of intention, not only the declarer but also the other party knew the fact that their declaration of intention is not true. Article 353, which addresses fictitious declarations of intention, provides that a contract formed by fictitious declaration of intention made in collusion with the other party shall be void.

> Example 1
>
> X who owed 1,000 dollars from A has land as his only property. X was intending to escape from the compulsory execution by A, and he colluded with Y to create the appearance that X sold his land to Y. They have created a notarial document, and X has registered to transfer his land to Y.

In this case, Y knew X's true intention that X would not transfer the ownership to Y. Therefore, the sale between X and Y is a fictitious declaration of intention,

thus the contract shall be void. Therefore, A can carry out the compulsory execution over the land.

2.2. Requirements

Requirements of a fictitious declaration of intention are;

1) The declarer has declared his or her intention which does not reflect his or her true intention; this means that the declarer clearly knew that the actual declaration of intention was not the true declaration of his or her own intention.

2) The declarer and the other party have colluded with each other to create a view which is contrary to the facts; this means that both parties have consented to create the appearance that is not true.

As mentioned, the contract which was made by a fictitious declaration of intention shall be void because there is no necessity to protect the other party. In other words, the ownership is deemed to have not been transferred in above case. Therefore, X can assert nullity of the contract and he can demand a return of the land based on his ownership.

2.3. Relations with A Third Party

> Example 2
>
> In the case of Example 1, Y sold the land to Z and transferred the registration while taking advantage of holding the registration.

In principle, nullity of the contract may not be asserted against the third party who acted in good faith without gross negligence (Former part of Paragraph 2 of Article 353).

The meaning of "void" in the case of fictitious declaration of intention is different from "void" in Article 354 or 357. "Void" in Article 354 or 357 means it is not appropriate to acknowledge the effect of the contract because such a contract violates a mandatory provision of law, the public order and good customs, etc. There is no room to make them effective in such cases because to make such a contract effective in itself is against the Civil Code. In this context, "void" in Article 354 or 357 is called "absolute void".

On the other hand, in the case of fictitious declaration of intention, the contract itself is not against the law, but there is no necessity to acknowledge the effect of such a contract because the party knew that their declarations of intention don't

reflect their true intention. However, it is necessary to protect a third party who believed the appearance which was made by the fictitious declaration of intention. Therefore, the declarer cannot assert the nullity of the contract against a third party who acted in good faith without gross negligence.

In Example 2, Y sold the land to Z and transferred the registration while taking advantage of holding the registration, so Z cannot obtain the ownership because the contract between X and Y is void in theory.

However, X made a false appearance which showed that Y had the ownership of the land and X designed it. On the other hand, Z trusted that Y was an owner because Y held the registration.

In this case, if Z acted in good faith without gross negligence, X cannot assert the nullity of the contract between X and Y. Consequently, Z can obtain the ownership of the land.

On the contrary, if Z acted in bad faith or in good faith with gross negligence, it is not necessary to protect such a third party. Therefore, in this case, X can assert the nullity of the contract between X and Y against Z. So, "void" in Article 353 can be called as "relative void".

The background theory of Paragraph 2 of Article 353 is that a person who made up a false appearance must assume the obligation based on such a false appearance. This liability is derived from the Doctrine of Estoppel.

Sometimes, Paragraph 2 of Article 353 is applied theoretically in cases where a registration doesn't correspond to a relation of rights.

For example, X sold his land and transferred the registration to Y. After that, X rescinded the contract based on a mistake and Y didn't raise an objection about it. However, X didn't demand return of the registration for a long time. Then, Y sold the land to Z who believed that Y was an owner because of the registration. In this case, there are some possible ways of thinking to protect Z, and one of them is an idea that Z shall be protected by the analogical application or Paragraph 2 of Article 353.

Section 5 Agency

1. Intention of Agency

What is the system of Agency?

1.1. Definition

According to Article 364, an agency is defined that 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.

For example, where an agent Y performed a legal act (entering into a sale contract) as an agent of X with the other party Z by stating that he is acting on behalf of X within the scope of the agency authorization conferred by X himself, the effect of the contract is imputed directly to the principal X.

1.2. Advantages of Agency System

In the fundamental rule of the modern civil code, a person shall assume an obligation based on his intention alone. In other words, the effect of the other person's declaration of intention shall not be attributed the person. However, it has become very difficult for a person to conduct economic activity when the scope of the economic activity has been expanded. Therefore, it is necessary to extend the scope of a private person.

For example, if X has to conclude contracts in both Phnom Penh and Siem Reap, he has to give up one of these contracts. To meet this kind of problem, an agency system was thought out.

Via the conferring an agency authorization on Y, X may extend both its own business and time without the execution by himself. Simultaneously, he also uses the expertise and the techniques of Y.

On the other hand, in the case of a limited capacity person who can't make definitively effective declaration of intention independently, a person who manages the property of the limited capacity person is required. Therefore, for the protection of a limited capacity person to carry out certain act, a guardian shall be appointed for minor, a person under the general guardian, and a person under the curatorship.

For example, if X is a person under general guardianship, he may not transact with the other person because he doesn't understand legal consequences of his

act. Therefore, the court shall appoint a guardian who acts on behalf of X (Article 1105).

1.3. Types of Agencies

There are two types of agencies:

a) Agency by will is a kind of agency that the principal appoints an agent and confers an agency authorization within a specific scope (authorization via a contract)

b) Agency by law is a kind of authorization that is created by law (authorization by law)

Comparison in case of juristic person: in the case of a juristic person, it cannot act because a juristic person is an entity. Therefore, for a juristic person, a person who actually deals transactions is required. A person who actually deals transactions is called a director (Article 58). The relationship between the juristic person and its director is similar to the relationship between the principal and the agent. The director of the juristic person is appointed by the articles of incorporation or the general meeting of the members. Therefore, the director in this sense, it is similar to the agency by will. But although the scope of agency authorization may be determined by the contract, it must comply with the law where there is no specific agreement. In this meaning, the director of juristic person is the agency by law.

2. Requirements of Agency Creation

There are three requirements to create the agency as the following:

(1) Agent is conferred the agency authorization by the principal

In the Civil Code, there is a provision of the principle of private autonomy, which means that only the individual himself may be able to perform in his business. But, in order to extend the performance of business, the law has permitted the agency authorization.

In order to create agency, the main issues is the act of the agent which must be performed based on the agency authorization that is conferred by the principal.

Agency authorization is the basis that the effect of legal performance of an agent Y falls into X, the principal.

For example, X had authorized Y on behalf of him to purchase a car.

(2) Agent enters a contract within the scope of agency authorization

This means that the agent must exercise the agency authorization to the extent of the subject matter stated in the contract only.

A contract conferring agency authorization between X and Y is mostly created through mandate in fact. However, not only mandate that can create the agency authorization, but also other contracts can also create an agency such as the contract of employment or contract for work.

For example, X is the owner of a supermarket, having appointed a staff Y from one among all branches and conferred him the authorization to buy the soaps 100 cases. In this case, Y is deemed to be conferred the agency authorization in purchasing the soaps within 100 cases.

(3) Agent created a contract by declaring that he acts on behalf of the principal

For an agency, an agent is required to declare that he performs the legal act (the act on behalf) for the principal. It is called the principle of declaration to perform on behalf of a person who he represents. In this case, in order for other party to know who is the party of transaction. This relates the execution of the contract to put trust on that person.

2.1. Agency Authorization

2.1.1. Occurrence of The Agency Authorization

An agency authorization can be created by contract between the principal and the agent or by law (Article 365).

Where the agency authorization arises from the contract between the principal and the agent, it is called the agency in fact.

For example, Y is conferred the agency authorization based on the will of principal of X, this means that it is based on the contract between Y and X.

Where the agent is appointed by law and the scope of agency authorization is also determined by law, it is called the agency by law.

For example, an agent Y was authorized by law, for instance, a guardian for a person under general guardianship, it is an agency by law.

Also, a proxy is a document only to prove the existence of the agency authorization, so it is not required to confer the agency authorization.

2.1.2. Scope of Agency Authorization

(1) Confirmation of the scope of agency authorization

For the scope of an agency authorization which is established by the contract, the scope of agency authorization is normally determined within the contract, as

well. Where an agency authorization is established by law, the scope of the agency authorization is established by the provisions of such law.

> Example
>
> X conferred an agency authorization to buy a car to Y. However, Y entered into a contract to buy land with Z.

In this case, X gave an agency authorization to Y but Y executed a contract outside the scope of the agency authorization. So, Y's act shall be an agency without authorization and the effect of the contract isn't attributed to X in general. It shall be a matter of an agency by estoppel (Article 372).

An agent refers to a person who enters into a contract for the principal and he needs to be conferred to declare his intention in a certain scope. For example, X ordered Y to buy a car for X. If Y has discretion in negotiation of the price, type of the car, etc. Y can be considered an agent. On the other hand, if X already decided to buy a certain car from Z at the price of 10,000 dollars and Y doesn't have any discretion in buying a car, Y can't be considered an agent. In this case, Y is called "a messenger".

(2) In case where scope of agency authorization is not clear

Where there is no provision regarding the scope of the agency authorization, the scope of agency authorization is determined based on the interpretation of the act of granting the agency authorization first. Secondly, if the scope is still not clear based on the interpretation of the act of granting the agency authorization, an agent is entitled to conduct "acts of preservation or improvement that would not alter the nature of the things or rights". (Paragraph 2 of Article 366)

An act of preservation means an act to maintain the status of the property.

For example, a father X stated to his son Y "take care of my property", it can be considered that X gave an agency authorization to Y but its scope is not clear. If the scope of the agency authorization is not clear based on the interpretation of the act of granting the agency authorization, Y can conduct only acts of preservation or improvement that would not alter the nature of the things or rights. And if the window of X's house has been broken so Y ordered a repair shop B to repair the window, the effect of the contract for work between Y and B shall be attributed to X. therefore, X must pay the remuneration to B.

Also, an act of "improvement" means the act of increasing the value of the things or rights.

For example, in above case, in the case where X has an agricultural land and Y applied fertilizer to the land, Y's act can be considered to increase the value of the land. However, if Y changed the land into housing land, it shall be considered to be an act that altered the nature of the land. Therefore, even if the value of the land was increased by changing it, the act of Y in this case shall be an agency without authorization according to Proviso, Paragraph 2 of Article 366.

(3) Limitation on agency authorization - conflict of interest

According to Paragraph 1 of Article 367, an agent is not entitled to conduct acts with respect to which the interests of the principal conflict with the interests of the agent, even where such acts are otherwise within the scope of the agency authorization. This means that although the agent has been authorized to be agent, the agent will become the agent without authorization if the act is in conflict with the principal. However, this shall not apply where the principal consents thereto.

In other words, even if the act of agent is in the scope of agency authorization, it is limited in cases where the interest conflicts between the principal and the agent.

There are two types of conflict of interest:

a) Self-contract: The business transaction between principal and agent

b) Two-way agency

In principle, the agent must protect the interest of the principal; therefore, if the agent represents a third party who has the conflicting interest with the principal, one party may seriously lose the interest.

Example

1) X granted an agency authorization Y to purchase a car. Y has a car too; so he wants to sell his car.

2) X granted an agency authorization Y to purchase a car. Z also granted an agency authorization Y to sell his car too. Y has intention to sell Z's car to X as an agent of both parties.

Case 1) It is called "the self-contract".

According to Paragraph 2 of Article 367, dealings between the agent and the principal are presumed to involve conflicting interest between the principal and the agent. Also, Paragraph 1 of Article 367 provides that an agent is not entitled to conduct acts with respect to which the interest of the principal conflict with the interest of the agent.

Why does the Civil Code prohibit the creation of self-contract?

Usually, a principal X has intention to buy a car as low of a price as possible. Also, Y has an intention to sell his car as high of a price as possible. However, in this case, it's seen that where Y is the agent, and also the seller, Y can fix the price of the car by himself and it shall conflict with the principal's interest.

Case 2) It is called "two-way agency"

Paragraph 3 of Article 367 stipulates that where an agent represents both a principal and a third party, the dealing between the agent and the principal are presumed to involve conflicting interests between the principal and the agent and an agent is not entitled to conduct such an act.

Why does the Civil Code prohibit two way agency?

The reason why a two-way agency is prohibited is that the two-way agent might enter into a contract which is favorable for one of the parties.

Exception: although the law prohibits the agency for the above cases, there is still exceptional case if the principal gives the consent on the act of the agent. In the case of two-way agency, both principal's consents are required. Also, even if the principal(s) didn't consent beforehand, the principal(s) can ratify the performed act because in cases of self-contract or two-way agency, it shall be an agency without an agency authorization. Therefore, "consent" in Paragraph 1 of Article 367 means an acceptance before the act by the agent.

(4) Abuse of an agency authorization

Example
X has authorized the agency to Y to buy a car. Then Y entered into a contract with Z; but, at the time of conclusion of the contract, Y had the intention to embezzle the purchase price for himself.

In general, the effect of the contract shall be attributed to X because the principal who selected a person such as Y to be his agent has to be responsible for such risk.

Then, how about in a case where Z was aware of Y's real intention?

In general, there is no necessity to protect a person such Z.

There are some possible ways to think to be excluded such Z from the protection.

First way of thinking is an idea that the provision of mental reservation (Article 352) shall apply analogically. This idea presumes that the principal and the agent combine into one entity and Y declared his intention which is against X's real intention. Therefore, if Z was aware Y's real intention, the effect of Y's act shall not be attributed to X

Second idea is that prohibition of the abuse of rights or the principle of good faith (Article 4 and 5) shall apply in this case. This idea insists that if Z was aware of Y's real intention or wasn't aware due to gross negligence, Z cannot assert the attribution of the effect of Y's act because it is against the principle of good faith or prohibition of the abuse of rights.

2.2. Extinction of Agency Authorization

Grounds for extinction of agency authorization based on Article 368 are:

- the death, bankruptcy or dissolution of the principal;
- the death or bankruptcy of the agent, or a restriction on the agent's capacity to act; or
- the termination of the trust, employment or other legal relationship that gave rise to the agency authorization.
- An agency created by law is extinguished for reasons specified by law.

Although the limitation on the capacity is the ground for extinction of the agency authorization, Article 375 provides that a principal can confer an agency authorization on a person who has a limited capacity to engage in the legal acts. In the case of a restriction on the agent's capacity to act, the foundation of reliability of the principal is lost when the agent has had his capacity to act limited because the principal granted the agency authorization based on the fact that the agent has a full capacity. On the other hand, in the case of Article 375, the principal is aware that the agent has a limited capacity when he grants an agency authorization. So he must bear the risk of appointing such an agent.

On the other hand, the reasons behind the extinction of agency authorization in an agency created by law are stipulated by the law. For example, if the declaration of the commencement of general guardianship is revoked (Article 27), naturally, the agency authorization of the general guardianship is also extinguished.

3. Act of Agency

3.1. Disclosing An Intention to Act on Behalf of A Principal

Example
X has conferred Y an agency authorization to buy a car and Y has entered into the contract with Z. Y has intention to carry out the act for X but he didn't declare his intention to Z.

According to Article 364, to make the effects of the agency to be imputed directly to the principal, an agent must disclose his intention of acting on behalf of the principal.

The reason why the agent must disclose his intention to act on behalf of the principal is that, for example, if X's agent Y declared "please sell your car" to Z without disclosing an intention to act on behalf of X, and Z accepted this offer, the contract shall be established between Y and Z. To avoid this situation, an agent must indicate he is acting on behalf of the principal such as "Y, agent of X" or "X's agent Y".

In the case where an agent does not declare his intention that acts on behalf of a principal, the other party can treat the contract as executed between such a party and the agent (Paragraph 1 of Article 373).

On the other hand, in the case where the other party was aware of agent's intention to act on behalf of the principal, he knew who the counter party of the contract was. So, Proviso, Paragraph 1 of Article 373 provides that if the other party knew the real intention of the agent at the time of the conclusion of the contract, the other party can treat the contract as executed only between such party and the principal.

Therefore, in the above case, if Z wasn't aware of Y's intention that he was acting on behalf of the principal, Z can demand payment of the purchase price against Y. However, if Z knew the intention of Y, Z can assert the establishment of the sale contract only between X.

Then, how about the case where Z didn't know Y's intention to act on behalf of X at the time of conclusion of the contract, but he became aware that Y acted on behalf of X afterwards? In this case, Z could choose either X or Y as the counter party (Paragraph 2 of Article 373).

3.2. Defective Act of Agency

An act of agency is an act where a representative "enters into a contract with another party by stating that he is acting on behalf of a principal". The representative acts on behalf of the principal in all aspects, from conducting negotiations regarding the contract with the other party, agreeing on the contents of the contract, to signing the contract, etc. Then, who can assert the nullity of the contract in the case where the agent declared a defective declaration of intention?

Example

1) X has conferred Y an agency authorization to buy a ruby. But Y misunderstood that a ruby and a garnet are the same stone. After that, Y bought a garnet from Z.

2) X has conferred Y an agency authorization to buy a car. Y entered into contract with Z. But Z defrauded the car from A before making the contract.

Case 1): Can X rescind the contract based on the mistake of Y?

- What is the intention of Paragraph 1 of Article 374?

According to Paragraph 1 of Article 374, where the validity of a contract made

1) by the person who makes declaration of intention may be affected on the grounds of mistake, fraud, or duress

Or

2) the knowledge

Or

3) negligent ignorance of any fact by mistake, the existence or inexistence of that face

shall be determined with respect to the agent.

In the above case, X wanted to purchase a ruby, but Y misunderstood that a ruby and a garnet are the same stone. Therefore, based on Paragraph 1 of Article 374, X may rescind the contract based on the mistake.

Case 2): Can X assert his ownership against A over the car?

- What is the intention of Paragraph 2 of Article 374?

Based on Paragraph 2 of Article 374, where the principal has authorized the agent to execute a particular contract, the principal cannot assert the agent's ignorance of facts if they were known to the principal.

With respect to case 2), there are two sale contracts. First is the contract made between A and Z having Y as the third party; and second, it is the contract between Y and Z; thus, according to Paragraph 3 of Article 347, the rescission of the contract on the ground of fraud may be asserted against a third party other than the other party. However, if the third party has acted in good faith and without negligence, the rescission of the contract may not be asserted against the third party. In this regard, if Y acts in good faith, A may not assert the recession against Y.

Then, how about in the case where X knew that Z defrauded the car from A and he took advantage of Y's innocence to be protected by Paragraph 3 of Article 347? It should not be allowed. Therefore, Paragraph 2 of Article 374 provides that if the principal has authorized the agent to execute a particular contract, the principal cannot assert the agent's ignorance of facts if they were known to the principal or the principal was ignorant due to the principal's negligence. In respect of case (2) if X has known that Z defrauded the car from A, X may not assert his ownership against A even if Y acted in good faith without negligence.

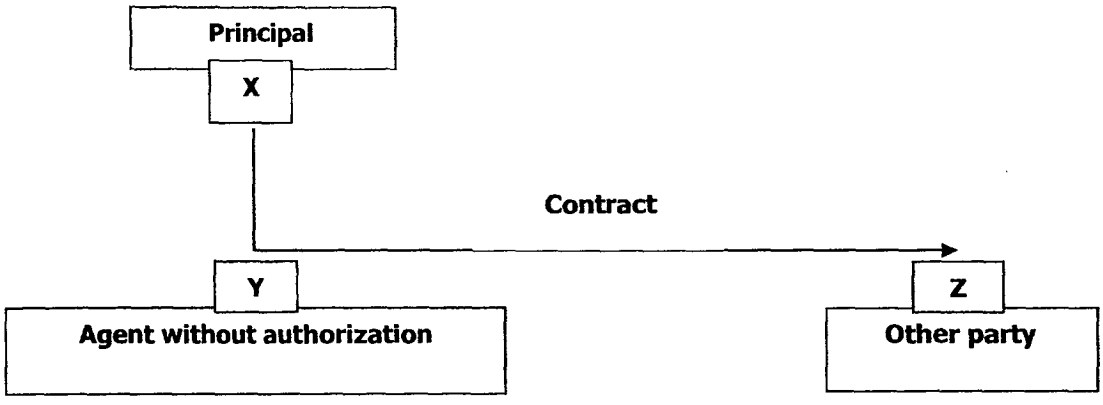
3.3. Capacity of Agent

In general, a principal can confer an agency authorization to a person who can represent him or her to enter into a contract with the other party. Also, the principal can confer an agency authorization to a person who has a limited capacity. The question comes up is that can the principal rescind the act of a person who has a limited capacity conducted on behalf of the principal?

If the principal has already conferred an agency authorization to a person who has a limited capacity and has known that he or she is a limited capacity person. In other words, the principal still conferred the agency authorization to that person as his agent with the knowledge of it. In such a case, the principal cannot rescind the contract between his or her agent who is a limited capacity person and the other party, and the principal shall not assert that the agent has a limited capacity (Article 357).

On the contrary, if a principal conferred an agency authorization to a person who has a limited capacity without knowledge, it can be considered that the principal made a defective declaration of intention. Therefore, if the principal fulfilled the requirements of mistake, fraud, etc.., he principal can rescind the contract which provides an agency authorization.

4. Agency Without Authorization



4.1. Intention

Where a person conducts an act likely as agent with the other party without being granted an agency authorization by the principal, it is called agency without authorization (Paragraph 1 of Article 369).

There are two types of agency without authorization:

- Agency without authorization

  In the case where a person conducts an act as agent without any authorization

- Agency by acting outside the scope of agency authorization

  In the case where a person who was granted an agency authorization but conducts an act outside of the scope of the agency authorization

4.2. Effects of Agency Without Authorization

Example
Y entered into a contract with Z to buy Z's car at 10,000 dollars as X's agent. However, Y is not granted the agency authorization by X.

4.2.1. Relationship between Principal and Agent Without Authorization

In general, an agent without agency authorization acted on behalf of the putative principal shall not be attributable to the putative principal; nonetheless, the principal can ratify the act of the agent without agency authorization (Paragraph

1 of Art. 369). In the case where the principal has ratified the act of the agent without agency authorization, the act shall take effects retroactively from the time it is conducted (Paragraph 2 of Art. 370,). However, if ratification is not exercised against the other party, the principal may not assert the effects on ratification against the other party (Paragraph 1 of Art 370).

4.2.2. Relationship between Principal and Other Party

The principal is able to ratify any act of an agent without agency authorization, and that ratification is a unilateral legal act in which an effect occurs by the principal's declaration of intention one-sidedly.

The ratification must be exercised against the other party (Paragraph 1 of Article 370). For example, even X stated that he has ratified the act of Y in the above case, the ratification doesn't come into effect, so X must tell Z that he has ratified the act of Y. Because if the principal does not tell Z, it seems not stable for Z who is the waiting party for ratification. Therefore, the other party (Z) may demand that the putative principal indicate whether the putative principal ratifies the act or not. Within a reasonable period of time, if the principal does not respond within the established period of time, ratification shall be deemed to have been rejected (Paragraph 3 of Article 370).

In above case Z can demand that X indicate whether X ratifies Y's act within an established reasonable period of time. If X ratifies Y's act within the period of time, the act by Y becomes valid retroactively from the conclusion of the contract and X shall assume the obligation to pay the purchase price. If X indicated that he would not ratify Y's act or X didn't reply within the period, the effect of Y's act shall not be attributed to X and Y shall assume the responsibility of agent without agency authorization (Article 371).

Also, the other party can rescind the contract executed without agency authorization until it is ratified by the principal (Paragraph 4 of Article 370). Therefore, if X has already ratified Y's act, Z cannot rescind the contract anymore. If Z has rescinded the contract already, X may not ratify after the rescission.

It is not clear whether the Civil Code allows the principal to refuse the ratification positively before the demand of indication. It can be considered that the principal can refuse the ratification of the act of the agent without an agency authorization. Because the purpose of the ratification is that to settle the relationship between the principal and the other party as early as possible, so there is no necessity to deny the principal's refusal before the demand of indication by the other party. Therefore, X may refuse to ratify before party Z demands, and X does not necessarily wait for the demand from Z.

4.2.3. Relationship between Other Party and Agent Without Agency Authorization

If an agent without agency authorization acted as an agent but he cannot establish the existence of an agency authorization or obtain a ratification from the putative principal, the agent without agency authorization shall be liable for either performing or paying damages to the other party (Former part of Article 371). In above case, if Y cannot prove the existence of his agency authorization or obtain the ratification from X, Z may demand payment of the purchase price or damages against Y. If the content of the contract which was executed by Y is the transfer of specific property, Z can demand only damages because Y cannot implement the obligation to transfer the specific property in general

Exceptional rule:

Even though other party may demand the agent without agency authorization for paying damages or performing, the agent without agency authorization has means to exempt from paying damages or performing.

(1) When the other party Z has known in advance that the agent without agency authorization Y does not have agency authorization, but he or she intentionally enters into a contract; hence, the other party Z shall not be protected in such a case. Therefore, the agent without agency authorization shall be exempted from the liability (Proviso of Article 371). It means that Y may be exempted from performing or paying damages.

(2) In the case where the agent without agency authorization acted without negligence in regard to the absence of the agency authorization, and the other party didn't know about the lack of the agency authorization with negligence, the person shall be exempted from the liability (Proviso of Article 371).

Example:

1) X, the principal, has granted the agency authorization to Y.

2) X, the principal, had died suddenly at a few minutes before midnight on October 20, 2011 in the distance (there was no correspondence procedure).

3) Y has concluded the contract with Z following morning, October 21, 2011.

In such a case, Y has been granted the agency authorization and this agency authorization has been extinguished due to the principal's death based on Item (a), Paragraph 1 of Article 368. Therefore, the act (3) shall be an agency without agency authorization and Y shall be responsible for agency without authorization. However, if Z was not aware of the lack of Y's agency authorization with negligence, Y shall be exempted from this liability.

5. Agency by Estoppel

5.1. Intention

An agency by estoppel is a type of agency without authorization. According to Article 372, there are three types of agency by estoppel as following:

1) An act exceeding the scope of the agency authorization by agency by estoppels

2) Agency by estoppel after the termination of agency authorization

3) Agency by estoppel due to manifestation of grant of agency authorization

As mentioned, an agency by estoppel is one kind of agency without an agency authorization. Therefore, its effect shall not be attributed to the principal in general. The putative principal can ratify the act of an agent by estoppel. However, in the case of an agency by estoppel, the principal is responsible for making unreal appearance that the putative agent has the agency authorization. On the other hand, there is a necessity to protect the other party who believed the unreal appearance.

Therefore, Article 372 provides how to achieve a balance between the putative principal and the other party.

Example

(1) X conferred Y an agency authorization to purchase a car. But Y entered into a contract to buy land from Z.

(2) X conferred Y an agency authorization to purchase a car but X has terminated the contract which granted the agency authorization already. After the termination, Y entered into the sale contract of car with Z as X's agent.

(3) Y has begun to negotiate with Z to buy the car as X's agent. In fact, X has never authorized Y as his agent. Afterwards, Z inquired X whether Y was the agent of him or not. X replied that he has authorized Y as the agent.

5.2. Act Outside The Scope of Agency Authorization by Agency by Estoppels

Paragraph 1 of Article 372 intends to protect the other party in the case where the agent had carried out the act which exceeded the scope of agency authorization.

Basically, the principal must bear the risk of the appointment of the agent who executes a contract outside the scope of the agency authorization.

However, it is necessary to protect the third party who believed that the agent acted within the scope of agency authorization.

To protect the other party, it's necessary to respect the conditions below:

1) The other party believes that is the agent with the agency authorization of the principal

AND

2) The other party acts in good faith without negligence and

5.3. Agency by Estoppel After The Termination of Agency

According to Paragraph 2 of Article 372, the principal shall be responsible for performing the contract based on the doctrine of estoppel even if the former agent enters into a contract after the extinction of an agency authorization. However, Proviso of Paragraph 2 intends to protect the other party in the case of agency by estoppel after termination of agency authorization.

To protect the other party, it's necessary to respect the conditions below:

- the other party didn't know the extinction of the agency authorization without negligence

5.4. Agency by Estoppel Due to Manifestation of Grant of Agency Authorization

According to Paragraph 3 of Article 372 provides that if a putative principal gives the impression that an agency authorization has been conferred on another, or allows another person to give the impression that he has received an agency authorization despite the absence of an agency authorization, the putative principal is obligated to the other party to make performance under the contract. The reason why the putative principal shall be responsible for the agency by estoppel due to manifestation of grant of agency authorization is that the putative principal has a responsibility for making a false appearance which shows that another person had an agency authorization. Therefore, in general, X shall be responsible for performing in case 3). However, if the other party knew the fact or wasn't aware of it due to negligence, there is no necessity to protect such an another party.

To protect the other party, it's necessary to respect the conditions below:

- The other party didn't know that Y didn't have an agency authorization without negligence

6. Sub-agency

6.1. Intention

In principle, a person authorized as an agent pursuant to a contract with a principal may not be permitted to appoint a sub-agent (Article 376, the first sentence). The reason is that an agent has to make a declaration of intention by himself because an agency is a system which is established based on trust between the principal and the agent.

However, the agent may appoint the sub-agent based on Article 376 proviso in cases where:

1) The principal consents

Or

2) Circumstances exist that make such sub-agency unavoidable

The meaning of "circumstances exist that make such sub-agency unavoidable" is that, for example, the agent was suddenly take ill but there was no time to inform the principal of it because it was the previous day of the contract. In this case, the agent may appoint a sub-agent. If the agent had enough time, the principal could appoint another person as an agent or wait for the recovery of the agent, so the agent may not appoint the sub-agent. Therefore, the meaning of "circumstances exist that make sub-agency unavoidable" is limited to an emergency.

6.2. Effect of Sub-agent

6.2.1. Status of Sub-agent

A sub-agent must be on the behalf of the principal for the act that is conducted within the scope of agency authorization. In other words, a sub-agent is not a representative of the agent, but a representative of the principal. Therefore, an act that is conducted by a sub-agent within the sub-agent's authority and is accompanied by the sub-agent's express statement that the act is conducted on behalf of the principal is binding on the principal. For example, a principal X cannot refuse to perform his obligation even if he didn't know the agent Y appointed a sub-agent Z and Z entered into a contract with the other party as the sub-agent of X in the case where there were circumstances that exist to make sub-agency unavoidable.

Also, a sub-agent has the same rights and obligations as an agent with respect to the principal. Therefore, if the sub-agent executes a contract outside of the scope of the agency authorization, he must be responsible as agency without agency authorization.

6.2.2. Relations between an Agent and Sub-agent

The scope of the responsibilities of the agent and sub-agent with respect to the principal:

1) Where an agent appoints a sub-agent based on the Article 376 proviso, the agent is responsible to the principal in connection with the appointment and supervision of the sub-agent (Paragraph 1 of Article 377)

2) Where an agent appoints a sub-agent on the instructions of the principal, the agent is not responsible for the conduct of the sub-agent unless the agent knew that the sub-agent was unfit or untrustworthy and the agent failed to either notify the principal of such fact or remove the sub-agent.

For example, if the agent Y appointed Z as a sub-agent but Z was not a credible person and Z lost the money which was paid from the other party as the purchase price, Y has to compensate for the money to X. However, in the case where X instructed Y to appoint Z as a sub-agent, the responsibility shall be diminished. In this case, Y shall be responsible only if Y knew that Z was unfit or untrustworthy and Y failed to either notify X of such fact or remove Z from a sub-agent.

Section 6 Remedies for Breach of Contract

Seb-Section1 General Rule

1. Introduction

When the obligor and obligee has created the contract and the obligor fails to perform the obligation arising from the contract, the Civil Code has regulated the provision to provide remedies for the obligee as follows;

1) Specific performance

2) Damages

3) Termination of contract

A specific performance aims to implement the performance directly. On the other hand, demanding damages or termination of the contract intimidates the obligor to perform his obligation and induces the obligor to implement the performance indirectly. A termination of the contract shall be dealt with the contract law, so we deal with a specific performance and demanding damages here.

2. Types of Non-performance

The obligor who fails to perform the obligation arises from other various grounds in which the grounds are determined their types as below (Article 389):

1) Delayed performance

2) Impossibility of performance

3) Incomplete performance

4) Other cases which performance is not carried out in accordance with the intended purpose

2.1. Delayed Performance

Article 391 provides what cases shall fall into category a delayed performance.

A delayed performance is one among the four of the said types and refers to that both parties has specified a time certain to perform, but if the obligor has elapsed the time without attention to his own performance, it shall be deemed delayed performance. There are three types of delayed performance.

(1) If any specified due date is assigned to the performance of an obligation, the obligor shall be responsible for the delay on and after the time of the arrival such a time limit.

The meaning of "specified due date" is a time when the actual due time that is fixed.

For example, in the case where both parties have reached the agreement that the obligation will be performed on 25th June 2011, it shall be a specified due date. If the obligor doesn't perform his obligation before 26th June 2011 has come, he shall be responsible for the delayed performance.

(2) If any unspecified due date is assigned to the performance of a obligation, the obligor shall be responsible for the delay on and after the time when he becomes aware of the arrival of such a time limit.

"Unspecified due date" denotes that although it is sure to com, the time when it will be realized is not fixed.

For example, in the case where the parties stipulate that "the next time it rains in Phnom Penh, the borrower shall return the book which he borrowed", the borrower has to perform his obligation when he becomes aware that it has rained in Phnom Penh.

(3) If no time limit is assigned to the performance of an obligation, the obligor shall be responsible for the delay on and after the time he receives the request for performance.

There is a special provision for a loan for consumption (Paragraph 2 of Article 594) which stipulates that if the parties have not stipulated the date of return, the lender may give notice of demand of return within a reasonable period of time designated by him. Other than loan for consumption, the obligor shall be in delay at the same time as the request by the obligee.

2.2. Impossibility of performance

When it is physically, economically or socially impossible to perform the obligation, the performance is deemed impossible.

For example, X sold an antique pot to Y. Nevertheless, before delivering the antique pot to Y, the obligor, X destroyed the antique pot because of his negligence. In this case, X is impossible to perform the obligation physically. Also, in the case where the antique pot was stolen by somebody, it might be possible to perform the obligation because the subject matter may be returned, but, in common sense, it shall be impossible to perform.

If it is fixed that the performance of an obligation will be impossible due to the obligor's fault before the due date, it shall be deemed to be an "impossibility of performance". Therefore, in this case, the obligee may demand damages even if the due date hasn't come yet.

2.3. Incomplete Performance

Incomplete performance means that an obligor has performed the obligation but the act of performance was inappropriate, imperfect presentation in an unreasonable manner (Article 393).

When the performance is not carried out at all, this shall constitute a delayed performance or an impossibility of performance, not incomplete performance.

On the other hand, if the subject matter of the sale contract has defect, it shall be an incomplete performance. However, in the case of sale contract, the Civil Code provides special provisions regarding warranty liability. Therefore, the seller shall assume liabilities based on these special provisions.

For example, in the case where if the buyer ordered the computer shop to deliver 100 computers but the shop delivered only 90 computers at the due date, it shall be a partially delayed performance. In the same case, if the shop cannot get the same type of computers from the market anymore, it shall be a partial impossibility of performance.

3. Multiple Remedies

Where the obligor hasn't performed the obligation, the obligee may select three mentioned remedies (as described in Part 1 above). However, even though there are three types of remedies, the obligee may not simultaneously select those three remedies if they are in mutual conflict (Article 395).

For example, if Y did not perform his obligation despite X's demand:

- X can terminate the contract and/or demand damages
- X can seek the specific performance and/or demand damages

However,

- X cannot seek the specific performance and termination at the same time.

Sub-Section 2 Specific Performance

1. Intention

Specific performance means compulsorily forcing the obligor to perform his obligation through court procedure. In this case, the Code of Civil Procedure shall apply.

However, if the nature of the obligation is not suitable for specific performance, the obligee cannot seek the order.

2. Types of Specific Performance

Where an obligor does not perform voluntarily an obligation, the obligee may seek an order of compulsory execution from the court; and the proceedings of specific performance consist of three types such as direct enforcement, substituted execution, and indirect enforcement.

2.1. Direct Enforcement

Party who wins the case by judgment may bring the final judgment to demand the obligor for performance. This is the method to realize the object of performance directly by the execution organ, which is suitable for the execution of the obligation such as payment of money and delivery of the thing. As this execution method doesn't compulsorily require the debtor to actively cooperate, it is not necessary to exert pressure on the debtor's body or free will.

2.2. Substituted Execution

When the court's decision becomes final judgment, the obligee may realize his claim which shall be done by himself or a third party on behalf of the obligor and to collect expenses thereof in money from the obligor (Article 527 of Code of Civil Procedure). This method is suitable to execute obligations which are not suitable for the execution organ to directly carry out, but has the nature, that even if the obligor himself does not realize the object of performance, realizing the same effect is enough for the obligee, for example, a substitutable obligation to act.

2.3. Indirect Execution

This is the method to psychologically exert pressure on the obligor to force performance of its obligation (Article 528 of Code of Civil Procedure). As to the measures thereof, a way of ordering payment of compensation for damages, sanction by the national government, imposing penalties, or placing in prison, etc., is taken. As compulsory execution forced on the obligor's body and free will is rather stronger than the direct enforcement. This method is used for the

execution of obligations having the nature that only the obligor's action can realize the object, for example, a non-substitutable obligation to act or an obligation of inaction.

However, as the substitutable obligation to act can be executed by the indirect execution, the Code of Civil Procedure admits the indirect execution as the execution method for the substitutable obligation of nonfeasance.

2.4. Mutual Relationship among The Three Proceedings of Compulsory Execution

According to the ideal of the economy of legal action, the kind of obligation and the order in which the above three methods are to be used should rely completely on the respect of individuality, in which minimal pressure and compulsion should be applied to the obligor. Also, more direct and effective means, if any, should be chosen, and circuitous methods should not be approved even if done selectively.

Taking account of the ideal of economy of legal action, the following interpretations are usually precedents and prevailing opinion.

a) Only direct enforcement is executed for obligations which permit direct compulsion.

b) Substituted execution and indirect execution are exercised where it is sufficient and the direct enforcement is impossible.

c) Where the obligation do not permit indirect compulsion, compulsory realization is abandoned and only compensation for damages is chosen.

Sub-Section 3 Damages

1. Intention

Damage is the resulting harm arising from the non-performance of the contract. If the obligor doesn't perform his obligation, the obligee can demand damages for any resulting harm (Paragraph 1 of Article 398).

2. Requirement

2.1. General requirement

Paragraph 1 of Article 398-1 provides general requirements to demand for damages:

1) An obligation is not performed.

2) The non-performance is due to the obligor's fault.

What shall correspond to "non-performance" is stipulated in Article 389.

If the obligor proves that the non-performance was not the fault of the obligor, the obligor is not liable for damages. It means that the obligor assumes a burden of proof that he didn't commit any fault.

2.2. In The Case where The Obligor Uses Another Person As An Assistant

2.2.1. General Principle

From the aspect of the principle of individual liability, the obligor doesn't need to compensate for damages which are caused by another person's act.

However, the Civil Code provides that if the obligor uses an assistant to act in lieu of him or carry out performance of the obligation and the assistant fails to perform the obligation, the obligor has to compensate damages (Paragraph 2 of Article 398). The reason is that the obligor obtains benefit from using an assistant. Also, in general, the assistant is under the supervision of the obligor.

2.2.2. Exception

If the obligor proves that

1) he has not negligence in the selection and supervision of the assistant

AND

2) The assistant has no negligence,

he may be discharged from the liability.

Case Study

Shall X compensate damages to Z in the following cases?

1. X who owns a liquor-shop ordered an employee Y to deliver 10 bottles of beer to the customer Z's house. Z bought these beers the day before. Y lost his balance riding a bike and fell on the way of delivery, and broke all the bottles of beer.

2 X is an owner of a furniture shop. Z bought a sofa and asked X to deliver it to Z's house. Then X asked a transportation company Y to deliver of the sofa. But Y dropped the sofa from a truck and broke it on the way of delivery.

(Conclusion and Grounds)

1. Yes.

Y is an assistant of X used to perform X's obligation.

2. Yes/No

If you consider that an assistant shall be a person who the obligor can supervise, Y is not an "assistant" of X in this case because Y is independent from X and X cannot order or supervise Y. Therefore, X doesn't need compensate for damages to Z.

On the other hand, if you consider that an assistant does not necessarily mean a person who can be supervised by the obligor, X has to compensate damages to Z otherwise X proves he had no negligence in the selection of and supervision over Y.

3. Scope of Damages

3.1. Concept of Damages

Article 400 provides two types of the concept of damages; the benefit of performance and the other expenditures regarding the contract.

3.1.1. The Loss of Benefit of Performance

The remedies of non-performance aim to recover the condition if the obligation had been performed. In other words, the standard of the scope of damages is what benefit would have been received under the contract up to "this" time if the contract was implemented. This is the basic idea of the scope of benefit of performance in Paragraph 1 of Article 400.

However, sometimes the scope of the benefit of performance shall be extended to infinity. Therefore, Article 401 stipulates the limitation of the scope of damages.

For example, X has purchased the grocery store from Y and Y delayed to transfer his store to X for a month, so that X may demand for damages for one month income that the X would have received as the benefit.

3.1.2. Other Expenditures Relating to The Contract

If the obligor failed to perform his obligation, it might cause not only loss of the benefit, but also other additional expenditures or burden resulting from the non-performance.

For example, X sold the motor to Y and both parties have agreed that Y came to take the motor at X's home. But when the due date had arrived, Y didn't go to take the motor which caused X to pay for the rental fee for the place where motor was parked.

In this case, the rental fee shall be an additional expenditure.

3.1.3. Mental Harm

The obligee can demand payment of damages for mental harm by the court's order (Paragraph 2 of Article 400).

The mental harm is so wide meaning and it's not clearly specified because such damages cannot be presumed or precisely determined, but the general idea, it shall be decided with taking into consideration of concrete situation, degree or kind of the mental harm by judge.

In Japanese practice, it is considered that if the loss of property is recovered with compensation, also mental harm can be recovered. Therefore, the court rarely acknowledges the compensation for mental harm other than compensation for loss of the property in the case of loss of property.

3.2. Intention of Article 401

Article 401 provides the scope of damages. There are two types of damages to be compensated for; normal damage and special damage.

As mentioned, the scope of loss of the benefit of performance may be extended to infinity. Therefore, article 401 limits the scope of damages to be compensated for.

3.2.1. Normal Damage

A "normal damage" refers to damages which occurred normally due to non-performance. For example, if the seller destroyed the specific property which was the subject matter of the contract, the value of the specific property shall be a normal damage. In general, in the case of a delayed performance, the normal damage shall be a utility value during the delay. Also, in a case of an impossibility performance, an exchange value shall be the normal damage. In the case of incomplete performance, the normal damage shall be a utility value if a completion of performance is possible, and an exchange value if the completion is impossible.

3.2.2. Special Damage

Item (b) of Article 401 provides that special damages suffered by the obligee due to special circumstances shall be compensated for if the occurrence of such special damages could have been anticipated by the parties. For example, in a case where Y bought a car from X for 1,000 dollars but X didn't deliver at the due date. Also, Y has made a sales contract with Z for this car priced at 1,500 dollars. Then, Z terminated the contract with Y due to delayed performance of Y. In this case, the special damages shall be 500 dollars which would be resale profit. In

the case of a special damage, the obligee must prove that the occurrence of such special damages could have been anticipated by the parties at the time of the conclusion of the contract.

(1) Parties who have to anticipate

Item (b) of Article 401 stipulates clearly that "the parties" shall anticipate that the special damage would occur. The reason is that only if the both parties could anticipate the occurrence of the special damages at the time of the conclusion of the contract, they can decide whether they shall enter the contract, or how to stipulate the condition of the contract. Therefore, if only one party anticipates the occurrence of the damage, it cannot be considered the "special damage".

(2) The object of anticipation

The object of anticipation is an occurrence of the special damage, but not the special circumstance. In the above case, the special damage is a resale profit of 500 dollars, and the special circumstance is the fact that Y had made a resale contract with another person. In this case, if X knew the fact that Y had already entered into a sales contract with Z for 1500 dollars, he shall compensate 500 dollars as the special damage. On the other hand, if X knew the fact that Y had already entered a sale contract with Z but X didn't know the price, the damage which X shall compensate is the amount of difference between 1000 dollars and the market price of the car.

(3) The time of anticipation

The parties need to anticipate the occurrence of the special damage at the time of the conclusion of the contract. However, sometimes the contract takes a long time from the conclusion to the performance, so the circumstance may be changed in such a duration. Therefore, in the case where of the obligor anticipated the occurrence of the special damage after the contract but he dared not take a measure to stop it and the damage was expanded, it is possible to interpret that the other party could demand such damage according to Item (c) of Article 401.

(4) Exception

Article 401(b) proviso stipulates that if the parties did not take the possible occurrence of the special damages into consideration when the contract was concluded, the obligor doesn't need to compensate for the special damage. For example, X ordered a transporter Y to deliver a precious and fragile glassworks. X packed the glassworks by himself and told Y that the contents of his parcel had precious and fragile glassworks but Y didn't need to treat it with special care

and X didn't pay an extra fee for special treatment. In this case, both parties anticipated that a large amount of damage would arise if Y breaks these glassworks. However, both X and Y didn't consider the damage and there was no intention of including such damages in liabilities. Therefore, even if Y breaks the glassworks, he doesn't need compensate for such a large amount of damage.

3.2.3. In The Case of Non-performance Based on Malicious Intent or Particular Bad Faith Conduct

Among non-performance, there may be cases where the obligor does not perform an obligation for the purpose of imposing harm to the obligee. Such non-performance based on malicious intent or particular bad faith conduct should be repressed. Therefore, the Civil Code stipulates that if the damage has arisen due to the result of the obligor's malicious intent or particular bad faith conduct, the obligee can demand damage even it is not considered as a normal damage or a special damage by the court. Also, in this case, the court can order that the obligor pay to the obligee as damages the profit or benefit obtained by the obligor even if any damage has arisen. For example, X, an owner of a chicken farm, sold some chickens to Y who also owns a chicken farm. But chickens which X sold had an infection and X knew that fact before delivery but he didn't tell it to Y. Then, all of Y's chickens became infected and died. This kind of damage is considered malicious intent and should be compensated for, regardless of whether such damage was anticipated. Malicious intent is not necessarily involved in a "particular bad faith conduct," but the purport of a "particular bad faith conduct" is to include parties who can be regarded in the same manner as parties with malicious intent when determining the scope of damages.

Case Study

In the following cases, does the damage which Y suffered from corresponded to a normal damage or a special damage? If it is a special damage, to acknowledge such damage which is compensated for, what fact did the parties need to anticipate?

(1) Y, a taxi driver ordered a repairer X to repair his taxi by 10th July 2011. However, the repair was in delay for 3 days due to X's fault, so Y couldn't work for 3 days. X's average business income is $25 per day and it is an average wage for a taxi driver.

(2) Y bought a land with house from X to reside in. The delivery of the land and house was delayed for one year due to X's fault. Then, Y had to rent a house for

$500, but the room was too luxury and not proper for Y's family.

(3) In the case of (2), Y had to pay 20 dollars for extra transportation fee every month because the house which Y rented was far from his office. If he had resided in a house which X sold to him, Y would not have needed to pay the extra fee of 20 dollars.

(4) In the case of (2), the house which Y rented burned down due to a fire from the next house and Y lost 5,000 dollars worth of household belongings.

(5) Y is an owner of a flour mill. Y's mill has stopped because one of the components of the mill was broken. Y needed to get a new component because he had no spare. Y intended to send a sample of the component to the factory which makes such components, so that the factory can make a new component for Y. Then, Y asked a transporter X to deliver the sample of the component to the factory. However, the delivery of the sample was in delay due to X's fault and Y had to shut down his flour mill for 5 days. Y's business income is 500 dollars per day.

(Conclusion and grounds)

(1) It is a normal damage.

(2) The rent of the substitute house itself is considered a normal damage. However, in this case, the price of the rent is unreasonably high. Therefore, the court can reduce the amount of the compensation.

(3) It can be said that the extra transportation fee is a normal damage.

(4) The loss of household belongings shall be considered a special damage because it cannot be said that the loss has arisen from normal situation. Therefore, the parties need to anticipate that the special damages would arise at the time of the conclusion of the contract. In this case, "special damage" which shall be anticipated is a loss of household belongings by the fire from the next house.

(5) This case is based on a famous leading case in England (Hadley v. Baxendale, 1854). The loss of a business income of Y shall be considered a special damage. The shutdown of Y's flour mill shouldn't necessarily have happened even if X was in delay to deliver because Y might have had a spare component. Therefore, to acknowledge the special damage in this case, the parties need to anticipate the fact that Y had to shut down the flour mill if X is in delay to deliver the sample. Also, if the business income of Y is much higher than the average, to place all

amount of damages on X, X needs to anticipate that Y's business income is 500 dollars per day.

3.3. Special Rules for Monetary Obligations

According to Article 399, in a case of monetary obligation, the obligor is not exempted from payment of interest for delay even if the obligor proves that he had no fault. In a case of monetary obligation, the damage shall correspond to the interest for a delay in general. On the other hand, there is no room to consider the impossibility of monetary obligation because money has high substitutability. Therefore, the obligor shall assume obligation to pay interest for delay even if it caused due to force majeure (Paragraph 1 of Article 399).

However, sometimes the delay of payment causes damages other than interest. For example, X lent 1,000 dollars to Y and Y didn't return it at the due date. X had to pay a purchase price of his car from the money which he rent to Y, but he couldn't pay the purchase price and the sales contract was terminated. In this case, Y has to compensate for damages other than interest for delay if he fails to prove that he was not at fault for the non-performance (Paragraph 2 of Article 399).

4. Grounds for Reduction of Damages

Even if the scope of damages that should be compensated for based on the criteria in Article 401, and if the grounds for reduction of damages prescribed in Article 402 exist, the court can reduce the amount of compensation for damages.

There are two types of grounds for reduction.

The first is a case where the obligee's negligence or fault contributed to the non-performance of the obligation (Paragraph 1 of Article 402). The contribution of the obligee's negligence to "the occurrence of non-performance" refers to cases where, for example, a buyer tells the seller the wrong address and the seller delivers the subject matter to a different person. Due to the contribution of the obligee's negligence, non-performance itself may be denied. In addition, if there was also carelessness on the obligor's part, it cannot be denied that there was non-performance, but it is possible to reduce the amount of compensation for damages proportionately, upon evaluating the extent of the contribution.

Secondary, regarding to the occurrence of non-performance and damages, even in cases where there are no issues of the obligor being liable, there may be cases where the expansion of damages could have been prevented if the obligee acted appropriately. For example, in a case where a doctor operated on a patient but his recovery was delayed due to the doctor's error in medical treatment.

However, the patient did not follow the doctor's orders to rest after the operation, which resulted in the patient's recovery being more delayed. In this case, the patient can demand damages from the doctor but the amount of compensation shall be reduced.

5. Compensation in Money

5.1. General Rule

According to Article 404, a compensation for damages for non-performance shall be made by the obligor in money. This is because using money to compensate is the easiest way, and is fair for both of the contracting parties as well. How to decide the price of the damages is the serious problem.

5.2. A Base Point of Time for The Calculation of Damage

A price of the subject matter of the contract is fluctuant sometimes. And how to calculate the damages is problematic in the case of a fluctuation of the price.

> Example
>
> Y bought a used car from X at the price of 1,000 dollars as a market price and paid the purchase price. However, X destroyed the car due to X's fault before delivery. The price of the same model car rose up to 1,500 dollars at the time of the impossibility of the performance and after that, the price became 1,700 dollars. Then, Y filed a suit demanding damages. Now the market price is 1,200 dollars.

(1) Basic idea

The parties decide the price of the subject matter in accordance with the price at the time of making the contract. However, sometimes the price is changed after that, in most cases, the price might be raised. In a case where it takes a long time from the conclusion of the contract to performance, the parties can contemplate the fluctuation of the price. Therefore, in this case, a normal fluctuation shall be in a range of a normal damage.

On the other hand, a steep rise can happen due to a change in social conditions. It can be said that such a fluctuation of prices can happens under "special circumstances" and it shall refer to a "special damage". Therefore, if the parties could have anticipated the sharp climb of the price at the time of the conclusion of the contract, the obligor has to compensate all amounts as a special damage.

(2) Base point of time

Then, what time shall be the base point of the time for the calculation of damages? There are some possible ways of thinking. The most standard way is that the base point of the time for the calculation shall be the time of non-performance because the obligee shall obtain the right for demanding damages at the time of non-performance.

The next problem is whether a 500 dollars increase in price is a normal increase or not. If it can be said that the increase was normal, X has to compensate the entire amount of 1,500 dollars. On the other hand, if a 500 dollars increase can be considered to exceed beyond ordinary expectation, it shall be a special damage, and only if X and Y could have been anticipated at the time of the conclusion of the contract, X shall assume an obligation to compensate for all damages. However, if it was impossible to anticipate, X needs to pay the amount of ordinary increase.

6. Liquidated Damages, etc.

6.1. Meaning and Functions

The obligor and obligee can separately and in advance establish conditions for the payment of damages and an amount to be paid (Paragraph 1 of Article 403).

Sometimes, acknowledgement of the scope of damages or calculating the amount of damages is found to be difficult. From the perspective of the obligee, there is the risk that the obligee will not be able to obtain sufficient damages, whereas from the perspective of the obligor, there is the risk that the obligor will have to assume unanticipated damages. Consequently, the contracting parties can agree on the amount of damages in advance in the event that non-performance occurs. This is referred to as liquidated damages. If liquidated damages are established, even if the matter is taken to the court, the amount of damages that the court should order the obligor to pay will, in principle, be based on the agreed amount, and it is not possible to change this amount.

6.2. Requirements

If liquidated damages are agreed upon in the contract, it is necessary for non-performance to have occurred to demand damages. The obligee doesn't need to prove the negligence of the obligor.

If liquidated damages are specified, can the obligor refute that there was no negligence and be exempt from liability? This point is not made clear in Article 403. It should be considered that this issue is decided based on the purpose of the special agreement that specifies liquidated damages. It would be possible to

demand the liquidated damages regardless of the negligence if the purport is to prevent disputes about with or without negligence of the obligor, and to enable for the amount of liquidated damages to be demanded. Such agreements are often made when the obligee has stronger standing. However, unless the purpose of the special agreement is merely to increase the amount of liability of the obligor, the obligor, going back to the principle of liability of non-performance, does not have the necessity to pay the amount of liquidated damages if the obligor proves non-negligence. If the contents that were agreed upon are not clear, it should be considered that the obligor is exempt from liability if non-negligence is proved, in accordance with the principle of non-performance.

On the other hand, in a case where the obligee is in a vulnerable position, he is in danger of a making disadvantageous agreement of liquidated damages that would be one-sidedly. Therefore, the Civil Code provides that a special agreement exempting the obligor from liability for non-performance, that is intentional or the result of a gross negligence, is void to give some protection to the obligee (Paragraph 2 of Article 403).

6.3. Effects of Liquidated Damages

If liquidated damages are established, the court cannot, in principle, reduce the amount of liquidated damages (Paragraph 3 of Article 403). This is because even if damages are not concretely proved, the agreement made by the parties that would enable for compensation of the decided amount to be demanded is respected. However, if the amount of liquidated damages is grossly higher or smaller than the actual calculated damages, it is not justifiable or fair for the court to order that the liquidated damages be paid and thus, the court can increase or decrease the amount of liquidated damages (Proviso of Paragraph 3 of Article 403). It is not specified in the Code to what extent this amount can be increased or decreased. When considering that the liquidated damages amount can be increased or decreased only in cases where it is grossly high or low, it is appropriate to regard that this amount can be increased or decreased not to the extent of actual damages, but to a reasonable amount while taking the actual damages into consideration.

6.4. Penalty for Breach of Contract and The Liquidated Damages

According to paragraph 5 of Article 403, a penalty for breach of contract shall be presumed to constitute liquidated damages. A penalty for breach of contract means that in the case where one of the parties committed a breach of the contract; he must pay consideration other than damages, based on the agreement. Therefore, the party who committed the breach of the contract shall

assume responsibility for non-performance even if he pays the penalty for breach of contract.

For example, if a damage of 500 dollars arises due to the obligor's non-performance, and there is a contractual term such that "if the contract is breached, the party who breached the contract must pay a penalty for breach of contract of 100 dollars", if this is regarded as a term that specifies a pure penalty for breach of contract, then the obligor must pay 100 dollars as the penalty for breach of contract in addition to the 500 dollars for damages. If this contractual term regarded liquidated damages, the obligor would have to pay 100 dollars.

It is hard to prove the exact amount of damages in some cases. However, where there is an agreement about the damages in advance, the obligee can avoid this difficulty. On the other hand, for the obligor, if there is an agreement about the reasonable damage in advance, the obligor is able to prepare for the compensation and he doesn't need to worry about how much the court impose the payment for damages on him.

Besides "amount to be paid for damages", parties can create a special agreement regarding conditions of liability for damages.

Paragraph 3 or Article 403 stipulates that the court may not increase or reduce the agreed-upon amount of liquidated damages if the parties agree on the amount of damages. Since the purpose of this provision is to avoid unnecessary dispute on scope of damages, the court is not allowed to change the scope of damages in the case where the case is filed to the court.

7. Subrogation by Compensation

According to Article 405, the obligor shall be automatically subrogated to the position of the obligee if the obligee has received as damages compensation for the value of the property or rights to the subject matter of the obligation. A subrogation by compensation aims to provide equality to parties' benefits between the parties who paid damages and the party who received the compensation.

For example, X deposited his antique pot to Y but Y broke a pot with negligence. In this case, Y shall be liable to compensate damages: Where the X receives the amount of damages equal to the value of the antique pot, Y shall obtain the ownership of the broken pot. Y can repair the pot and become its owner.

Also, in the same case, the pot which was deposited was stolen by Z because Y didn't lock his safe. In this case, Y has to assume liability for non-performance. After compensation for damage to X, Y shall obtain the right to demand return of

the antique pot based on infringement of ownership against Z because Y subrogated X's ownership.

8. Extinctive Prescription

According to Article 406, the period of extinctive prescription applicable to the right to demand compensation for damages based on non-performance is five years from the time when the damages occurred.

Where an obligation is not performed, the obligee may demand some remedies such as specific performance, damages, and termination of the contract. For each remedy, extinctive prescription period shall be taken to consider.

The extinctive prescription of the right to demand damages follows the general principle of extinctive prescription (Article 480), and the extinctive prescription perod is five yars starting from the time that the right can be exercised.

Therefore, in the case of the right to demand damages due to non-performance, the extinctive prescription period shall start when damages occur, not when non-performance occured. For example, X sold a car to Y but the car had defect with its engine. For first 1 month, there was no trouble with the car, but after 1 month has past, it stopped working. In this case, the non-performance occured at the time of delivery. However, the damage hasn't occured at that time. Therefore, Y couldn't demand damages at the time of delivery. On the other hand, when the engine stopped and Y realized it, he can exercise his right to demand damges, so the extinctive prescripition starts from 1 month after of the delivery.

Sub-Section 4 Termination of Contract

1. Occurrence of Right of Termination

Termination of contract denotes a unilateral legal act which relieves both parties of their duties under the contract except for the duty to pay damages (Paragraph 1 of Article411). Termination of contract makes an effect one-sidedly and no need to make an agreement with the other party because it is a unilateral legal act (Article 312).

There are some occurrences of right of termination.

1.1. Right of Statutory Termination

Right of statutory termination is established by Article 407 through 413. For example, in the case where X didn't deliver the subject matter within

reasonable period after the due date in spite of Y's demand, Y can assert the termination of the contract. In this case, Y's termination shall be exercised based on Item (a) or Article 408.

1.2. Right of Agreed-upon Termination

Right of agreed-upon termination is a right of termination by which one or both parties can terminate the contract based on the contract itself (Paragraph 1 of Article 414). For example, if parties made an agreement, in the contract beforehand, that "the buyer can terminate this contract after the delivery of the subject matter one-sidedly at anytime within 1 week", the buyer can terminate the contract under such condition based on the contract itself.

The effect or method of exercise of right of termination coincides with right of statutory termination unless the parties agree otherwise (Paragraph 1 of Article 414).

1.3. Right of Termination Based on Special Provisions

Some of provisions in particular types of contracts stipulate peculiar right of termination in each contract. Article 647 on mandate and 663 on contract for work are examples. We'll deal with such termination in session for particular types of contracts.

2. Similar Systems to Termination

There are some systems similar to termination but not termination itself.

2.1. Termination by Agreement

Termination by agreement denotes a termination based on a new agreement of the parties in case where the party didn't stipulate about termination in their contract (Paragraph 2 of Article 414). For example, a buyer Y demanded termination of the sale contract in advance because of difficulty of fund-raising and X accepted it. In this case, a new agreement to terminate the contract is considered to have been established. In this case, on the contrary to statutory termination, Y cannot terminate the contract by one-sided declaration of intention. A new agreement, that is to say, a new contract different from the original one, is required to terminate the contract. In addition, termination by agreement, which terminates the original contract by new agreement, differs from agreed-upon termination which is exercised based on agreed condition of termination beforehand in the original contract.

2.2. Rescission of Contract

In the case where a contract is rescinded, the contract deemed void from the beginning (Paragraph 2 of Article 358).

Rescission of contract and termination of contract have something common;

i) They relieve both parties of duties under the contract and

ii) They shall make an effect one-sidedly because both of them are unilateral legal acts.

However, right of termination arises on the grounds of material breach of the other party after the contract was made normally. While on the other hand, as to rescission of contract, reason (fraud, duress, etc.) is required to exist at the time of a conclusion of the contract.

3. Requirements of Termination

Based on Article 407 of the Civil Code, the requirements of termination for non-performance are as follows:

(a) In a bilateral contract

(b) One of the parties committed a material breach of the contract

It is not required that non-performance shall be arisen by fault (Article 408, Paragraph 2). Article 408, Paragraph 1 provides that material breach of the contract shall be deemed to occur if it falls into any items among the following four items. As a result, when one fact which is provided is recognized, it is impossible to turn it over any more. On the other hand, although the fact is not the item which is provisioned in Paragraph 1 of Article 408, it is still possible to acknowledge other fact as a material breach of the contract because items Paragraph1 of Article 408 are just only examples.

3.1. Termination for Delayed Performance

According to Item(a), Paragraph1 of Article 408, whereby after a failure to perform at the specified time, the other party demands that the non-performing party perform the obligation by establishing a period of performance of reasonable length, and the obligation is not performed within such period, the party can terminate the contract immediately.

For example, X entered into a contract to sell a car to Y, and X transferred his car to Y. Nonetheless, Y has not paid X the purchase price at the due date. In this case, if X demands that Y shall pay the purchase price with establishing a period of performance of reasonable length, and Y doesn't pay the purchase price within the period, X can terminate the contract.

The three requirements are as follows:

(1) The obligor does not perform the obligation at the specified time

(2) The obligee demands the non-performing party perform the obligation by establishing a period of performance of reasonable length

(3) Obligor does not perform the obligation within an establishing period of performance of reasonable length

(1) The obligor does not perform the obligation at the specified time

Likewise the above example, Y has not paid the purchase price at the specified time.

Regarding this requirement, it is necessary that the performance itself is possible to exercise. If the obligor doesn't perform his obligation because of impossibility of the obligation, it is a matter of Item (c), Paragraph 1 of Article 408.

(2) The obligee demands the non-performing party perform the obligation by establishing a period of performance of reasonable length

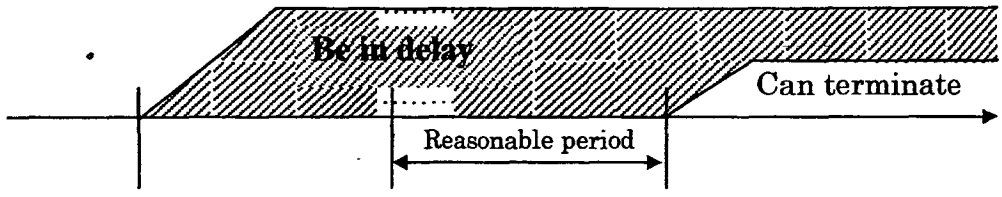
In the above case, if Y has not paid the purchase price at the due date, X shall demand Y shall pay the purchase price by establishing a period of performance of reasonable length.

(3) Obligor does not perform the obligation within an establishing period of performance of reasonable length

When Y has not paid at the due date, X shall demand that Y perform his obligation within an establishing period of performance of reasonable length. In the case where Y does not perform the obligation in an establishing period of performance of reasonable length which is demanded, X can terminate the contract.

As to requirement (2), it is a matter how to solve a problem related to delayed performance. If there is a justifiable reason for the delay, the obligor is not in delay. For example, X sold his car to Y and they set the due date. At the due date, X didn't deliver his car because Y didn't tender his performance. In this case, both X and Y are not delay even they didn't deliver his car because of the defense of simultaneous performance (Article 386). Therefore, X has to tender his performance to make Y in delay if X wants to terminate the contract. Then, shall X tender his performance to make Y be in

delay? And shall X demand perform the obligation by establishing a period of performance of reasonable length at different times?



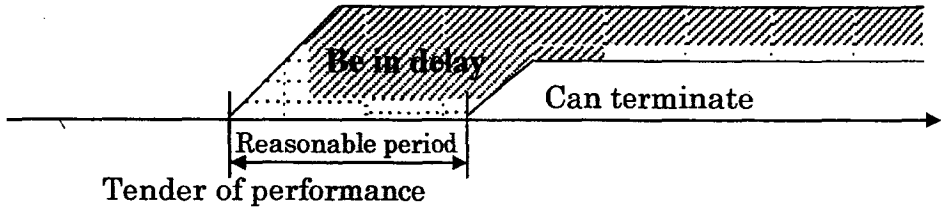
Tender of performance Demand of performance

*Is X required to both of the tender of performance and demand performance separately?

For interpretation, we may think that the obligee may terminate the contract, only after a tender of performance to make the obligor in delayed and then demand to perform the obligation.

On the other hand, we may think that the obligee may demand to perform the obligation in the same time of tender of performance because this article is provisioned that "obligation is not performed in that period", but not "in case where obligor is in delayed."

Based on this idea, the obligee (X) doesn't need to demand performance after the reasonable period from the tender of performance because "by establishing a period of performance of reasonable length" is to give the obligor a last chance whether he perform his obligation or not.

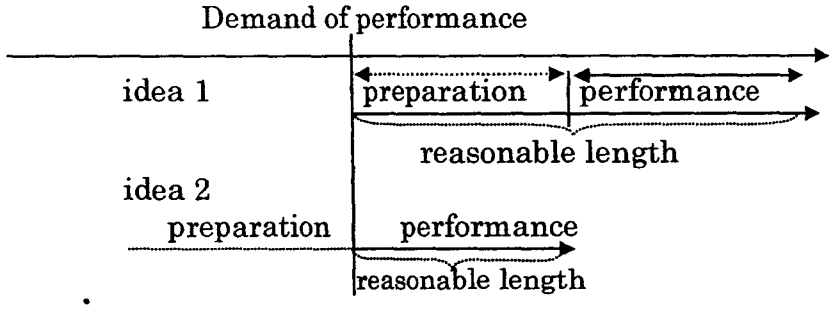


Tender of performance
And
Demand of performance

* X can tender of his performance and demand of the performance against X at once.

Then, how long shall "reasonable period" be? There are some possible ways of thinking. One of them is the idea that reasonable length means a period which is required for preparation and performance after X's demand. Another idea is that

only required period to perform is enough on the premise that Y has been finished his preparation.



Based on idea 2, it is unnecessary to protect the obligor who doesn't respect the contract so that he hasn't even prepared his obligation. For example, X entered into a contract to sell 10 televisions as unspecific property but X didn't deliver them at the due date. Then Y demanded to perform X's obligation. In this case, "reasonable length" shall be decided on the premise that X has finished separation of the subject matter from other things and preparation for the delivery.

3.2. Termination for Delayed Performance When Time is of the Essence

In the case where the purpose of the contract has not achieved if the obligation is not performed by an establishing period, it is considered as "material breach of contract" if the debtor does not perform the obligation in an establishing period (Article 408, Paragraph 1, Item (b))

In this point, there are 2 types of contract.

First type is the contract that its purpose cannot be achieved by its nature if the performance is not performed within a specified period.

For example, X ordered a tailor Y to make a wedding dress for a wedding party on 7th November 2010. However, when 7th November came, the tailor has not finished the job. In this case, X can terminate the contract because Y commits material breach of contract. It is clear that the purpose of this obligation cannot be achieved if performance is not made at the due date from the nature of contents of the contract.

Another type is the contract that should be performed within the specified time along the will of the parties.

For example, X ordered cases of beer for his dinner party but a liquor trader Y could not deliver them at the day of the party. In this case, X needs to tell that he

needs cases of beer at the certain day to assert it shall fall into Y's material breach of the contract because it is not clear that the purpose of this obligation cannot be achieved if the performance is not made at the due date.

And if X told that he needs cases of beer at the day of the party, even if Y performs his obligation afterward, it has no any benefit for the obligee. Therefore, the obligee can terminate the contract after specified period.

3.3. Termination for Impossibility of Performance

Item (c), Paragraph1 of Article 408 stipulates that where it is impossible to carry out the essential act of performance, the other party can terminate the contract.

The essential act of performance is an act that parties cannot achieve the purpose of the contract if it is not performed.

The essential act of performance shall be decided based on nature or contents of the contract and will of the parties.

For example, X entered into a contract to sell a car with Y. X is a seller, and Y is a buyer. After concluding the contract, Y has paid money to X; however, the engine of the car has been broken because of the flood before delivery.

In such a case, even if the car is in original shape, the obligation becomes impossible because Y cannot drive this car anymore. Therefore, Y can terminate the sale contract immediately because X cannot deliver the car which is the essential act of performance of the contract to Y.

On the contrary, in the case where there is a subordinate obligation other than the main obligation, the obligee cannot terminate the contract based on non-performance even if the obligor doesn't perform the subordinate obligation.

For example, X entered into a contract to sell his land to Y and they agreed that X shall pay the registration fee. After the conclusion of the contract, Y paid the registration fee instead of X but X doesn't pay the registration fee to Y.

In this case, to pay the registration fee is a subordinate obligation so it is possible to consider that Y cannot terminate the contract on the ground of non-performance.

3.4. Termination for The Destruction of Trust between The Parties

Item (d), Paragraph 1 of Article 408 stipulates that where the magnitude of the breach is so substantial that trust between the parties is destroyed and further performance cannot be expected, the other party can terminate the contract.

However, this type of termination of contract is not stated clearly. The relationships of trust in contracts vary from over-counter-sale of which

relationship of trust is not very important to continual sale or contract for work which is based on strong relationship.

For example, X sells raw materials of products to Y continuously and Y produces products from the raw material. X makes a few day delays for supplement of the raw materials often and accordingly Y cannot produce products frequently. It shall be so difficult for Y to maintain the relationship of trust with X even if each breach of contract is not serious. Therefore, Y can terminate the contract for destruction of trust between parties.

Also, termination of such the contract happens mostly in a contract between lessee and lessor (lease contract.)

For example, for the payment of rental fee and if failing to pay rental fee 1 time or 2 times may not be considered as material breach of contract (the lessor may not terminate the contract). Nevertheless, if lessee fails to pay rental fee from 4 time to 5 times, it may be considered as material breach of contract (the lessor may terminate the contract). For practice in Japan, the failure to make a rental payment for 6 times may be considered as material breach of contract.

As to this type of termination, the right of termination doesn't arise simply from a minor breach of the contract. Whether an act corresponds to "the magnitude of the breach of contract" shall be decided by Cambodian Practice.

4. Method of Exercising the Right of Termination

Article 409 has stipulated about termination as follows:

A party having the right to terminate a contract may terminate the contract by expressing an intention to terminate to the other party.

(1) An intention may be expressed by means other than a lawsuit or by lawsuit (Paragraph 1 of Article 409).

Because it shall be overload if the party can terminate only by a lawsuit.

(2) An expression of an intention to terminate may not be revoked or withdrawn (Paragraph 2 of Article 409).

If revocation or withdrawal of intention to terminate is possible, the effect of the contract shall revive and accordingly the status of counter-party or interested party becomes unstable. However, it is possible to consider that a person who has right to terminate can revoke or withdraw his intention to terminate in the case were the notice of revocation has reached the other party at the same time or prior to the intention to terminate because termination takes effect when it reached.

In addition, the general rule of declaration of intention shall apply to intention of termination, so it is possible to rescind the intention in the case of mistake, fraud or duress etc.

(3) An expression of an intention to terminate may be subject to a condition precedent (Paragraph 3 of Article 409).

A condition denotes that the events which occur in the future and are uncertain (Paragraph 2 of Article 325). Also, a condition precedent means that the obligation or right takes effect when the condition is fulfilled (Paragraph3 of Article 325). For example, in the case where the parties agreed that "if X marries, Y will present a car to X", a condition precedent is imposed on a gift contract.

In the case of termination of a contract, for example, a buyer Y failed to pay the purchase price at the due date then seller X can expressed the intention that "I'll terminate this contract under the condition Y doesn't pay the purchase price within one week". This intention of termination imposes a condition precedent.

5. Effect of Termination

5.1. Theory of Effect of Termination

According to Article 411, the effects arising from the termination of a contract are as follows:

a) Termination of a contract relieves both parties of their contractual duties under the contract except for the duty to pay damages.

b) Parties have obligation to return the other party to their original state.

c) A party required to return money with interest or property with any benefit.

However, there is no provision which stipulates clearly why these effects occur.

There are two concepts regarding the effect of termination of a contract; the first concept recognizes that the termination of a contract has a retroactive effect (referred to as Concept A) and the other concept does not recognize the retroactive effect of the termination of a contract (referred to as Concept B).

(1) Concept recognizing the retroactive effect (Concept A)

According to this Concept, in the case where a contract was terminated, it shall be deemed no contract from the beginning. Therefore, if the party received performance before termination, he shall restore the other party to their original state based on unjust enrichment.

In the case of unjust enrichment, the obligation to return is limited to existing benefit in general (Paragraph 1 of Article 736). For example, in the case where Y

bought 10 Kilograms of rice from X for 100 dollars and paid 50 dollars. After that, at the time Y had consumed 4 Kilograms of rice, X terminated this contract because Y didn't pay another 50 dollars. The obligation which Y shall return as unjust enrichment is limited to 6 Kilograms of rice according to Paragraph 1 of Article 736. However, in the case of termination, Y shall assume an obligation to restore X to X's original state based on Paragraph 2 of Article 411. In this case, Y shall return 40 dollars for consumed rice, or it is possible to consider that Y may return 4 Kilograms of the same quality of rice because the original subject matter was unspecified property.

Therefore, according to Concept A, the scope of the obligation to return the parties to their original state has extended from "benefit to the existing benefit (paragraph 1 of Article 736 of Civil Code)" to "restore the other party's original state (Paragraph 2 of Article 411 in Civil Code)".

<Relationship with the transfer of ownership>

According to Concept A, the transfer of ownership shall be extinguished retroactively because the termination has a retroactive effect.

For example, X enters into a contract to sell a car to Y and X delivers it to Y but Y does not pay the purchase price to X at the due date in spite of X's demand and X terminated the contract. This Concept recognizes that the termination has a retroactive effect. Therefore, the buyer Y is not the owner from the beginning because of the termination. In other words, the ownership shall not "be returned" from Y to X. It means that X is deemed to have been an owner from the beginning. Therefore, X may demand that Y shall return the car based on the ownership if Y possesses the car.

(2) Concept which contradicts the retroactive effect (Concept B)

According to this Concept, the termination of contract is considered as not having a retroactive effect. So the original claim and obligation have been changed to the claim and obligation to return to the parties' original states.

According to the above example, in the case where X terminates the contract, it is not considered that Y does not have ownership since the beginning, but when X terminates the contract, Y shall return the car to X as a new obligation based on the termination.

In this concept, provision of the termination is applicable only toward the future, and to regard the obligation which has not been carried out as no longer existing

one in the future. On the other hand, performance already carried out is valid and doesn't become unjust enrichment.

Concept B criticizes concept A for the ground that there is no provision which stipulates the retroactive effect of termination. In the case of rescission of the contract, the Civil Code provides the existence of the retroactive effect clearly (Paragraph 2 of Article 358). The reason why the Civil Code recognizes retroactive effect on rescission is that there is defect of contract from the beginning. On the contrary, in the case of termination of contract, the contract was made completely valid but the reason of termination arises after that. Concept B insists that, in order to recognize retroactive effect which denies the effect of contract from the beginning, substantive enactment is absolutely necessary especially in the case of termination because it was made completely valid.

<Relationship with the transfer of ownership>

Based on Concept B, ownership is restored automatically by the termination of contract at the time of terminating the contract. For example, the ownership was transferred to buyer Y at the time of making contract and restored to seller X automatically at the time of termination as an effect of termination. Therefore, Y shall assume to return the subject matter if he received it already.

5.2. Extinction of Relationship in Contract

5.2.1. The Extinction of Duty Under the Contract

Based on Concept A, when the termination of contract occurs, all duties of the parties arising from the contract shall be extinguished retroactively, which means that the contractual parties are relieved of their duties under the contract except for the duty to pay damages based on paragraph 1 of Article 411.

Based on Concept B, when the termination of the contract occurs, all the duties of the parties arising from the contract which were already performed under the contract shall change to the obligation to return, so the party receiving the property as a result of the contract from the other party shall return that property received back. Also, the obligation which has not been performed shall be extinguished toward the future by the termination of a contract.

5.2.2. The Restoration of The Transfer of Ownership

For example, X and Y concluded a sale contract to sell X's car to Y and X delivered the car, but X terminated this contract because Y hadn't paid the purchase price instead of X's demand.

In this case, according to Concept A, it is deemed that Y had never obtained ownership and X had been an owner from the beginning. Therefore, X can demand to return ownership based on his ownership

On the other hand, based on Concept B, ownership has been transferred and the obligation to return the ownership is a new obligation. Also, the ownership was returned to X automatically at the time of termination. Therefore, X can demand to return the car against Y based on ownership.

The differences between these two Concepts have an influence on the Concept of third party protection interested.

For example, in the above case, Y has received the delivery of the car from X and sells that car to Z but X terminated the sale contract between Y.

According to Concept A, buyer X is not the owner of that car from the beginning, so the third party Z is considered as the one who bought the car from Y who is not the owner of the car, so Z cannot acquire ownership of the car. However, this conclusion diminishes the safety of transaction of Z. Therefore, Paragraph 4 of Article 411 protects only a third party who entered the contractual relationship before the termination.

On the other hand, according to Concept B, buyer Y is considered that had an ownership until termination of the contract, and when the seller X has terminated the sale contract, the ownership should be turned from third party Z to Seller X. Based on this concept, Z who appeared before the termination may obtain the ownership from Y. Therefore, Concept B insists that Paragraph 4 of Article 411 is a confirmatory provision.

Also, there is another problem that has the third party in Paragraph 4 of Article 411 been protected including both good and bad faith third party or require no negligence or not. These problems will be solved by precedent in the future. However, Paragraph 4 uses the term "legitimate interest", so it is possible to consider that only the third party who acted in a good faith without negligence shall be protected by this provision, and the third party who acted in bad faith or good faith but with negligence shall not be protected because he doesn't have legitimate interest.

5.3. Obligation to Return Original State

5.3.1. Nature of Obligation to Restore

According to Concept A, the obligation to return the property delivered under the contract after its termination is a special case of unjust enrichment. Generally, if the contract has been terminated, there is deemed never to have been any

contract from the beginning, so the scope of the obligation to return is limited to existing benefit based on Paragraph 2 of Article 736. However, Paragraph 2 of Article 411 expands the scope of obligation to restoration to the party's original state as mentioned.

According to Concept B, the obligation to return the property delivered under the contract after the termination of the contract is a new obligation based on the termination, and obligation already performed is valid because the termination of the contract affects only toward to the future.

5.3.2. Content of Obligation to Restore

After the termination of the contract, the party that has received performance shall return the performance to the other party.

Moreover, the Civil Code also states that the party having received performance shall return not only what has been received but also must return any interest or benefit derived from monetary claim or subject matter.

In this context, an obligation to restore means not only restoration to the state at the time of making contract but to the possible state. It is necessary to consider that "if the parties didn't enter the contract, what would have happened till this time?"

In the case where the price of the subject matter has differed greatly between the time of making contract and time of termination, it shall be made up by demanding compensation because the Civil Code only provides that the scope of restoration shall be limited within to return the subject matter with benefit or money with interest.

5.3.3. Where the Party of The Contract Cannot Return Back The Property

The rights of termination shall be extinguished in the case where the party having the right of termination:

a) Lost, destroyed or rendered incapable of being return the subject matter of a contract due to intentional act

b) changed into a thing of a different type due to processing or reworking.

In other words, in the case where the subject matter is lost, destroyed or rendered incapable of being returned without intentional act, the right of termination shall not be extinguished. In this case, the party who has the right of termination shall pay the value by money up to the actual price (Paragraph 2 of Article 412).

Case study

X sold a new car to Y and has delivered that car to Y already. Y paid the purchase price of 20,000 dollars to X. After, it turned out that the car was not a new car and its price should have been only 15,000 dollars. Y demands that X shall deliver a new car but X did not deliver a new car within the reasonable period of performance. Then Y terminated this sale contract based on Article 408 paragraph 1 Item (a). After that, before performing the obligation to return, Y destroyed the car due to his negligence.

What Y can demand against X?

(Conclusion and Grounds)

Y can terminate the car sales contract even Y destroyed the car because he destroyed it not on purpose (Contrary application of Paragraph 1 of Article 412).

Based on the termination of the contract, X has to return the 20,000 dollars received with interest. Also, Y has to return the subject matter and benefit but returning the car is impossible. However, Y has to return 15,000 dollars to X based on Paragraph 2 of Article 412. Usually in such a case, X can extinguish his obligation to the extent that their respective amounts are equal by making a declaration of intention of set-off (Paragraph 1 of Article 464).

In conclusion, in this case, Y can demand to pay 5,000 dollars and interest against X.

5.4. Obligation to Pay Damages

Paragraph 1 of Article 411 stipulates that termination of a contract relieves both parties of their duties under the contract except for the duty to pay damages. In other words, the party that committed the material breach of contract shall be responsible for paying damages. It means that the party who committed the material breach of contract shall pay damages even though the contract has been terminated and obligation in the contract shall be extinguished.

Then, what is the scope of the duty to pay damages?

There are two kinds of interests to be compensated for: expectation interest (also refers benefit of performance) and reliance interest.

Expectation interest (Benefit of performance in Paragraph 1 of Article 400) refers to benefit which would have been acquired if the contract was performed as promised. For example, Y bought X's ring at the price of 1,000 dollars. Y intended to sell it to Z for 1,500 dollars and has made contract with Z. After that,

Y terminated this contract because X didn't deliver the ring in spite of Y's demand. In this case, "expectation interest" shall be 500 dollars because Y would have obtained 500 dollars as benefit if the contract has implemented normally.

On the other hand, "reliance interest" means that the expenditure by the party who believed that the contract shall not be terminated. In this case, the party who suffered damages due to termination of contract can demand compensation for damage which would not have been expended if he knew the fact that the contract would be terminated. For example, Y entered into a sale contract with X and borrowed money from bank with interest. If Y terminated this contract before payment, Y shall lose money corresponding to the interest. In this case, "reliance interest" shall be the amount of interest.

Case Study

Y has bought a classic car from X at the price of 20,000 dollars and has paid money to X already. Two months after the conclusion of the contract, Y terminated the contract because X did not deliver the car in spite of Y's demand. The price of the car has increased to 25,000 dollars until the termination date.

May Y demand extra USD 5,000 in addition to the original price of the car? How about in the case where Y entered into the contract to sell the car with Z at the price of 30,000 dollars between conclusion of sale contract with X and termination?

(Conclusion and Grounds)

In accordance with Paragraph 1 of Article 411, termination of the contract relieves both parties of their duties under the contract except for the duty to pay damages. In the above fact, Y terminated the contract because X did not perform his obligation under the contract to deliver the car to Y on due date.

To sum up, regarding the contract between X and Y, X is exempted from obligation to deliver the car to Y due to the effect of termination of the contract, but X assumes the obligation to pay damages to Y.

The conclusion and grounds shall be different between Concept A and Concept B.

1) Nature of Obligation to Pay Damages

<From Concept A>

According to Concept A, the contract shall extinguish retroactively from the beginning and as a result, there is no ground to acknowledge compensation for benefit of performance in general. Therefore, one possible way of thinking is that Y can demand only reliance benefit such as the cost for preparation of the contract such as interest when he borrowed money from the bank, etc. If constructing so, Y cannot demand 5,000 dollars as compensation.

However, it is also possible to think that even if the contract is extinguished retroactively from the beginning, damages due to non-performance remains after termination of the contract. Based on this idea, Y may demand compensation for benefit of performance, thus, 5,000 dollars.

<From Concept B>

According to concept B, the party who has right to terminate can demand compensation for expectation interest (benefit of performance) naturally because responsibility for non-performance lasts after termination.

2) Scope of Damages

In the case where the compensation of expectation interest (benefit of performance) is recognized, articles on damages based on non-performance (Article 398 through 406) shall apply.

However, it is problem which time shall be the time of the standard of the compensation. This problem is connected with the interpretation of the scope of damages (Article 401).

In this case, it is possible to think that the time of the standard is at the time of termination because a right to damages derives from the termination. Based on this idea, X and Y shall exchange 20,000 dollar with the car, and Y can demand 5.000 dollars as an expectation interest.

Also, it is possible to consider that only when a party who has a right to terminate resold the subject matter to the third party before termination and the occurrence of special damages could have been anticipated by the parties when the contract was executed, the resold price shall be recognize as damage (Paragraph 2 of Article 401). According to this idea, Y may demand 10,000 dollars as an expectation interest if X and Y anticipated the occurrence of the resale benefit at the time of the contract was executed.

6. Extinction of Right to Terminate

6.1. In The Case of Damage etc., of The Subject Matter by Intentional Act

According to Paragraph 2 of Article 412, the right of termination shall be extinguished if the party is entitled to the right of termination

(a) lost, destroyed or rendered incapable of being returned the subject matter of a contract due to the intentional act

(Example: the subject matter of contract is resold or entirely broken intentionally)

OR

(b) changed into a thing of a different type due to processing or reworking

(Example: The sale contract of rice, but the rice which is the subject matter of the contact is milled into a powder and produced as bread)

The reason why the right to terminate shall be extinguished in above two cases is because it shall be against "the principle of good faith" (Article 5) if the party who destroyed and made it impossible to return the subject matter intentionally can terminate the contract.

The right of termination shall not be extinguished in the case where the subject matter is lost, destroyed or rendered incapable of being returned without intention. In this case, the party who has the right of termination shall pay the value by money up to the actual price (Paragraph 2 of Article 412).

6.2. Extinction Because of Prescription

Article 413 stipulates that the right of termination based on non-performance as well as the right to demand actions to return to the original state that existed prior to the execution of the contract shall be extinguished by prescription five years from the time when the non-performance occurred.

Non-performance: is started from the time which is in delay.

Delayed performance: is started from the time when the other party has already performed.

The right to demand actions to return to the original state based on the termination of the contract is not made independently from the termination of contact and the party who is entitled to the right to demand actions to return to the original state shall exercise such rights before the right of terminations is extinguished by the prescriptive.

For example, in the case where X and Y entered into a sale contract but Y didn't pay the purchase price despite X's delivery, Y shall be in delay from the time when X delivered the subject matter. In this case, the extinctive prescription runs from the time when Y was in delay. Therefore, X shall both execute the right to termination and claim for restoration within 5 years from X's delivery.

6.3. Extinguishment by Performance or The Tender of Performance

The requisite of termination based on the delayed performance are;

a) Other party didn't perform his own obligation

b) The party who wants to terminate the contract demanded to perform the obligation by establishing the period of performance of a reasonable length.

c) The obligor didn't perform his own obligation within such period.

Therefore, if the obligor performs the obligation in the time that is set and the obligation is extinguished due to the achievement of such purpose, the right of termination is also extinguished.

Then, how about the obligee refused to receive the subject matter despite the obligor tendered his performance in accordance with the obligee's demand? In this case, if the obligee received the subject matter, the obligation would have been extinguished. Therefore, in this case, it's possible to recognize that the right to terminate of the obligee shall be extinguished due to the obligor's performance based on principle of fairness.

7. Termination and Third Party

Paragraph 4 of Article 411 provides that "the legitimate interests of third parties may not be prejudiced by a termination". The concept of the "third party" refers to any party besides the party himself or his general successor such as successor or mergerer. So, may any person besides the parties be a "third party" or not? Paragraph 4 of Article 411 says only a third party who has the "legitimate interests" becomes the third party.

For example, in the case where the car was sold from X to Y, then Y to Z. Z cannot avoid being affected if X terminated the contract. Cases can be divided into two by time of appearance of third parties.

The first case is, for example, after Y resold the car to Z, X terminates the sale contract with Y. Z in this case is called "third party before the termination". The other is "third party after the termination". For example, X terminated the contract against Y but Y resold the car to Z after termination. In this case, it is necessary to consider Y's resale is considered to constitute embezzlement. But the effect of the resale contract must be considered apart from the criminal case.

It is not clear that whether the paragraph 4 of article 411 demands the third party to have the legitimate interest before the termination, and the third party after termination shall be protected by paragraph 4 of article 411 or not.

How to protect the third party is depending on whether the retroactive effect is recognized or not.

Broadly speaking, there are two concepts regarding retroactive effect in termination;

-A concept which recognize the retroactive effect of the termination (hereinafter called "Concept A)

-A concept which doesn't recognize the retroactive effect of the termination (hereinafter called "Concept B).

Example case) X sold his car to Y. Z bought the car from Y.

(1) Based on Concept A

Based on this idea, there is deemed never to have been any contract to begin with between parties due to the termination. In case where the seller already delivered the thing, then the contract is terminated, the seller can demand the buyer to return the thing back based on the ownership due to the retroactive effect which makes the right of ownership not transfer from the beginning.

Therefore, in above case, X's ownership is deemed not to transfer from X to Y. So, Z shall be deemed to take over the ownership from Y who didn't have the ownership and logically Z cannot obtain the ownership.

Even though this idea recognize the retroactive effect, but based paragraph 4 of article 411 which is the special provision to protect the third party who has the legitimate interest; so, if the third party has a legitimate interest, the effect of termination of the contract can't not be asserted against the third party.

What kind of third party that is determined to have the legitimate interest?

Based on paragraph 4 of article 411, the termination of contract by parties cannot be effect the interest of the third party if that third party is good faith and no negligence.

Anyway, the third party shall have the relationships in the contract before terminating the contract so that he can assert his own interest.

➢ Perfection: necessary / not necessary

It is possible to consider that the third party shall obtain possession (of movable) or registration (of immovable) to be protected by Paragraph 4 of Article 411 because the third party is considered to make maximum means to protect his right. According to this idea, the possession or registration has a function as "requisition for right preservation".

On the other hand, it is also possible to think that perfection is not necessary for the third party to be protected because Paragraph 4 of Article 411 doesn't request the perfection for the third party.

Then, how about the third party AFTER the termination?

According to Concept A, the third party who entered into the contract after termination cannot be protected by Paragraph 4 of Article 411 because retroactive effect had arisen already. The third party after termination is deemed to obtain ownership from a person who didn't have ownership. So, the third party cannot obtain the ownership. Of course, in the case where the subject matter is a movable, Z may obtain the ownership if Z fulfilled the requirements which are stipulated in Article 193. However, in the case where the subject matter is an immovable, the third party cannot obtain the ownership by bona fide acquisition. Consequently, there is an idea that protects such a third party through analogical application of Paragraph 2 of Article 353. Because it can be said that X had left the registration and created the appearance that Y was the owner of the immovable and Z believed that Y was the right holder.

A typical case of the application of Paragraph 2 of Article 353 (fictitious declaration of intention) is that, for example, a debtor A lost a suit with a creditor P and intended to avoid attachment of his car from P. A told his friend B this situation and colluded with B and fictitiously "sold" B the car and delivered it. In this case, a sale contract between A and B is void based on Paragraph 1 of Article 353. Moreover, A didn't have intention to transfer his ownership to B and B also didn't have intention to obtain the ownership. So, A shall still have the ownership (Article 133: To transfer the ownership, the agreement of both parties to transfer the ownership is required). However, B abused A's trust and sold the car to C who reasonably believed that B was the genuine owner. In this case, according to Paragraph 2 of Article 353, A may not claim his right against C to preserve C's transactional safety. To be protected by the Article, C shall act in good faith without gross negligence at the time of making the contract.

The reason why the Civil Code protects such a third party in good faith without gross negligence is because a person who created fictitious appearance such as A shall not be eligible to assert invalidity of the contract against the third party who trusted the appearance with reasonability. This rule derives from "Doctrine of Estoppel".

As to termination of the contract, there was no explicit collusion of will between X and Y in above case. Therefore, it is impossible to apply Paragraph 2 of Article 353 directly. However, it is similar to the situation on fictitious declaration of intention that X had left the registration unchanged after the termination and

created the appearance that Y was the genuine owner. Therefore, if Z believed that Y was the genuine owner in good faith without gross negligence, there is room to protect such Z through analogical application of Paragraph 2 of Article 353. Thus, X may not assert his ownership against Z who acted in good faith without gross negligence.

(2) Based on Concept B

According to Concept B, the termination doesn't have a retroactive effect. Even though there is the termination of contract, X isn't deemed to have been an owner from the beginning. But even the termination doesn't have retroactive effect, when there is the termination of the contract, the owner may demand to transfer the subject matter back, although such thing is already transferred to the third party. For example, in above example case, if X terminated the contract, Y shall assume a new obligation to return what he received due to the termination.

Based on this concept, the relationship between X and Z is similar to double transfer from Y regardless Z bought the subject matter before or after the termination, thus a person who obtains the perfection in advance of the other one may assert the ownership. It means that even if there were no provision such as Paragraph 4 of Article 411, the result shall be the same as double transfer. Therefore, paragraph 4 article 411 is not the special provision to protect the third party who has the legitimate interest, just a confirmatory provision.

Then, shall Z enter into contract in good faith without (gross) negligence? It is not stipulated clearly in Paragraph 4 of Article 411. Or shall the third party obtain the perfection to be protected?

In the case of defective declaration of intention, the third party needs to act in good faith without negligence except the duress (Article 346, 347, etc.). On the other hand, in the case of termination, it is not clear whether the third party is required to act in good faith without negligence.

As mentioned above, the relationship between X and Z is similar to the double-transfer. Therefore, Z must obtain possession prior to X to be protected. Also, this issue can be considered on a parallel with the matter of "the perfection and the third party on the double-transfer" (Paragraph 2 of Article 134).

➢ Perfection

With regards to the transfer of the ownership of immovable, registration is the perfection for the immovable property (article 134). Therefore, even though the seller acquired the ownership from the buyer and the buyer sold it to the third

party, but if the third party registered the transfer before the seller, the third party has more priority than the seller; and the seller may not be able to demand the third party to return and cancel the registration of the third party.

The Scope that is considered as third party under the article 134

a) No limitation, besides the party himself

b) A bad faith person shall be excluded from the third party

c) A particular bad faith person shall be excluded from the third party

For example, even if Z registered his ownership prior to X and Z acted in simply bad faith, he can assert his ownership against X in accordance the idea 3, but cannot in accordance with the idea 2.

The point to notice is that in the case of the third party before the termination of the contract, X will not necessarily terminate the contract because of Y's non-performance and X may demand compensate against Y without termination. In other words, even if Z know that Y had fallen into non-performance, it is reasonable that Z expected X wouldn't exercise his right to terminate and Z could obtain the ownership legally.

Therefore, the position as the third party in the case of the third party before termination is different from the third party in the case of rescission. On the contrary, in the case of the third party after termination, object of the good faith or bad faith is not a fact that Y has fallen into non-performance but a fact that the contract has been terminated already. If Z knew the fact that the contract between X and Y had been terminated, it means Z knew Y was not eligible. In this case, necessity to preserve Z is not high. Therefore, if Z acted in bad faith, it is possible to consider that Z is excluded from the third party because Z doesn't have legitimate interest.

All things considered, means to preserve the third parties shall be decided while taking into consideration balancing of "the third party" on the rescission and the double sales.

Section 6 Effect of Bilateral Contract

Bilateral contract is a type of a contract that the parties have obligation toward one another. Thus, the parties to the contract have a close relationship, and for this reason the contract has mutuality.

Mutuality nature of the bilateral contract is divided into three:

1. Mutuality nature on formation of a bilateral contract
2. Mutuality nature on performance of a bilateral contract
3. Mutuality nature on continued existence

1. Mutuality Nature on Formation of a Bilateral Contract: Initial Impossibility

Even if it was impossible to implement the content of a contract at the time of its formation, the contract shall not be void because of impossibility (Paragraph 1 of Article 355).

However, this provision shall not preclude either contracting party to the contract from rescinding the contract on the ground of mistake if the requirements for mistake are met.

There are two parts of impossibility

Partial Impossibility
Complete Impossibility
} whether an obligor has fault that lead to impossibility

If the partial impossibility occurred, it shall be a matter of the warranty liability.

Also if the complete impossibility occurred by the obligor's fault, then the obligor has to assume the liability for non-performance.

➢ Complete Impossibility: In case that the obligor commits no fault, the obligee may not demand the execution of the contract or damages or any compensation (Paragraph 1 of Article 398)

For example, X sells a house to Y.

- Initial impossibility Article 415 (sale of obligation of parties)

- Impossibility without fault of the obligor, Article 415 and Paragraph 1 of Article 398 shall apply.

2. "Mutuality" Nature on Performance of Bilateral Contract

2.1. Defense of Simultaneous Performance

2.1.1. Function

Article 386 stipulates the right to defend of simultaneous performance between the obligor and obligee such as encouraging performance of obligation and avoiding damages in case of failing to perform the obligation. In principle, if the law does not state about the defense of simultaneous performance of a bilateral contract, it creates inequality in performance because the other party is not entitled to defend in the case where such party fails to perform the obligation or ignore his own obligation. In other words, without defense of simultaneous performance, the obligee has to perform the counter obligation or terminate the contract at the end in the case where the obligor didn't perform his obligation. In such a case, the obligor might have used money received or sold the subject matter of the contract and the obligee might not recover the subject matter already performed. Therefore, the other party of the contract may refuse to perform his own obligation until the other party performs his obligation. A defense of simultaneous performance has a function to avoid damages in such a case.

2.1.2. Requirements

Article 386 also stipulates some requirements for defense of simultaneous performance such as:

1) The presence of equivalence obligation which arose from same bilateral contract

2) The obligation of a party is due

3) The other party demands the other party to perform the obligation without tender the performance of his own obligation.

Based on proviso of Article 386, in the case where the time for performance of the other party's obligation has not arrived, the counter party cannot assert the defense of simultaneous performance. The counter party can't realize his claim compulsory because the obligor has a benefit of time 'Paragraph 1 of Article 330).

2.1.3. Effect

(1) Existence Effect

a) As long as party has a defense of simultaneous performance, the party will not be in delay even the party who has the defense of simultaneous performance doesn't perform his obligation at the due date because the party has a legitimate right to refuse to perform his obligation in this situation.. A delayed performance is a type of non performance of the obligation. A delayed performance occurs when a specific time of performance has passed.

There are three types of delayed performance (Article 391);

i) Where performance is to occur at a time certain, when such time has arrived,

ii) Where performance is to occur at a time is uncertain, when the obligor knows that such time has arrived.

iii) Where no time for performance is specified, when the obligor receives a demand for performance

b) As long as the party has a defense of simultaneous performance, the other party cannot execute a set-off (Paragraph 1 of Article 468). A set-off is a system to extinguish obligations by a party's declaration one-sidedly and unilaterally, so an obligation with defense shall be protected from a set-off.

(2) Effect from exercise of simultaneous performance in Civil Lawsuit

A party who has defense of simultaneous performance can assert the defense in litigation. In this case, if the court acknowledged the defense, the court shall render the judgment for performance in exchange for counterperformance. For example, the plaintiff X filed a suit against Y to demand payment for 5,000 dollars as a purchase price of X's car and Y asserted the defense of simultaneous performance in the litigation. If the court acknowledged Y's defense, the judgment shall be "the defendant shall pay 5,000 dollars in exchange of the delivery of X's car."

Case Study

Can X decline Y's demand to transfer of the subject matter in following cases?

(1) X owns a wine shop. A customer Y comes to the shop. X does not know Y. Y proposes X to sell 10 bottles of beer for 6 dollars. X agrees to Y's proposal and prepares the ten bottles for Y. However, Y told that "I forgot to bring my wallet. I will pay later, so please just give me the 10 bottles right now".

(2) In case of 1), Y told X "I have my wallet but there is only 1 dollar. I will pay 1-dollar, so please provide 10 bottles of beer right now. I'll pay rest later".

(3) X sold his own car to Y for 5,000 dollars. The due date of both obligations is on September 10th. However, X and Y did not tender the performance of their respective obligations on the said date. After that, Y demanded a transfer of the car from X without tender the performance of his own obligation.

(4) X sold a car to Y for 5,000 dollars and the parties agreed that Y shall pay the amount on September 10th and X shall deliver the car to Y on September 30th. Y paid the purchase price to X on September 10th. Later on, Y demanded X to deliver the car on September 15th.

(5) X concluded to sell his car to Y for 5,000 dollars and made an agreement that Y shall pay the purchase price on September 30th and X shall transfer the car to Y on September 10th. X didn't transfer the car to Y at the due date and Y demanded X to transfer the car on September 15th without tender of his performance.

(6) In case (5), both X and Y didn't tender the performance at due dates. Then Y demanded X to transfer the car without tender of his performance on October 1st.

(Conclusion and Grounds)

(1) Yes

As a matter of fact and based on Article 386, it is normal for general performance of the contract in ordinary transaction as such when we buy a thing, we need to pay for it to the seller and that seller will give the thing as a simultaneous performance. However, in case 1), Y bought beer from X but Y did not pay money to X since Y forgot his wallet. Thus, X has the right to defense and refuse to deliver beers to Y until Y performs the obligation of paying for X simultaneously.

(2) Yes

The provisions concerning to performance (Article 434 through 463) shall apply to performance of the contract. According to article 441, an obligee is not required to accept a partial performance because a partial performance is not deemed to meet the purpose of the contract. Therefore, even if Y pays 1 dollar, it is not "the performance of its obligation" and X can decline Y's demand.

(3) Yes

In this case, both obligations are deemed to be the same condition as obligations without time limit (Paragraph 3 of Article 391) because both obligations have

been over due. Therefore, X can decline Y's demand if Y claims X to transfer the car without tender of Y's performance.

(4) Yes

X doesn't have to transfer the car until 30th September. In other words, Y may not require X to perform the obligation before a commencement time has arrived (Paragraph 1 of Article 329). X has the benefit of the determination of time (Article 330).

(5) No

X's obligation has arrived on September 10th. It means the other party's obligation as arrived for Y. On the other hand, Y's obligation has not arrived on September 15th yet. Therefore, X cannot refuse Y's demand in accordance with proviso of Article 386.

(6) Yes/No

In this case, both obligations are deemed to be the same condition as obligations without time limit like case 3). However, in this case, X has an obligation which should be executed prior to Y. After the due date, X was liable of liability for delayed performance. The problem is whether it is fair to allow such X to refuse Y's demand based on defense of simultaneous performance.

There are some possible ways of thinking. The one is an idea to deny X's defense of simultaneous performance because X has an obligation which is required to perform prior to Y originally. The other one is an idea of affirmation of X's defense of simultaneous performance because Article 386 requires only arrival of the time for performance of both obligations. In addition, it seems to be unfair if X has to perform prior to Y even there is a significant risk that Y will not substantially perform in accordance with its intended purpose.

2.2. Defense of Insecurity

Article 387 stipulates that "a party to a bilateral contract who is required to perform an obligation in advance of the other party may refuse to perform the obligation if there is a significant risk that the other party will not substantially perform its obligation in accordance with the contract. However, this shall not apply where the other party provides security or otherwise takes a measure that extinguishes the existing risk".

For example, X sold his car to Y on 31st October 2010 and they agreed that X would deliver the car on 5th November 2010, and Y shall pay X on 12th November 2010. On 1st November 2010, Y, however, become bankruptcy.

In such a case, X is insecure about the performance by citing that Y is bankrupt. In such instance, X is the party who can assert the defense of insecurity and refuse to perform his obligation.

Nonetheless, if Y provides security, X cannot refuse to perform the obligation.

2.2.1. Function

i. Injustice may happen in case where there is a significant risk that Y will not perform, but forces X to perform.

ii. Help X to avoid from damage in the case where Y cannot perform

2.2.2. Requirements

i. Existence of obligation which a party to the bilateral contract is required to perform in advance of the other party.

ii. A significant risk that the other party will not perform in accordance with the content of contract.

Reasons of insecurity can be:

- Bankruptcy
- Insolvency
- Shortage of capital for a short period

In addition, following cases can be considered as non-economic risk:

- Resignation of any important assistant
- New regulation of the government which banned import of important materials

For example, X sold Y an artistic object and Z is the one who produces the object as a non-substitute craftsman. After making a contract, Z deceases. In this case, if X can find another person who has similar skill to that of Z, then the risk will be extinguished by providing a measure other than security.

Thus, the subject matter of risk is not only related to economic matter, but also non-economic matter such as human factor.

This means that if one party performed the obligation, the defense of insecurity cannot be used, except neither party can fulfill the performance.

iii. The other party does not provide security or otherwise take a measure to extinguish the risk

Security in this case means not only the security by property such as pledge or hypothec but also the security by a person such as guarantee.

Example 1: X sold Y his car and they agreed that X shall deliver the car in advance of the payment. Even if Y had became bankrupt at the time of X's performance, X cannot assert the defense of insecurity in the case where Y found a guarantor.

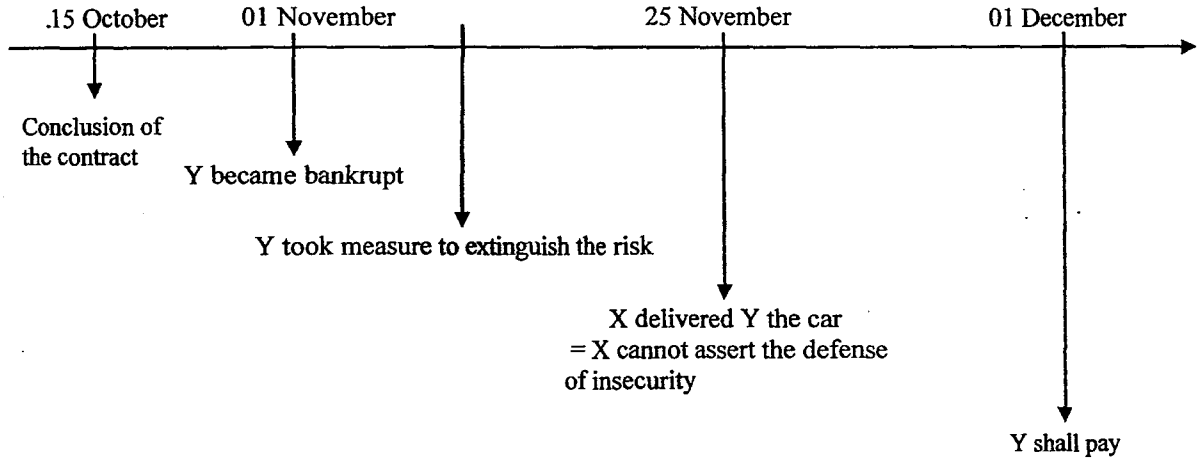
Example 2: X agreed to sell Y an artistic object, and A is the important crafts man. Before the final production, A deceased. However, X cannot assert the defense of insecurity if Y employed a new craftsman B who has the same skills as A.

The first and the second examples are the cases of extinguishment of risks.

2.2.3. Effect

As long as, a party has a defense of insecurity, that party can refuse to perform his obligation until the other party provides security or takes other measure that extinguishes the risks.

For example, X sold a car Y on 15th October 2010 and they agreed that X shall deliver the car on 25st November 2010 and Y shall pay the purchase price on 1st December 2010. However, Y became bankrupt after making of the contract.



In case that X asserts defense of insecurity but Y took measures to extinguish the risk before 25th November, X cannot assert the defense of insecurity and he shall be liable for the delayed performance if X didn't perform his obligation on 25th November.

On the other hand, if Y didn't provide security or take measures to extinguish the risk before 25th November, X shall not be liable for the delayed performance.

Party that has a defense of insecurity can assert such defense in the litigation.

In the case where Y assert that he provided enough security or took measure to extinguish the risk as the counter defense, in the judgment, the court must dismiss X's claim.

3. Mutuality Nature of the Continued Existence

3.1. Intention of Burden of Risk

For example, X sold Y a watch costing 100 dollars. If X destroyed the watch with intention or negligence, what is the consequence that X will face?

- Specific performance
- Demand for damages
- Termination of contract

} are general remedies that Y can demand

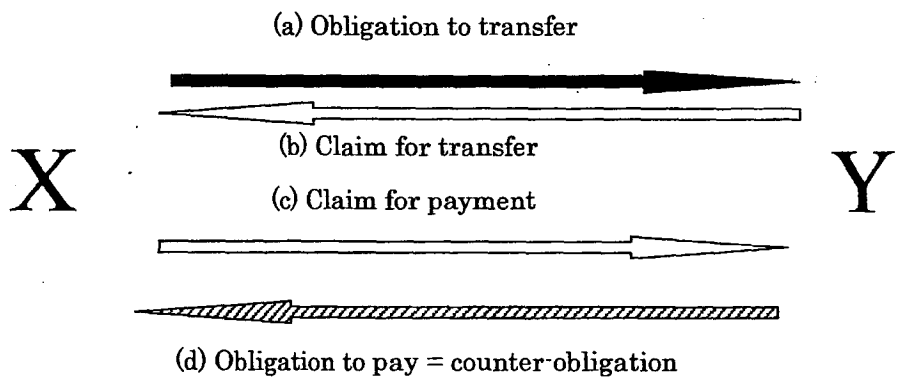
In case of antique watch which cannot be substituted and is a specific property

- Y may not demand specific performance
- Y may demand for damages
- Y may terminate the contract

In the case where Y chooses to demand for damages, the obligation of delivery of the watch which X assumed changes into paying damages.

Then, how about in the case where A has no fault for impossibility of the contract?

The contractual relationships are as follows;



In the case of a bilateral contract, the parties have mutual obligation and claim each other.

For example, a seller X has an obligation to transfer the subject matter (a) and claim for payment (c). Also, Y has an obligation to pay (d) and claim for transfer (b). In this relationship, an obligation to transfer (a) and claim for transfer (b) and an obligation to pay (d) and claim for payment (c) are "two sides of the same coin". Therefore, if the obligation to transfer (a) is extinguished, the claim for transfer (c) shall be extinguished too.

According to Article 415, if the obligor has no fault for impossibility of the contract, the obligation shall be extinguished and the obligee may not demand performance thereof. The "obligor" here means a person who assumes an obligation to transfer the subject matter and the "obligee" means the other party. Therefore, if the subject matter of the sale contract was destroyed without X's fault, the obligation to transfer (a) shall be extinguished and Y cannot demand transfer (b) of the subject matter anymore

Then, how about the counter-performance? Can X demand payment against Y in above case? The matter of "burden of risk" denotes that "who shall bear the risk if an obligation to transfer becomes impossible, the obligor or the obligee?" In other words, in the case where the subject matter to be transferred was destroyed without the fault of either party, the counter-obligation shall be extinguished or not.

Regarding this point, there are two concepts.

(1) A concept that the counter-obligation shall be extinguished.

In above case, if Y's obligation to pay is extinguished, Y doesn't pay the purchase price. It means X is the person who loses the benefit. It means that X shall bear the risk.

(2) A concept that the counter- obligation shall not be extinguished

If the counter-performance is not extinguished, Y still has obligation to pay even though the subject matter of the contract is destroyed and impossible to transfer. It means the obligee shall bear the risk.

It depends on the kind of the subject matter which concept shall be applicable.

According to Paragraph 1 of Article 416, in the case where the subject matter of a bilateral contract is to transfer title to specific property and it destroyed, lost or damaged without the faults of either party, the obligor shall bear the risk.

Also, according to Paragraph 2 of Article 416, risk by destruction, loss or damage of the property comprising the subject matter of the contract shall be transferred to the obligee under certain circumstances.

For example, X delivered a watch to Y's house at due date. However, Y refused to receive it without reasonable reason. Later, the watch is damaged and the obligation to deliver became impossible. In such a case, when X delivered the watch, the risk has been transferred in accordance with Item (b), Paragraph 2 of Article 416. Therefore, Y has to pay the purchase price even though Y didn't obtain the watch.

Moreover, according to Paragraph 1 of Article 418, in the case where the subject matter of a bilateral contract constitutes the transfer of title to non-specific property and the property to be delivered has not yet been specified and it was destroyed or lost without the fault of the obligor, the obligation shall not be extinguished. In other words, in this case, the obligor shall assume the risk.

*Background Information: Specific Property and Unspecific Property

1. What Is Specific Property?

A specific property refers to any property the parties have prescribed according to its special characteristics and cannot be substituted by other property. Usually, immovables or antiques are considered to be specific property. However, if the party specified the land by the location such as facing certain street or near the station, the subject matter shall be unspecific property with limit.

In the case of the obligation to deliver specific property, the obligor shall preserve such property

1) with the care of a good manager

2) until delivery thereof (Article 314).

1.1. The Care of A Good manager

Article 314 states that if the subject matter of an obligation comprises delivery of a specific property, the obligor shall preserve such property with the care of a good manager until delivery thereof. It means that the manager shall preserve the property in a better way than he preserves his own property.

The opposite concept of "the care of a good manager" is "the same care as his own property" in Paragraph 2 of Article 1262 (custody of succession property, "even before accepting or renouncing succession, the successor

shall manage the succession property with the same care as his own property"). Other related articles include:

- Article 601(Paragraph 1): Lease
- Article 640 (Paragraph 1): Mandate contract
- Article 729 (Paragraph 2): Management of affairs without mandate
- Article 776: Right of retention

In above cases, the obligor keeps other person's property. Therefore, he needs to preserve such property more carefully than his own property.

The contents of "the care of a good manager" shall be decided by a common idea that "what the care shall be taken generally is" from the view point of the general idea of transaction.

* There are four levels of management:

- Absolute responsibility: even if the manger does not make any fault, as long as there is damage to the property, the manager shall be responsible.
- The care of good manager: the manager shall manage the property with a better care than his own property, and be responsible for it in the case of force majeure.
- Management with the same care as one's own property
- No responsibility

1.2. The Meaning of Taking Care "Until Delivery"

Seller or manager has duty to take care until the date of delivery, not until the due date. In the case where the due date has passed without performance because of obligor's fault, the obligor shall assume duty to compensate the damage through fate. On the other hand, the due date has passed without performance because of obligee's fault, it is possible to consider that the obligor shall manage the subject matter with the same care as his own property.

2. What is unspecific property?

Unspecific property refers to the property of which the parties have not prescribed the special characteristics (Paragraph 1 of Article 315). Mass-products are unspecific property in general. Unspecific property has substitutability.

The obligor has to decide which property shall be delivered before delivery. An act which chooses the subject matter to be delivered and prepare to delivery is called as "specification".

According to Paragraph 2 of Article 315, unspecific property has been specified

1) the obligor has specified the property to be delivered, and

2) he has completed all acts required for delivery of that specified property.

After the specify, the obligor has the duty to subsequently deliver only that specified property (Paragraph 2 of Article 315)

2.1. Specification of The Unspecific Property

The specification takes effect in the case where following two requirements are fulfilled.

1) where the obligor has specified the property to be delivered;

2) where the obligor has completed all acts required for delivery of that specified property.

(1) Where the obligor has specified the property to be delivered

The obligor has to identify the property to be delivered from numerous unspecific properties before delivery because it is impossible to transfer the ownership without determination of the subject matter.

Usually, there is no room to consider the impossibility of the performance on unspecific property before identification of the subject matter. However, the risk shall be transferred after the specification of unspecific property under certain conditions.

There is no concrete article which provides the way of specification. However, it is necessary that the obligor separate certain things in order to, at least, be distinguished from other things. Basically, it can be considered as identification in the case where the obligor has moved certain things from others or marked certain things to distinguish from others. For example, if the electric supplier has separated or put a mark on 10 televisions which to be delivered, it can be said that he has already specified the property to be delivered.

(2) Where the obligor has completed all acts required for delivery of that specified property

"Acts required for delivery" in Paragraph 2 of Article 315 means that the obligor exercised to make it in the condition which he can deliver it at any time if the obligee wants.

Which acts corresponds to "act required for delivery" shall be decided in accordance with contents of the obligation to delivery. There are two kinds of the obligation to deliver the subject matter;

(a) obligation to bring, and

(b) obligation to be collected

(a) In the case of obligation to be bring

Second sentence of Article 445 stipulates that the obligations other than an obligation to deliver specific property, the performance shall be made at the current residence of the obligee. This obligation is called as "obligation to bring".

In this case, the obligor shall bring the subject matter the current residence of the obligee. This type of obligation is called "obligation to bring".

With regard to the obligation to bring, only if the obligor tenders performance actually at the residence of the obligee, it shall be deemed "has completed all acts required". In the case where the obligor ordered a transportation agent to transfer the subject matter, specification shall not occur without the actual tendering of the subject matter by the agent at the obligee's residence. Therefore, in the case where the subject matter is destroyed, lost or damaged in transit, the obligor still bear the obligation to transfer the same kind of property because he hasn't specified unspecific property.

(b) In the case of obligation to be collected

The first sentence of Article 445 provides that where the place of performance is not agreed to between the parties, performance of an obligation to deliver specific property shall be made at the place where the property was located at the time the obligation arose. This is called as "obligation to be collected". For example, a seller X sold his antique pot to Y. At the time of conclusion of the contract, Z kept the antique pot for X. In this case, Y shall come to Z's place to pick up the antique pot.

In the case of obligation to be collected, the obligor shall make it in the condition which he can transfer the subject matter to the obligee at

anytime the obligee comes to receive. In concrete terms, after the obligor identified the property to be delivered, he shall prepare to deliver such as packing or wrapping.

It is left to Cambodian interpretation whether the obligor shall notify that he already prepared to deliver to the obligee. As to the obligation with the due date, the obligor doesn't need to notify it to the obligee because the obligee has to come to receive at the certain date. On the other hand, if parties have not set the due date, it is possible to interpret that the obligor assumes a responsibility to notify that the obligor has prepared to transfer already.

2.2. Effect of specification

According to Paragraph 2 of Article 315, the obligor has the duty to subsequently deliver only that specified property after specify.

And other effects on specification are taken by other articles or interpretation.

(1) Transfer of ownership

Where the specification has been completed, the transfer of ownership has also been completed.

Even though the transfer shall take effect in accordance with agreement between the parties, it is impossible to transfer the ownership with unspecific property. Therefore, once specify takes effect, it can be considered that the ownership shall be transferred.

(2) Transfer of risks in case of certain conditions

Paragraph 2 of Article 418 states that after the property to be delivered has been specified, the provisions of Article 416 shall apply mutatis mutandis. Then, Paragraph 1 of Article 416 provides that the obligor shall bear the risk when the subject matter is to transfer title to specific property. Also, Paragraph2 of Article 416 stipulates that the risk shall be transferred to the obligee upon Item (a) through (c).

(3) Obligation to transfer-Right to alter

The obligor has the duty to subsequently deliver only that specified property after the specification (Paragraph 2 of Article 315). Formally, rights to alter the subject matter to be delivered can apply only in the case of unspecified property, but not in specific property because the specific property is unique, and has no substitutability.

Therefore, if the subject matter is destroyed, lost or damaged with the faults of the obligor after the specification, the obligor shall assume responsibility for non-performance. However, in most cases of specified property, it is still possible to get new unspecific property even after the property to be delivered has been specified. In this case, it can be considered that the obligor shall be allowed to obtain new subject matter and deliver them. It is called "right to alter of the obligor".

For example, an electric supplier X sold 10 televisions to Y and they agreed that Y shall come to receive these televisions at the due date. Then, X separated 10 televisions to be delivered and wrapped them as preparation. However, after the specification, these televisions were destroyed due to X's fault. In this case, can X obtain another same type television and deliver them to Y? Or X shall assume the liability for impossibility of the performance?

In the case where there is a special agreement between the obligor and the obligee about the right to alter, the obligor can specify new subject matter and deliver them based on the agreement.

The problem is whether the obligor can change the subject matter without consent of the obligee after the specification. One possible idea is to deny the right to alter based on formal interpretation of Paragraph 2 of Article 315 which stipulates that the obligor has the duty to subsequently deliver ONLY specified property after the specification. However, property-specification system is to do a favor of the obligor to perform his obligation and it is not necessary that specification of unspecific property means transformation of the obligation from unspecific property into the specific property itself. In other words, even the unspecific property was specified, it doesn't mean the unspecific property becomes specific property itself. Therefore, it is probable to consider that the obligor can obtain new unspecific property, specify them and deliver them as long as same kind of unspecific property existence.

3.2. Principle of burden of risk

In a bilateral contract, with regard to the transfer of title to a specific or unspecified property, who shall bear the burden of risk when it becomes impossible to perform or loses the property due to damage without any fault of the obligor? What are the requirements for bearing the burden of risk or for exempting from the burden of risk?

3.2.1. Transfer of Title to Specific Property

In the case of a bilateral contract, contracting parties have mutual obligations to perform which are obligation to transfer and obligation to pay for example. As to an obligation to transfer, the subject matter can be divided into two kinds; specific property and unspecified property. The examples of specific property are an ancient pot, an ancient watch or a special picture and so on.

And when the contract to transfer of the title of specific property is created, and in the case where the subject matter was damaged or lost without the faults of either party, which becomes impossible to perform. In this case, the obligor shall bear the risk. It means that the obligor (the seller) cannot demand counter-performance from the buyer. It means that the obligor cannot demand the buyer to make payment. Finally, the seller has lost the subject matter of the contract in principle, and it means that the obligor shall bear the risk of loss because the seller possessed and controlled the subject matter, prior to the delivery made to the buyer. The buyer cannot demand any damages from the seller because the damage of the property is not the fault of the seller, neither.

The burden of risk in the case of specific property shall meet the following conditions:

a) In a bilateral contract;

b) The subject matter of the delivery is the transfer of title to a specific property;

c) The obligation to deliverer of the property has been become impossible

The condition that the obligation has been become impossible is not stipulated in the article clearly, but burden of risk is the rule for realization of fairness when one of the obligations has become impossible in a bilateral contract.

The impossibility to perform the obligation is not due to the faults of either party.

If all requirements are fulfilled, the obligor (= the seller) may not demand counter performance. Also, the obligee (= the buyer) may terminate the contract (Article 407 and Item (c) Paragraph 1 of Article 408).

Case Study

X made a contract to sell an antique pot to Y for 50,000 dollars. After the conclusion of the contract, the antique pot was destroyed without negligence of either X or Y.

What can X assert Y in this case? How about Y?

(Conclusion and Grounds)

In this case, X's obligation shall be extinguished because the obligation to transfer has become impossible without X's fault (Article 415).

The kind of the obligation which X assumes is an obligation to deliver specific property (314) and X's obligation has become impossible without either party's negligence. In such a case, Paragraph 1 of Article 416 shall apply.

Paragraph 1 of Article 416 provides that in the case where the obligation has become impossible because of destruction, loss or damage without either party's fault in bilateral contract, the obligor shall bear the risk thereof and may not demand counter-performance. In other words, the counter-performance which Y assumed is to pay the purchase price and it shall be extinguished. Therefore, X may not demand payment against Y and the loss shall be attributed to X, the obligor. X lost an antique pot which is worth 50,000 dollars. This is the meaning of "risk".

On the other hand, Y may terminate the contract to regain the purchase price if he already paid for. However, Y cannot demand damages because X isn't liable for impossibility.

3.2.2. Transfer of Title to Unspecified Property :

Where the subject matter of a bilateral contract is the transfer of title of unspecified property before the specification, and the obligor (= the seller) has lost or damaged without his faults, the seller is still obligated to deliver that unspecified property to the obligee (= the buyer). It means that the obligation shall not be extinguished, so the obligor is still obligated to perform.

For Example, X sold 1 ton of rice to Y under a sale contract. Prior to the delivery of rice to the buyer, the rice was burnt due to arson by the third party. In this case, the seller shall bear the burden of risk, and the seller's obligation shall not be extinguished. Therefore, the seller shall find another ton of rice to deliver to the buyer.

The burden of risk shall meet the following conditions:

a) In a bilateral contract

b) The subject matter of the contract is unspecified property

c) Prior to the specification

d) the subject matter is lost or damaged without the fault of the obligor.

3.3. Exceptions

Although the obligor shall bear the burden of risk in general, there are some cases where the obligee shall bear the burden of risk:

(1) Where the burden of risk shall be transferred to the obligee in a bilateral contract where the subject matter is to transfer specific property (Paragraph 2 of Article 416)

Usually, the obligor controls the specific property until delivery. Therefore, the Civil Code stipulates that the obligor shall bear the risk in principal.

However, when the subject matter has come under the substantial control of the obligee, or it can be equated with that the subject matter has come under control of the obligee, the risk shall be considered to be transferred from the obligor to the obligee.

Therefore, Paragraph 2 of Article 416 provides that the risk shall be transferred to the obligee upon any of the following events in principle:

a) when the obligor delivers the property or transfers the registration of the title thereto to the obligee, or actual delivery is transferred (Item (a), Paragraph 2 of Article 416);

In this case, the substantial control of the subject matter can be considered being transferred to the obligee, so the obligee shall bear the risk in general. In the case where the subject matter is a movable, there is no room to consider burden of risk because the obligation to transfer a movable shall be extinguished with the obligor's performance. Therefore, the subject matter in Item (a), Paragraph 2 of Article 416 shall be deemed an immovable in this context.

b) when the obligor has made a proper preparation for the delivery to be made, and has made a proper tender of performance, but the obligee has refused the delivery (Item (b), Paragraph 2 of Article 416).

This Item provides that in the case where the obligee has refused to accept the performance even though the obligor made a proper tender of performance, the obligee shall bear risk without receipt of the subject matter because the obligee could have received the subject matter at the time of tender of performance.

c) when the obligee has unreasonably refused to accept the performance of the obligor. For example, the obligee announced to the obligor that he would not accept the performance of the obligor (Item (c), Paragraph 2 of Article 416).

It seems that Item (b) and (c) stipulate the same, but item (c) provides where the obligee has unreasonably refused in advance to accept the tender of performance. When the obligee has declared that he won't accept the tender of performance, it might be waste of time and effort for the obligor to continue proceeding with the preparations. Therefore, the Civil Code stipulates that it is sufficient for the obligor to give notice to the obligee that preparations for performance have been completed and demand the obligee's acceptance of performance in this case (Proviso of Article 454).

In other words, in the case of Item (b), the obligor needs to tender of his performance actually at the due date to transfer the risk, but in the case of Item (c), only he must do is giving notice that the preparations for performance have been completed and demand the obligee's acceptance of the performance instead of actual tender of performance.

(2) In the case where the subject matter is unspecified property.

In the case where the subject matter of a bilateral contract constitutes the transfer of title to unspecified property and the property to be delivered has been specified, the provisions of Article 416 shall apply mutatis mutandis (Paragraph 2 of Article 418). If it is not stated in the contract, the transfer of burden of risk shall be bound to the obligee if any condition mentioned at any Item of Paragraph 2 of Article 416 has been fulfilled.

According to paragraph 2 of Article 315, when the obligor has specified the property to be delivered and has completed all acts required for delivery of that specified property, the obligor has the duty to deliver only that specified property. Whether an act corresponds to "specify" shall be decided in accordance with type of unspecified property.

(3) Impossibility due to the obligee's fault (Article 421)

Where the performance of an obligation becomes impossible due to the fault of the obligee, the obligee shall bear the burden of risk although the obligation to transfer the property is an obligation to act or not to act (Article 421).

Case Study

Who shall bear the burden of risk, X or Y, in the case below?

1. X is the owner of an electric store and Y is the customer. They made a contract selling 10 sets of new model televisions, and these sets of television were stored at X's warehouse. The delivery and payment are made on 1st December.

(1) Someone caused fire on the warehouse before X completed the preparation, and as a result, all the televisions in the warehouse were burnt on 25 October.

(2) X has already separated the 10 televisions to be delivered and placed them separately from the other in the warehouse on 30 October. However, someone caused fire and burned the warehouse on 31 October. As a result, all televisions were burned.

(3) X and Y agreed that X shall deliver 10 televisions to Y's house. However, Y called X and said that "I changed my mind. I won't receive those televisions, and although you deliver them to me, I won't accept them." X asked Y to give reasons, but Y did not say anything. Later, someone caused fire and burned all the TV sets.

2. X made a contract selling an ancient pot to Y. Y came to X's house to confirm this antique pot prior to the due date, and Y dropped and broke the pot.

(Conclusion and Grounds)

1-(1) X shall bear the risk on the ground that televisions are unspecified property. And if the unspecified property was destroyed without X's fault, X shall still bear the burden of risk. It means that the obligation shall not be extinguished (Paragraph 1 of Article 418).

1-(2) X shall bear the risk on the ground that the 10 televisions are unspecified property. To just prepare and separate these televisions is not sufficient because X has an obligation to deliver the subject matter to Y's residence (2nd sentence of Article 445). Therefore, when X tenders of performance actually at Y's residence, the subject matter of this contract shall be specified as "the obligor has completed all acts required for delivery" in Paragraph 2 of Article 315. It means

that the obligation shall not be extinguished yet in this case (Paragraph 1 of Article 418).

1-(3) Y shall bear the risk on the ground that Y has unreasonably refused to accept the performance of X in advance. In this case, X doesn't need to tender his performance actually. Therefore, Y shall bear the risk (Item (c), Paragraph 2 of Article 416).

2- Y shall bear the risk on the ground that the obligation to deliver has been impossible due to Y's fault (Article 421).

Section 7 Effect of Obligation against Third Parties

Sub-Section 1 Avoidance of Fraudulent Act

1. Introduction

Generally, avoidance of fraudulent act can prevent obligor from disposing her unfair disposal of attachable properties, and the subrogation can allow obligee to exercise the obligor's right in order to preserve the right of obligee.

Through the rights of subrogation or avoidance of fraudulent act, the obligee can secure the attachable properties which is the subject matter of compulsory execution so that the obligee can receive performance of the claim. Therefore, the right of subrogation or avoidance of fraudulent act is really important for obligee.

However, both methods also violate the freedom of obligor in some sense. In that sense, the above two means are the main exceptional cases for general principle of private autonomy.

2. Function and Definition

Article 428 of Civil Code stipulates the avoidance of fraudulent act. This article allows the obligee to rescind an act conducted by obligor which infringes the obligee's benefit. The avoidance of fraudulent act is the right of obligee to file a lawsuit seeking a rescission of acts conducted by obligor that infringe the obligee's benefit, i.e., if the conduct of the obligor infringes the claim of obligee who may not receive satisfaction of his claim at all or insufficient amount because of the obligor's fraudulent act.

In this case, the obligee having rescinded the fraudulent act can demand a return of the properties or money which is the value of the property for the benefit of all obligees of the obligor.

Y has borrowed USD 1,000 from X and then Y gave land which is his only asset worth USD 2,000 to Z as a performance with substitute property. It means that an act conducted by Y causes damage to the obligee. That is to say, the obligee X could not receive satisfaction of his claim because obligor Y did not have any properties to satisfy X's claim. According to the above hypothesis, the avoidance of fraudulent act is a way to help X to get satisfaction of his claim through

rescission of performance with substitute property made by Y to Z. As a result, the property transferred to Z will be returned into the property of Y. Thus such a property shall be the subject matter of attachment by the obligee in order to be sold for satisfaction of claim.

3. Requirements

According to Article 428 and Article 429 of Civil Code, to rescind the fraudulent act, it requires abiding by four requirements as follows:

- Existence of claim to be preserved
- Fraudulent act
- Obligor's awareness of fraudulence
- Awareness of person who received a benefit from the obligor's act or a subsequent acquirer. However, if fraudulence is a gratuitous, awareness or unawareness of obligor is not the requirement in avoiding fraudulent act.

3.1. Existence of Claim to Be Preserved

First of all, the existence of the claim to be preserved must occur before the fraudulent act. Hence, if the claim of obligee occurs before the obligor transfers the property to third party, it means that the claim occurs before the fraudulent act. In contrast, if the claim of obligee takes place after the transfer of the property, it shall be unnecessary to preserve the claim because, when the obligee makes a claim for the benefit of the obligor, the obligee has known already about the obligor's scope of property.

Please note that the consideration of the fraudulent act, the time of the transfer of the property by obligor shall be taken into account. Therefore, complying with Article 135, if the obligor transfers the property without registration, such a transfer shall not be effective.

Example1: Y has borrowed USD 1,000 from X. Y's property is only the land L worth USD 2,000. After that, Y gave land L to Z, another obligee, as the performance with substitute property. In this case, the claim of X toward Y occurred before the Y gave land L to Z. Consequently, the property of Y was cut down after the claim of X arisen.

On the other hand, if Y applied land L to Z's claim then Y borrowed money from

X, it means that the property of debtor was cut down before the claim of X arose. Hence, X's claim arose after the fraudulent act, i.e., X has no ground to rescind the act.

Moreover, the claims to be preserved in this case are not only monetary claim, but also other claims other than this. Still, in accordance with Article 429 proviso of Civil Code, the claim must be transformed into monetary claim by the end of oral argument proceedings on which a judgment of rescission is based. Therefore, in case where the obligee has a non-monetary claim, Article 429 of Civil Code determines another requirement of rescission of fraudulent act that the claim must be transformed in monetary claim by the end of oral argument.

Example 2: Y has sold its jewelry to X at the price of USD 500. The agreed due date for delivery of the jewelry is one year later after agreement. Suppose that Y has only one property which is land L worth USD 2,000. Then Y gave the land to Z, another obligee, as the substitute property performance. In this case, X's claim is to demand the delivery of the jewel, but not monetary claim. However, if Y did not perform his obligation to deliver the jewel as demanded, the obligee can file two complaints: suit demanding the delivery of jewel and suit demanding the rescission of fraudulent act against a performance with substitute property. Meanwhile, X can only file one complaint seeking for avoidance of fraudulent act against substitute property. In both cases, in order for the court not to dismiss a suit seeking avoidance of fraudulent act, X must transform his claim into monetary claim, i.e., X must declare his intention to terminate the contract with Y and demand compensation for damage instead of demanding the delivery of jewelry. The declaration of the above must be made before the conclusion of oral argument, at latest, for suit demanding avoidance of fraudulent act.

3.2. Fraudulent Act and Awareness of the Fraudulence

The fraudulent act is an act that reduces the property of obligor to the extent the obligor becomes insolvent, and if the obligor is originally insolvent, the obligor will become more insolvent.

For example, Y owed X USD 1,000, and Y had USD 10,000, but Y has made a gift of all the money to Z. In this case, gift of money to Z violated the claim of X, and such a gift is a fraudulent act. On the other hand, if Y has only USD 300, which

is not enough for X's claim, but Y has given USD 300 to Z. As the above case, the gift of USD 300 has led Y to become more insolvent. This case is also the fraudulent act.

To be a ground in considering on notion of fraudulent act, please look at the practice in Japan. Two criterions are put in consideration to determine whether or not it is fraudulent act:

1. Making obligor become insolvent (unable to have enough money to perform an obligation to obligee)

2. Purpose

For example: Y borrowed USD 1,000 from X, while Y has a land costing USD 1,000. After that, Y hypothecated his land as a benefit of Z to secure a claim of USD 400. In this case, the property of Y which X can execute remains only USD 600; therefore, it can be construed that the above provision of security is the fraudulent act. Meanwhile, the purpose of borrowing money and hypothecation should be also considered: if the borrowing is used for supporting family living, the borrowing and hypothecation are made reasonably which should not be considered as the fraudulent act.

Besides, transfer of thing away from obligor's property is also a possible problem. In case where the transfer of ownership is made without paying consideration or with consideration cheaper than normal, this act is also considered as the fraudulent act. However, if the transfer of ownership is made at a suitable price, it shall not be considered as fraudulent act in general. Meanwhile, Japanese court sometimes considers it as the fraudulent act on the ground that selling immovable by obligor is made to get money which is easy to hide. Therefore, if there is enough evidence proving that the transfer of immovable made aims to hide the property, it will be considered as the fraudulent act.

Lastly, notice that Article 428 paragraph 3 of Civil Code does not allow applying article 428 paragraphs 1 and 2 to acts that were not intended to acquire a property right. The acts that were not intended to acquire a property right mostly involved with family matters. For example, marriages, divorce, and acceptance of succession and so on are not the acts that were not intended to acquire a property right although sometimes this act can make obligor become insolvent. Therefore, even though after the acceptance of succession and the obligor becomes insolvent because the succession consists of more debt than properties, the obligee is not able to cancel the acceptance. Actually, it can be considered that marriage, divorce, and acceptance of succession are the acts

strongly depending on the will of the obligor which the obligee cannot demand for rescission.

Besides, to avoid fraudulent act, it must be proven that the obligor and subsequent acquirer have known the damage from the act. However, if a benefiting person or subsequent acquirer who paid no consideration for the benefit or the acquisition or such a person did not know of the infringement of the obligor's act, it is not the requirement for the rescission of the fraudulent act.

3.3. Knowledge of Person who Received the Benefit of the Obligor's Act or of Subsequent Acquirer or the Fraudulent Act Is Gratuitous

Person who received the benefit of the obligor's act or subsequent acquirer must know the loss of interest from such act; if the person who received wasn't aware of the loss of interest, he or she will not responsible for the transfer of that thing.

1- Basic fact

Y borrows money from X $1,000. His only property is land L that is worth $2,000. After that, Y sold land L to Z1 at the price of $100. X has intention to rescind the act between Y and Z1. Y has known that this contract is the fraudulent act against X

Can X rescind the act between Y and Z1 in the following case?

1.1 Z1 doesn't know that it is the fraudulent act.

1.2 Z1 has knowledge that it is the fraudulent act.

2- In addition to the basic fact, Z1 has transferred land L to Z2 at the price of $2,000. X has intention to rescind the act between Y and Z1 and act between Z1 and Z2.

Can X do so in the following case?

2.1 Both Z1 and Z2 have known that it is the fraudulent act.

2.2 Z1 knows that it is the fraudulent act, but Z2 doesn't.

2.3 Z1 doesn't know, but Z2 has the knowledge with regard to this.

2.4 Z1 and Z2 haven't known.

[Conclusion]

1-1 No.

1-2 Yes.

2-1 Yes.

2-2 No. X cannot rescind the contract between Z1 and Z2 because Z2 is good faith. But in Japanese practice, X still can rescind the contract between Y and Z1 and demand the return of value of L (2000 dollars).

2-3, 2-4 it depends on your interpretation. In Japanese practice it is possible and after that, Z2 may demand unjust enrichment against Y but may not demand anything of Z1because effect of rescission is considered to occur relatively.

When the benefit is given gratuitously, the condition of having known is not necessary because such gratuitous benefit receiver or her subsequent acquirer didn't need to be not protected strongly.

4. The Exercise of the Avoidance of Fraudulent Act

4.1. The Mandatory Court Procedure

Based on Article 428, paragraph 1, the rescission of the fraudulent shall be made in a lawsuit because the avoidance of fraudulent act may affect many parties; as a result, it is necessary to clarify the existence and content of the effect of such rescission.

4.2. Deposit

The purpose of the avoidance of fraudulent act is to recover the attachable property of the obligor. Therefore, the subject matter of the avoidance of fraudulent act shall be returned to obligor's property but not to the obligee.

According to Article 430, where no other appropriate method exists to achieve restitution by a person receiving a benefit from the obligor's act or a subsequent acquirer, an obligee who exercises a right of rescission may demand that the benefiting person or subsequent acquirer deposit the thing obtained with an authorized depository office.

Examples of the case where restitution are inappropriate are as follows:

A- The rejection of receipt by obligor: This means that after having already demanded from a third party, but the obligor refused receiving the thing, the creditor may demand the deposit of acquired thing. The subject matter to be rescinded shall be movable. If it is an immovable it is not necessarily to exercise the method of deposit because the rescission of registration can be made without the consent of obligor if the court orders to do so.

B- Immovable property with a burden of security rights.

Basic fact

X is obligee that has the claim against Z $1,000 and Y is a 2000-dollar creditor against Z. Z has a land L, which is worth $ 4,000 is the only property and the land has furnished as security already to Y.

1- Z gives the land L to A, who is another obligee who has claim of $1,000 that is the performance with substitute property. Both of them are aware that it is the fraudulent act. X makes a lawsuit to the court to demand a rescission based on the avoidance of fraudulent act and the return the land. Z expresses the intention of denial of receiving land L. Can X demand that A shall rescind the registration of transfer of L?

2- Z gave land L to Y which is the performance with substitute property. Both of them are aware that it is the fraudulent act. Because of this reason, the claim of Y was extinguished and then the hypothec is extinguished too.

X lodged a complaint to court to demand the rescission based on the avoidance of fraudulent act and the return of land. Z expresses the intention of denial to return land L. Can X demand that Z shall?

Conclusion

1- Based on the above example, X may ask to rescind the fraudulent act and to demand that A return the Land even though Z already transferred the land to A. Anyway, such transfer doesn't extinguish Y's hypothec (subordinate nature of hypothec); therefore, Y is entitled to rescind the fraudulent act and rescind the registration of transfer of Land between Z and A too even if Z denied receiving the land. .

2- In case where Z has transferred the land to the only one hypothecee

With respect to this case, the claim of Y against Z shall be extinguished and the hypothec shall be extinguished too.

If X demands that registration of transfer between Y and Z shall be rescinded, it may have two effects:

- X may demand: the land is delivered to Z without burden of hypothec;

therefore, the creditor may demand the distribution, without any prioritized creditors, but such a permission to do that is so unfair for Y who is originally the prioritized creditor.

- X may not demand: if X may not demand, it means that Y will become the sole owner of immovable property; in contrast, the claim of Y is only $2,000 whereas the land is worth $4,000; so the remaining sale price is $2,000 and if the right to demand the return of the land is not permitted, it will infringe the benefit of other creditor without reasonable reason.

Therefore, although X may not demand the return of the transferred land, X may be entitled to demand 2000 dollars, which corresponds to the value remaining from the set-off of Y's debt.

4.3. Effect of Avoidance of Fraudulent Act

Based on Article 431, the avoidance of fraudulent act conducted by any creditor shall inure to the benefit of all obligees.

Therefore, in case that the transferred property is returned or deposited, such property may be attached through the normal procedure of compulsory execution and other creditors may participate in their distribution.

4.4. Period for Exercise of Right of Rescission

Based on Article 432, the duration of avoidance of fraudulent act is limited to one year of the time when the ground for rescission is first discovered by the creditor or within three years of the occurrence of the act giving rise thereto.

Such duration is relatively short and this period, the provisions of law pertaining to interruption of a period of prescription shall not apply to the expiration period of the avoidance of fraudulent act for the sake of legal stability.

Sub-Section 2 Subrogation by Creditor

1. Introduction

Subrogation of claim is a system which allows the creditor to exercise debtor's rights in place of debtor in order to preserve his or her own claim. It's different from the avoidance of fraudulent act that give the rights to the creditors to rescind acts of the debtor, which infringe the rights of creditor.

Subrogation by creditor is implemented in case that debtor ignores exercising his or her rights and such ignorance has infringes the creditor's rights.

Suppose that a debtor doesn't have enough money to fulfill his or her obligations towards his creditor, but has a leased house from which he earns the rental of 50US$ per month.

However, debtor sometimes may not care about collecting the rental fee from his lessee because he thinks that all the collected money will really goes to his or her creditor in the end. That is to say, h/she cannot keep that money. Therefore, creditor can use mechanism of the subrogation by creditor in order to be able to collect the rental fee directly from the debtor's lessee even though creditor has not had a title of execution to exercise his claim yet.

In this regards, the article 422 and consequent articles of the Civil Code stipulates the requirements so that the creditor can exercise this right.

2. Requirements

Article 422 of Civil Code stipulates that:

1. An obligee may, where necessary to preserve his claim, exercise a right held by obligor in place of the obligor. However, this shall not apply to a right that is personal to obligor, a right the exercise of which is entrusted to the complete discretion of the obligor, or a right that may not be made the subject of attachment.

2. An obligee may, where necessary to receive satisfaction of a claim held by the obligee, exercise via subrogation a right possessed by an obligor having a close connection to such claim.

2.1. Subrogation Based on the Article 422-1

According to the meaning of article 422-1 and article 423 of Civil Code, there are 4 requirements of subrogation by creditor:

2.1.1. Existence of Claim rights of Creditor and Necessity to preserve

Initially, in order to exercise the rights debtor possessed in place of the debtor, the creditor shall really have claim rights against the debtor. In addition, it doesn't mean that creditor having such a claim can always exercise the right the debtor possessed in place of the debtor. That is to say, there shall be evidence to prove the necessity to preserve claim held by obligee. It means that the ignorance of a debtor to exercise his rights violates the rights of creditor. In this regard, if debtor really doesn't collect the rental fee from his lessee, but he has many other kinds of property which is sufficient to satisfy the claim held by

obligee, then it is not necessary to preserve such a claim. In other words, it is not necessary for creditor to preserve his claim through using the mechanism of subrogation by creditor. Therefore, as long as the debtor does not have enough money to satisfy the claim held by the creditor or the debtor becomes insolvent, it is necessary for the creditor to preserve his claim via using mechanism of subrogation by creditor.

2.1.2. Debtor's Failure to Exercise His or Her Rights

Of course, if the debtor exercises his or her rights, the creditor cannot subrogate these rights. In case that a debtor exercises his or her rights, the subrogation by creditor infringes the obligor's personal will and also will lead to confusion because multiple parties exercise the same right.

Therefore, if the debtor already demands the rental fee from his lessee, the creditor cannot demand such a rental fee instead of the debtor.

2.1.3. The Content of Debtor's Rights

Normally, debtor's rights which a creditor can subrogate refer to the simple monetary claim such as the rights to demand payment arisen from a sale contract or lease so on.

However, in fact, there are not only the monetary claims which the creditor can exercise instead of debtor but also other rights such as right to rescission, right to terminate the contract, etc.

Therefore, in case the debtor does not collect rental fee of the house which he or she leases to lessee, his or her right is monetary claim. In contrast, if a debtor, A, enters into a contract which reads that he shall deliver a house to C according to the sale contract of immovable property, but this contract is made because of duress by C. in this case, A has legal right to rescind the contract due to the defective declaration of intention.

However, A who is a debtor still does not declare his intention to rescind the contract. In this regard, A's creditor can subrogate the right to rescind the sale contract of immoveable property instead of A who is his or her debtor. Meanwhile, the creditor can also subrogate the rights to invoke an extinctive prescription regarding claim of debtor with the purpose to prevent decrease of debtor's properties as long as the requirements for subrogation are fulfilled.

All in all, all kinds of rights of debtor might be subject to subrogation by creditor but it requires some requirements. It means that right that can be subrogated is not the right that is personal to the debtor, right that may not be made the

subject of attachment and right the exercise of which is entrusted to the complete discretion of the obligor.

The right that is personal to the debtor includes right to demand divorce, right to demand a division of properties in case of divorce, right to claim abatement for legally secured portion. Moreover, some of debtor's rights are rights set by laws for debtor to make decision by totally free will whether he would exercise right or not. For example, right to demand compensation from someone based on infringement of the personal rights such as defamation is a personal right. Therefore, debtor can either exercises or does not exercise this right, depending on his free will.

In this case, the creditor cannot implement the subrogation. The difficult problem may occur in determining which right cannot be decided by free will of the debtor. The precedent of Cambodia court will determine these rights based on actual cases that occur. Moreover, only attachable right can be subrogated.

In this regard, if a debtor has a right that law prohibits from be attached the creditor cannot attach this right, and so the subrogation is not useful. For example, right to demand livelihood support is a right which can be attached. Therefore, even if a debtor refuses to exercise his right, a creditor cannot subrogate such a right.

2.1.4. When to Exercise Subrogation

In principle, the claim held by a creditor against the debtor shall be due so that creditor can exercise subrogation according to the article 423 paragraph 2 of Civil Code. In other words, the creditor cannot exercise the subrogation unless his claim becomes due because the debtor, at that time, does not have obligations to pay debts yet. However, there are two exceptions to the above-mentioned principle:

A. Act of preservation

The proviso to paragraph 2 of article 423 of Civil Code provides the exception to above-mentioned principle for the act of preservation. The act conducted to interrupt prescriptive period is act to prevent the claim of the debtor from being extinguished because of the elapse of prescriptive period. For example, a debtor A has a claim right against Mr. C and the prescriptive period will elapse on January 5th, 2012. However, in this time, the claim held by the creditor Mr. B against debtor A has not become due yet. In this situation, if the above mentioned principle is applied the creditor B cannot exercise and when January 05th, 2012 elapses, the claim held by Mr. A against Mr. C shall be extinguished

by prescription and the creditor also lose opportunity to increase his debtor's properties which could bring benefits to himself.

Please note that the acceptance of performance from the third party is not an act of preservation. It means that as long as the claim has not become due yet, the creditor may not accept the performance made by the third party because the acceptance of performance made by the third party is not the act of preservation.

In contract, if the due date comes and the debtor still does not collect his claim against third party, the creditor shall demand that the third party pay the debtor or file a complaint with the court demanding the third party pay debt to the debtor in order to preserve his claim against debtor.

B. The Permission of the Court

The main sentence of paragraph 2 of article 423 of the Civil Code allows creditor to exercise debtor's rights even if his claim has not yet become due in case where he is permitted by the court to do so. However, in order to allow the creditor to exercise subrogation of debtor's rights even if creditor's claim has not become due yet, the court shall verify requirements of subrogation and necessity of exercising subrogation prior to due date. The court decides to allow the creditor to exercise subrogation by issuing a ruling according to the law on procedures of non-civil litigation. In such case, motion with court for permission to exercise subrogation shall be made by the creditor against the third party who is the debtor of debtor without filing a motion against debtor.

2.2. The Subrogation in Accordance with the Article 422-2

The article 422 paragraph 2 of Civil Code stipulates that an obligee may, where necessary to receive satisfaction of a claim held by the obligee, exercise via subrogation a right possessed by an obligor having a close connection to such claim.

It is different from the article 422 paragraph 1 of the Civil Code, which is already mentioned. The provision of article 422 paragraph 2 does not require necessity to preserve the creditor's claim in order to exercise subrogation. That is to say, subrogation can be exercised even though there is no necessity to preserve the claim of the creditor. This means that even though the debtor is not insolvent, the creditor can still exercise subrogation. What is necessary requirement is having a close connection between the claim of the creditor and the one of the debtor.

For instance, Mr. A has the rights to demand that Mr. B compensate the damage according to tortious acts. Here, because Mr. B has an assurance rights, so he

has the rights to demand compensation from insurance company. In this case, even Mr. B has adequate property to pay compensation of damage to Mr. A, Mr. A can still exercise subrogation against the insurance company instead of Mr. B because the claim of Mr. A and the one of Mr. B have a close connection.

It is determined that what kind of claim having a close connection depends only on decision of precedent of Cambodian court in the future, because the Civil Code doesn't clearly provide the definition of a nature of the term close connection.

3. Method of Exercise

The obligor may exercise his claim against a third party obligor, and then perform the obligation to pay the obligee. Where the obligor is insolvent, the obligee may subrogate against the third party obligor.

Unlike avoidance of fraudulence, the creditor can subrogate the right out of the court. Practically, the obligee may demand performance out of the court first and then, if the third party obligor denied the performance for the obligee, the obligee may file a complaint to demand with the court.

4. Effect of Subrogation by Creditor

4.1. Defense of Third-party Obligor

A third-party obligor may assert against the subrogating obligee any defenses possessed by the third-party obligor against his own obligee according to Article 424.

> X has a monetary claim right against Y and Y sold his jewelry to Z. Y did not provide either jewelry or demand payment. Because Y became insolvent, X subrogated the right to demand payment against Z, but Z refused to make payment because of a defense of simultaneous performance.
>
> In this case, if X subrogates to demand from Z because Z has a defense of simultaneous performance against Y; therefore, Z may be entitled to make a defense against X. This is simply because what X subrogate (exercise) against Z is Y's right but not X's own right. Therefore, Z can assert same defenses to such exercise.

4.2. Relationship between Subrogating Obligee and Obligor

In compliance with Article 425, after having been notified, the obligor may not be entitled to exercise his rights except where the obligor accepts the performance made by the third-party obligor.

X has a $400 claim right against Y and Y has a claim of $1,000 against Z too. Because Y became insolvent X subrogated the within the scope of the amount of $400 against Z and notified such subrogation to Y. After such notice, concerning 400 dollars, Y may not demand or do any other things besides accepting the performance made by Z.

In this case, if X subrogates the amount of $400 against Z and then notifies Y of such performance, Y may not exercise his right against Z. But, Y may exercise any part which is not yet subrogated. The article is intended to clarify who has an authority to exercise for the sake of third-party debtor.

4.3. Effect of Subrogation to the Obligor

The effect of subrogation by the subrogating obligee shall inure directly to the obligor based on Paragraph 1 of Article 426.

X has a claim of $500 against Y, and Y has a claim of $1,000 against Z. Because Y was insolvent, X subrogated the right within the scope of the amount of $500 against Z and then notified Y of such subrogation.

1- Because Y refused to accept the performance, X demanded Z to pay and then Z paid to X.

In this case, according to Paragraph 1 of Article 426, Z's performance is also effective against Y; therefore, the amount of obligation is reduced to $500.

2- X has filed a complaint demanding a payment whereas Z invoked the extinctive prescription regarding claim and such invocation is acknowledged (Z won the case). In this case, the binding effect extends not only to X and Z but also to Y; thus, Y may no longer demand a payment against Z.

In principle, a persons who can invoke the extinctive prescription according to Article 486 are only the parties, guarantor, joint obligor, a third party security provider, a third party acquirer and other person possessing the legally recognized interest. Therefore, the in complaint between X and Z, Z is the obligor, so Z is entitled to invoke the prescription.

The effect of invocation of extinctive prescription of Z regarding the claim

between Y and Z

According to item 3 of Article 486, extinctive prescription regarding a claim is invoked by an obligor and obligee; on the other hand, where the invocation made by the person possessing the interest, such effect does not extend the obligor. Therefore, if invoking the prescription, it has an effect on only X and Z, but not Y in general but art.426 exceptionally extends the effect to Y. because of the article, Z may avoid defend himself more than once (Once Z succeeds to defend against the subrogating obligee, Z doesn't have to defend anymore because such effect extends to the obligor(Y in this case.)).

4.4. Acceptance of Performance

According to item 2 of Article 426, if the obligee demands the third party obligor to pay the money, and the third party obligor pays to the oblgor, the obligor must therefore accept the performance; if the obligor does not accept the performance, the obligee can demand that third party obligor tender performance exceptionally directly to obligee.

According to Article 427, the obligee may preserve the thing delivered as such performance from the third party obligor for other obligees until it is delivered to the obligor.

X has a claim of $500 against Y, and Y also has a claim of $1,000 against Z. Because Y was insolvent, X has subrogated the amount of $500 against Z and notified Y of such subrogation. There are also other obligees such as A1, A2, and A3 against Y, each of them has a claim of $500. As Y refused to accept the performance, X has demanded Z to make the performance to himself, and Z also did so.

In this case, according to Article 427, X may not appropriate such $500 to his own claim. X must preserve and deliver the amount of $500 to the obligor (Y) and then X can exercise his own right normally by compulsory execution and so on. Of course, other obligees may exercise their right normally (X doesn't have any priority even he collected money from Z.).

X subrogated to demand Z for a payment of $500. When receiving, X must preserve it but cannot appropriate it or set-off.

Section 8 Extinction of Obligation

1. Introduction

An obligation arises from:

(a) Contract;

(b) Tortious act;

(c) Unjust enrichment; and

(d) Management of affairs without mandate.

The obligation can occur and also extinguish. Article 433 of Civil Code states the reasons of extinction of obligation.

2. Reasons of Extinction of Obligation

Obligations shall be extinguished on the following grounds:

(a) by performance, set-off, release, novation or merger;

(b) by impossibility of performance without the fault of the obligor;

(c) by the fulfillment of a condition subsequent or by the termination of the contract;

(d) by extinctive prescription; or

(e) by the exercise of a right of rescission.

3. Performance

3.1 Performing Person

Generally, performing person is the obligor. Article 435-1 of Civil Code stipulates that a performance made by a person who neither owns the property delivered for the purpose of performance nor has the authority to dispose of it shall not be a valid performance.

3.1.1. Third Party

An obligation may be performed by a third party (Article 434-1). A third party means a person who has no legal interest about contract between concerned parties such as just friends, parents and so on. For example, a guarantee is not a third party because she has a legal interest about performance because she needs to avoid guarantee liability.

3.1.2. Effect of Performance

If the obligor and third party have performed an obligation properly,

a) The obligation shall be extinguished (Article 433).

b) The third party can demand indemnification from the underlying obligor (unjust enrichment).

c) The third party can exercise via subrogation the claim held by the obligee and all other rights associated therewith (Article 459).

3.1.3. Exceptional Rule

In some cases, the third party may not perform instead of obligor:

a) If the purpose of the obligation cannot be achieved by the performance of a third party (Article 434-2).

b) The obligor and the obligee made agreement not to allow a third party to perform (Article 434-3).

Examples of obligation of which purpose cannot be achieved by the performance of a third party are obligation to draw a picture, to act on the stage, not to make a noise and so on.

As you see, many of obligations of an act or ones of forbearance of act are, in their nature, obligations which doesn't allow a third party to perform because the character of obligor is important.

3.2. Against Whom Performance Shall Be Made

3.2.1. General Rule

Performance is invalid unless it is carried out for the obligee or other person authorized to receive the performance (Article 437-1).

3.2.2. Exception

Where the obligor performs his obligation for a person who does not have authorization to receive performance, the obligor must perform once more for the obligee at the obligee's request. However, if the receiver of the performance is not authorized person to receive but reasonably seems so, it would be a problem for a debtor because the obligor may be at a loss what to do. That is to say, if he performs and the receiver is not authorized, the obligor shall perform again and if he doesn't perform but the receiver has an authority, it would be a delay of performance. It is called the problem of quasi right holder.

Art. 439 shall apply in such a case and according to the article, performance to unauthorized person to receive is exceptionally valid when the obligor is in good faith without gross negligence.

And when performance to quasi-holder of claim is considered valid, the actual right holder may not demand that the obligor perform again (art439-1) but may demand the receiving person return the received property.

3.3. When Performance Shall Be Made

In general, an obligor is forced to perform till the due date (Paragraph 1 of Article 443,391) and assumes liability for compensation if an obligor makes delay.

In addition, an obligor shall effect performance during regular business hours according to art.444. Therefore, it may be delay if the obligor pays the debt against the bank at the mid night of due date.

By the way time of benefit is mainly for the sake of the obligor and thus the obligor may waive that unilaterally (Article 330) and perform before due date (Paragraph 2 of Article 443).

3.4. Where Performance Shall Be Made

According to Article 445, the place of performance shall be the place where the property was located at the time the obligation arose in case of deliver of specific property and that shall be the current residence of obligee in other cases.

Of course, agreement shall apply if any.

3.5. What An Obligor Shall Do As A Performance.

3.5.1. Some Doctrines

Performance shall be in accordance with the purpose of the obligation and in good faith (Article 440).

In addition, performance shall be made fully in general and obligee is not forced to receive partial performance and thus X doesn't need to accept unless he wants to in case 4.

Costs of performance shall be borne by the obligor in general (Article 446)

On the other hand, the obligor may demand delivery of receipt (art.447) and return of documents (art.448).

3.5.2. Performance With Substituted Property

As I explained, performance shall be made in accordance with the purpose of obligation. For example, giving the immovable-property is not performance to pay 1000 dollars in cash even if the property is worth more than 1000 dollars.

In order for an obligor to make such performance with substituted property valid, an obligor needs agreement or consent of an obligee.

3.6. Tender of Performance and Delayed Receipt

Case Study

X is in 1000-dollar debt to Y. due date is 1st of June 2011. X and Y made a special agreement that interest shall be 20 percent annually in case of delay of performance. On the due date, X came to Y and tendered the 1000 dollars but Y rejected receipt just because obligee wants interest for delay.

What shall X do to avoid liability?

(Conclusion and Grounds)

X shall tender of performance.

As I explained, in order to extinguish the obligation, performance shall be carried out. But sometimes completion of performance needs some acts of the obligee such as receipt of money. Therefore, remedy in such a case where the obligee refuses to do something necessary for completion of obligation is necessary. That is a rule about tender of performance and delayed receipt is also relevant system to that.

3.6.1. Definition

Tender of performance is defined in art.453. According to the provision, definition is that obligor has completed preparations for an act of performance and has asked the obligee to accept such performance.

3.6.2. Methods of Tender of Performance

Other than art.453, A little bit more specifically, art.454 stipulates two ways of tender of performance.

One is principle method that actual tender of performance in accordance with the intended purpose of the obligation.

And the other one is preparation (including specification) and notice.. This method is sufficient as a tender of performance when the obligee has refused in advance to accept or when the act of the obligee is necessary.

The typical example of the case where the act of the obligee is necessary is the case where the obligee shall receive something at the residence of the obligor (c.f. Article 445).

3.6.3. Effect

First, when the obligee receives the tender of performance, you don't need to think about the effect of tender of performance and the performance itself separately because tender of performance completes instantly and becomes performance. The effect of tender of performance matters when performance cannot be carried out.

Main effects are as follows;

1) Exemption from liability of non-performance (Article 453-2)

2) Exemption from interest after tender of performance (Article 453-3)

3) Transfer of the risk (Article 416-2.b and Article 455.a)

4) Loss of the defense of simultaneous performance (Article 455.b)

5) Arising right to make a deposit to be exempt from the obligation (Article 455.c)

As you may see from the wording, these effects shall occur even without any fault on the obligee side.

For example, even when natural disaster or car accident prevents the obligee from receiving the tender of performance, these effects occurs anyway.

This is very different from delayed receipt which requires negligence (or intention).

By the way, typical case where tender of performance is rejected in Japan is rent case.

For example, the lessor and the lessor agreed that the lessor shall lease the house to the lessee at the price of 1000 dollars per year but later on the lessor starts to refuses the rent because she wants to raise the rent to 1500 dollars.

In such a case, if the lessee doesn't even tender the performance, it might fall on the breach of contract and may also assume an obligation to pay the interest for delay. In order to avoid such a liability, the lessee shall tender the performance at least. In addition, the lessee can make a deposit so that he can discharge the obligation completely.

3.7. Delayed Receipt

In case where the tender of performance is not accepted and the non-acceptance is caused by fault (intentional or unintentional fault) of the obligee at the same time, the obligor may be able to demand from the obligee any damages for the cost or expense such as a fee for keeping the things which are the subject matter of performance in the warehouse incurred by the obligor to keep it for a long period due to the fact that the obligee fail to accept the performance or cost or expense for taxes on immovable, etc. according to Article 456, Paragraph 1.

Besides, in the case of the non-acceptance of the tender of performance by the obligee, such as a case obligee does not come to get the thing from the obligor, it is a breach of duty by the obligee. The obligor may consider the termination of the contract. (According to Article 456, Paragraph 2)

Furthermore, in the case of the non-acceptance of the tender of performance by the obligee constitutes a material breach of the contract, the other party of the bilateral contract can immediately terminate the contract. The termination of the contract can be made only for a bilateral contract, because termination of the contract releases parties to the bilateral contract from his obligations based on the reason of the other party's failure to perform his obligations (according to Article 407). If there is material breach of the contract, there is no hope that the other party will perform his obligations and it is not appropriate to keep the contract relation in effect. Thus, the law allows the termination of the contract (according to Article 408, items A to D). Item A is the case where the other party demands the non-performing party, but the non-performing party still fails to perform his obligations despite the demand from the other party. Item B means that it is at the specified time defined in the contract but the other party fails to perform at such a specified time. Item C refers to the impossibility of performance. Item D specifies the termination of the contract due to the loss of trust by one party for the other party of the contract.

Article 408, Paragraph 2 is meant to emphasize that the party who commits a breach of contract cannot prevent the termination of the contract on the ground that non-performance occurred without fault of his part.

4. Set-off

4.1. Elements

4.1.1. Basic Elements of Statutory Set-off

According to Article 464 which states the meaning of and requirements for statutory set-off., the set-off which shall be made according to Paragraph 1 of this article is as follows:

a) Two individuals owe mutual obligations. It means that even though no agreement to set off between both parties exists. The set-off can be made by unilateral declaration of intention of set-off by one party.

b) Both obligations have the identical subject-mater, meaning that the set-off can be made for the monetary obligations or the obligations having identical alternative subject matter (For example rice). If the obligation is monetary one, the set-off shall be made in cash.

c) Both obligations are due for performance. In this case, it is the due time to satisfy the claim where one party expresses his intention of set-off to the other party.

Set-off which extinguishes the mutual obligations of both parties. So, the claim of one party already set-off has an effect on the claim to be satisfied.

d) The expression of intention of set-off means that the set-off made by one party who expresses intention of set-off to the other party (according to Article 465, Paragraph 1).

However, both parties can enter into a set-off contract to extinguish mutual obligations even though both obligations do not have identical subject matter. However, the interests of a third party shall not be infringed due to such set-off by both parties. Generally, the mutual obligations which are suitable for set-off may be extinguished by set-off contract. Although the subject matters of the obligations are not identical, for example claim having subject matter of monetary payment and claim demanding a delivery of rice etc., set-off can also be made by a set-off contract.

4.1.2. Grounds for Limitation on Set-off

Apart from this, there are some ground grounds for limitation on set-off:

(1) Obligation not suitable for a set-off (Paragraph 1 of Article 467)

This Article doesn't allow the set-off in case where it's not suitable for set-off because either or both of counter obligation is the special one that the party is necessarily to receive the payment from.

(2) Obligation owed by counter party is subject to defense (Paragraph 1 of Article 468)

If other party is entitled to make a defense against the counter-obligation owed by the other party, although the condition on set-off is fulfilled, it may not be executed.

(3) Obligation arising out of tort (Paragraph 1 of Article 469)

It is the limitation on set-off by the perpetrator who committed tort. If X has a claim on against Mr. Y and Y has the claim over a compensation for damage arising out of tort conducted by X; so, X may not assert the extinction of such obligation for compensation for damage arising out of tort by asserting the set-off.

(4) Agreement to prohibit a set-off (Paragraph 2 of Article 467)

In principle, parties are entitled to limit the condition to be executed. Thus, with regard to the set-off, party may state not to declare the set-off, but it does not have an effect to assert against the bona fide third party.

(5) Obligation prohibited from being attached (Article 470)

This Article doesn't allow the set-off of obligation which is prohibited from being attached. Obligation prohibited from being attached (Garnishment) is stipulated in Paragraph 1 and 2 of Article 382 of Code of Civil Procedure. The reason why set-off is not allowed is due to the necessity of living sustainability.

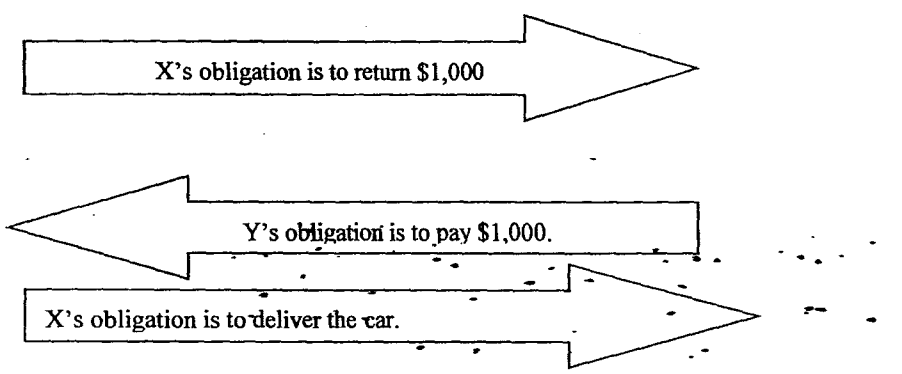
Regarding (1), for example, if the neighbors make agreement that they mutually owe obligations not to play piano after 9 p.m. it will be meaningless for other party who plays piano after 9 p.m. by declaration of set-off.

In Japan, it is mandatory for the employer to pay the total wage to the employee and the set-off by the employer is prohibited. Therefore, the obligation to pay the wage is also not suitable for set-off.

Regarding item (2), one of the typical examples of the defense to which the obligation owed by counter is subject to is the defense of simultaneous performance.

Case Study 1

X and Y make an agreement that X shall sell his car for $1,000 without any special agreement about the time of performance. Besides, X has borrowed Y $1,000. May X exercise the set-off?



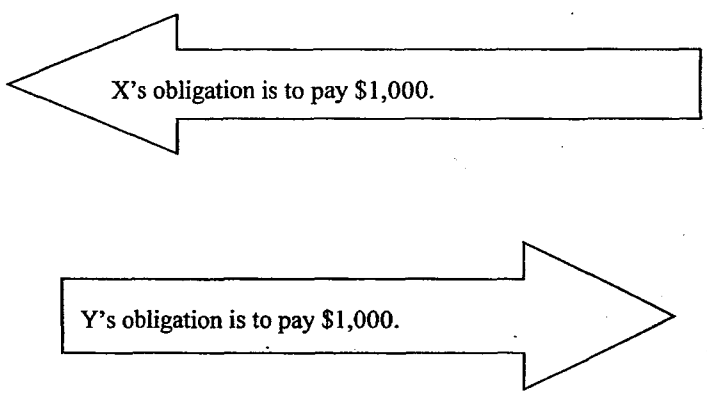
(Conclusion and Grounds)

In this case, Y owes an obligation to pay 1000 dollars to X while X owes 1000 dollars debt. It is, however, impossible to set-off both obligations because Y can demand the delivery of the car as a defense of simultaneous performance.

Case Study 2

1. On 16 May, 2005, Y borrowed X $1,000 and the agreed due date was on 16 June, 2005. X borrowed amount of $1,000 from Y on 16 May, 2007 and the agreed due date was on 16 June, 2007. Today is 16 June, 2011. May X exercise the set-off?

2. On 16 May, 2005, Y borrowed X $1,000 and the agreed due date was on 16 June 2005. X borrowed Y $1,000 on 16 May 2011 and the agreed due date was on 16 June 2011. Today is 16 June 2011. May X exercise the set-off?



(Conclusion and Grounds)

1 Y has a defense of extinctive prescription after the expiration of five years from the due date but X still can set-off both obligation because requirements for set-off has been met from June 16 2007, which is prior to the elapsing of such period.

2 Y has a defense of extinctive prescription after the expiration of five years from the due date and X cannot set-off both obligations because requirements for set-off has been met from June 16 2011, which is not prior to the elapsing of such period.

Grounds for distinction are as follows.

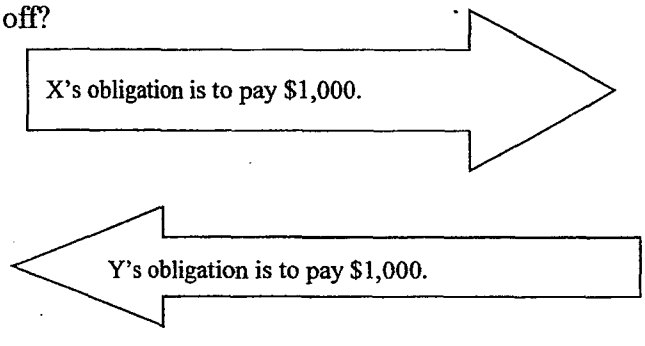
Theoretically, set-off has an effect to extinguish the obligation retroactively as of the time that the obligations became suitable based on art.466. Therefore, if requirements for set-off are met prior to the elapsing of extinctive prescriptive period and the holder of claim right which would be extinguished by the prescription declare the set-off, effect of such declaration shall have the retroactive extinction of both obligation as of the time that two obligations became suitable for set-off.

Substantially, the expectation to set-off the obligations which are already suitable for set-off may be still worth protection.

Next case is related to (3).

Case Study 3

Y borrowed $1,000 from X on 16 May, 2007 and the agreed due date was on 16 June, 2007. X has kept on demanding Y to pay, but Y does not yet perform the obligation. Afterwards, X ran over Y with his car; Y got injured and was entitled to demand compensation for damage against X. Does it have an effect in case where X declares set-off to the extent of $100? Does it have an effect in case where Y declares set-off?



(Conclusion and Grounds)

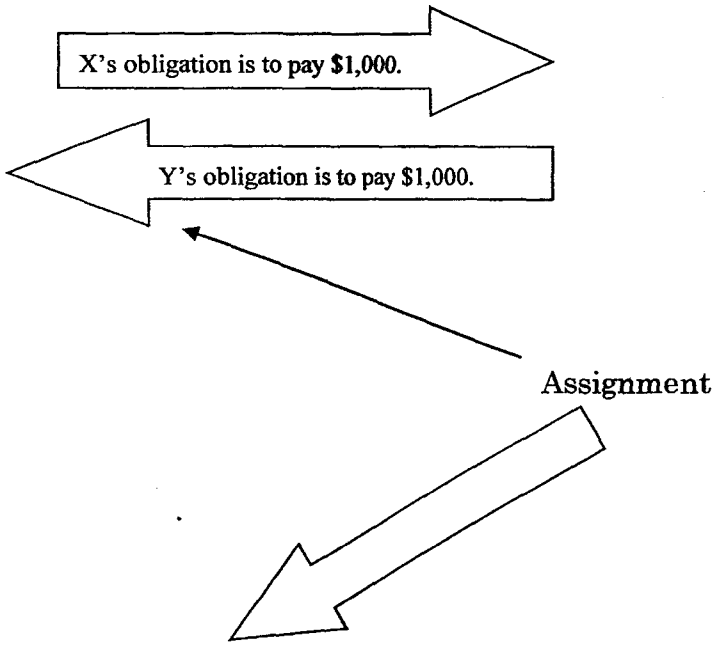
In case where X declares the intention to set off to the extent of $100, it doesn't have the effect because X may not assert the extinction of such obligation arising out of tort based on the set-off according to Article 469.

In case where Y declares the set-off, it is effective because Article 469 merely limits the set-off by perpetrator of tort only. Therefore, the victim may execute the set-off.

Let's see the case related to (4).

Case Study 4

X borrowed $1,000 from Y on 16 May, 2010 and the agreed due date was on 16 June, 2010. Y borrowed Z $1,000 on 16 May, 2011and the agreed due date was on 16 June, 2011 with the special agreement of prohibition of set-off. Z transferred his claim right against Y to X; may X exercise the set-off?



(Conclusion and Grounds)

X may execute the set-off if he doesn't know the special agreement because the condition of set-off exists.

Regarding (5), one of examples of prohibition from being attached is stated in Paragraph 1 and 2, Article 382 in the Code of Civil Procedure.

Article 382 of Code of Civil Procedure provides:

1. Salaries, wages and other claims in the nature of compensation for work may be attachable only within the limits set forth below, in respect of the balance remaining after deduction of taxes and social insurance premiums from the amount receivable by the debtor in execution on the date of payment of such compensation:

(a) an initial amount of up to 200,000 riels per month shall be immune from attachment;

(b) no more than one quarter of the amount from 200,000 riels to600,000 riels per month may be attached;

(c) no more than one half of the amount from 600,000 to 2,000,000 riels per month may be attached;

(d) no more than one half of the amount from 2,000,000 riels to 4,000,000 riels per month may be attached;

(e) no more than two thirds of the amount from 4,000,000 riels to 6,000,000 riels per month may be attached; and

(f) the entirety of the amount exceeding 6,000,000 riels per month may be attached.

Claims to receive livelihood support, educational support, medical support or other support having the objective of protecting the life of the debtor in execution cannot be attached.

Article 470 of Civil Code prohibits the debtor from asserting the extinction of obligation based on the set-off regarding non-attachable claims.

4.2. Set-off contract

Set-off contract is a contract that extinguishes the mutual obligation via an agreement of both parties even though both obligations do not have identical subject-matter (Article 464 of Code of Civil Procedure). In principle, one party may declare the intention of set-off when the requirements for statutory set-off are satisfied, but even though the requirements for statutory set-off is not satisfied, the party of the set-off contract can agree to extinguish the obligation via a set-off, which is one of the example of the principle of private autonomy. However, the right of a third party who is ignorant of such particular contract may not be infringed by the creation of set-off contract.

4.3. Effect

In case the requirements for set-off are satisfied and the party declares the intention of set-off, two effects will arise:

a) Mutual obligations are extinguished to the extent that respective amount are equal.

b) Effect extinguishing the two obligations by set-off arises retroactively as of the time that the obligations became suitable for a set-off. It means that both obligations become extinguished when the date of both obligations are due for performance.

Case Study

Both X and Y have agreed that X borrowed $1,000 without interest from Y on 17 June 2010 and the due date for performance is on 17 June 2011, but the interest for delay is agreed to be 10% per year.

Y also borrowed $1,000 from X on 17 May 2010 without interest and the due date for performance was agreed to be 17 May 2011 and the interest for delay was also agreed to be a 7% per year. X declared an intention of set-off on 17 August 2011. How much of claim rights of each party remain?

(Conclusion and Grounds)

In aforementioned Case Study, the requirement was satisfied on 17 June 2011. X declared his intention of set-off on 17 August 2011; according to Article 466 of Civil Code, "the set-off shall have effect of retroactively extinguishing the two obligations as of the time that the obligations became suitable for a set-off"; therefore, the mutual obligations of X and Y were deemed to be extinguished on 17 June 2011; and Y cannot demand the interest for delay because the obligation that X owed Y was deemed to be extinguished on 17 June 2011, so a delay does not occur for X's obligation. But X can demand a month which calculate in case is $5.83 because the obligation that Y must pay is considered to be extinguished on 17 June 2011, and the obligation that Y must pay X according to the contract is on 17 May 2011.

By the way, according to art.330, benefit of time is presumed to be established for the sake of debtor and it can be renounced. Therefore, In this case, by renunciation, X can set off his obligation prior to June 17 2011, his original due date while Y needs to wait until June 17 2011 to set off because Y is not the obligor and thus cannot renounce the time of benefit regarding claim right of Y against X.

4.4. Obligation under Attachment Order

Based on Article 471 of the Civil Code, the party is allowed to set off the mutual obligations but it is not allowed in some cases.

First of all, the debtor shall have acquired his claim right against the creditor in advance of attachment over the claim right against the debtor in order to set off the attached claim right and the claim right of the debtor. In addition, the due date of the claim right of the debtor shall come at the same time or earlier than the due date of the claim right of the other party in general. This is because the debtor shall not expect to set off the mutual obligations by not performing his obligation after the due date in case due date of the attached claim right comes earlier. However, special agreement based on Art.471-2 can make the debtor set off without regard to the due date of both obligations.

Case Study

X and Y have the mutual obligation. Both obligations occurred on 1 January 2011, and due date of X's claim right is on 1 June 2011, and due date of Y's claim right is on 1 July 2011. Can X assert the set-off after the attachment order?

1. The court decides to attach the claim right of Y (X's obligation) on 10 July 2011 upon Z's motion.

2. The court decides to attach the claim right of Y (X's obligation) on 10 May 2011 via Z's application.

3. The court attached the claim right of X (obligation of Y) at the date of May 1 2011 based on the application of Z. Can Y assert set-off after the attachment order?

(Conclusion and Grounds)

1. In this case, X can assert set off because he acquired his claim right against Y and also due date of claim right of X comes earlier than Y's claim right.

2. Even though attachment order was issued in prior to the due date of both claims, X can set off. This is because, when the due date of attached claims comes at July 2011, the due date of X's claim right would have come until then (June 2011) and thus the declaration of set off by X shall come into effect retroactively to the June 1 2011, which is earlier than due date of Y's claim right.

3. In this case, Y acquired his claim right in advance of the attachment but the due date of claim right of Y comes later than X's. Therefore, Y needs to make a delay of performance in order to set off but it is not worth protection and thus it is not allowed (Proviso of Paragraph 1 of Article 471).

The following is the example related to special agreement based on Paragraph 2 of Article 471.

Example: A deposited $10,000 at B Bank on 1 May 2010 and the due date for performance was on 1 May 2011, and on 1 June 2010, B lent A $10,000 and the due date for performance was on 1 June 2011. The money that B deposited was attached by C on 1 April 2011. B lent A the money because B expected that he had the counter-obligation (deposited money which was considered as security).

In this case, as explained above, B may not set off because the due date for B's claim right comes later than A's. However, it is possible for B to set off if A and B make a special agreement in advance. In reality, in practice in Japan, banks almost always makes such special agreement so that a bank can set off without regard to the due dates of mutual obligation.

5. Release and Merger

5.1. Release

Release is one of the reasons leading to the extinction of obligations and is a unilateral legal act. Therefore, the creditor can declare his unilateral intention to release the debtor from obligations.

The creditor can declare intention to release the obligor from all obligations and can also declare the intention to release part of the obligations. Article 474 of the Civil Code states that *the creditor can release part of the obligations.*

For example, based on the contract of loan for consumption in which the debtor borrows 1000 dollars from the creditor. In this case, the creditor can release 300 dollars from the total 1000 dollars obligations or the creditor can also declare the intention to release the obligations to pay the interest so on.

The creditor can declare the intention to release the debtor from the obligations only if the creditor is entitled to dispose of his claim. The creditor who is entitled to dispose is, in most cases, the normal creditor. However, sometimes such creditor shall not be entitled to dispose his claim because he/she has lost the rights to dispose in such a case where his claim is attached. Therefore, the creditor cannot release the obligations.

Article 475 of the Civil Code states that if an obligation is under attachment by a third party or the power of the obligee to dispose of the obligation is restricted due to any other reasons, the creditor cannot release the obligor from obligations.

5.2. Merger

5.2.1. General principles

In case where an obligation and claim belongs to one and the same person, it is useless for such an obligation or claim of the same person continues to exist. Therefore, it is reasonable to consider that the obligations shall be extinguished as in the case where obligation is performed.

This is the reason for considering merger as the reason for the extinction of the obligations.

5.2.2. Exceptional Rule

According to Article 479, Paragraph 2, if the claim comprises the object of a right possessed by a third party, such claim is not extinguished by merger.

The example of the exceptional rule is the case that the obligation which shall be extinguished comprises the object of the pledge of the third party or the object of the attachment by the third party or the object of other rights of the third party. If the obligations shall be extinguished by merger, it shall affect the interests of the third party so it is necessary to state that the claim rights or obligations shall not be extinguished in such case.

Section 9 Extinctive Prescription

1. Introduction

We have already studied the prescriptive acquisition. Basic philosophy is similar and as follows:

a) Stability and maintenance of social order

If the circumstances of the fact last long period, those circumstances shall be trusted and other legal relationships shall be created according to those circumstances. Therefore, it is reasonable to avoid a revocation of the long-term circumstances to maintain social order.

b) Reducing difficulties in collecting evidences

c) There is no need to protect "persons who are sleeping on the rights (who doesn't exercise the right) "

If the right owner leaves the circumstances which do not reflect the relation of rights for so long, this right owner shall not deserve to be protected by law.

2. Definition

Extinctive prescription regarding claim refers to the extinction of claim based on the fact that the creditor is not exercising the claim during the specified period.

3. Requirement

3.1. Prescriptive Period

3.1.1. Starting Time

Pursuant to Article 481 of the Civil Code, generally, the prescriptive period runs from the time that the claim is capable of being exercised.

"The time that the claim is capable of being exercised" means the period during which there is no legal obstacle in exercising the claim.

Please note that in some cases the time of the claim arisen and the time that the claim is capable of being exercised is different.

For example, if there is a designation of time certain for performing an obligation, the creditor cannot exercise his claim before such defined time. Therefore, the extinctive prescription period runs from that time.

If there is a designation of time uncertain for performing an obligation, the creditor cannot exercise his claim before such defined time. Therefore, the

extinctive prescription period starts running from the time when such time uncertain arrives.

If the time for performing an obligation is not specified, the creditor may demand performance at any time. Therefore, the extinctive prescription period starts running from the time when claim occurs.

3.1.2. Length of Period

In principle, the extinctive prescription period for claims is five years (Article 482). However, in respect to the claim over the cost of dealing purchase, or service between manufacturer, or merchant selling to a person who is not a merchant, the length of period is only two years because the claim of consumer in the operation of the consumer is difficult to seek as well as to maintain the evidence of payment; therefore, the Code stipulates a short period (Article 493). For example, A purchased goods at C's stores on June 1, 2011 without payment. Therefore, the extinctive prescription is only 2 years running from June 1, 2011.

With regard to the extinctive prescription period for a claim that is definitively established through a final and binding judgment, a judicial settlement, or other determination having the effect of a final and binding judgment shall be five years from the time when it is definitively established, even where a prescriptive period of original claim is otherwise established by law. However, where the time for performance has not occurred as of the time that the claim is definitively established, the extinctive prescription period regarding claim is five years or two years from the time that is established to perform the obligation has arrived (Article 484).

3.2. Invocation of Extinctive Prescription Regarding Claim

3.2.1. Necessity of Invocation of Extinctive Prescription Regarding Claim

According to Paragraph 1 of Article 486, a court cannot render a judgment based on extinctive prescription regarding a claim although the court is aware of the extinctive prescription regarding a claim because in case the court may be permitted to invoke extinctive prescription regarding a claim, it will violate the "principle of private autonomy". Moreover, such invocation is the benefit of the parties. Thus, the invocation of extinctive prescription regarding a claim of a person possessing the interest is necessary for the court to judge in order to issue the judgment based on the extinctive prescription regarding a claim.

3.2.2. Person who Can Invoke The Extinction of Prescriptive Period

In principle, person who can invoke the extinction of prescriptive period regarding claim is only the obligor, a joint obligor, a guarantor, a third party

security provider and a third party acquirer, but in the provision of Paragraph 2 of Article 486, a person possessing a legal recognized interest may also invoke the extinction of prescriptive period. The person possessing a legal recognized interest is not specifically determined whether which type of person is considered as the person possessing the legal recognized interest; consequently, it depends on the interpretation of law; however, such interpretation must not be made beyond the scope and purpose of Article 486. The interpretation about the person possessing the legal recognized interest must take account of whether such person is recognized as a person who is entitled to invoke the extinction of prescriptive period regarding claim or not.

3.2.3. Scope of invocation of extinction of prescriptive period

Based on the principle of subordinate nature of real security rights, in case the obligor invokes the extinctive prescription period regarding claim against the obligee, the interest arising from such invocation is imputed with respect to a third party too. For example, A borrowed money from B and C furnished his lad as hypothec. After that, when the prescription was expired, A invoked the extinctive prescription period regarding claim, and the court decided in favor of A to be exempted from the obligation based on the extinctive prescription period regarding claim; in this case, the hypothec that C had furnished to secure the obligation of A was also automatically extinguished. On the contrary, where extinctive prescription regarding a claim is invoked by a person having a right to do so other than the obligor, the invocation is effective only as between such person and the obligee, it does not have an effect upon the obligor or other person (Paragraph 3 of Article 486) in the example above, if C invokes the prescription of obligation of A, C can be exempted from exercise of hypothec right (subordinate nature) but such invocation doesn't affect the legal relationship between A and B. therefore, A needs to invoke by himself to discharge his obligation and A also can opt not to invoke the prescription and can perform his obligation if he wants to.

4. Effect

Extinctive prescription period regarding claim has the retroactive effect from the commencement of extinctive prescription period (when the claim is capable of being exercised), which means, if the extinctive prescription period has elapsed, claim is retroactively therefore extinguished from a commencement of extinctive prescription period and the obligor is exempted from paying the interest or compensation of other damages in a duration of commencement of prescriptive period. For example, A borrowed B $100 and a due date was on January 1, 2006. Until January 1, 2011, B sued A to demand for money. In this case, because the

prescription had been elapsed for five years, the claim can be extinguished by invocation. When the claim was extinguished, A did not need to pay the interest or to compensate for damages to B for the period from January 1 2006 until January 1, 2011 either, as well as the principal money due to the retroactive effect of extinctive prescription regarding claim as provided in Article 485.

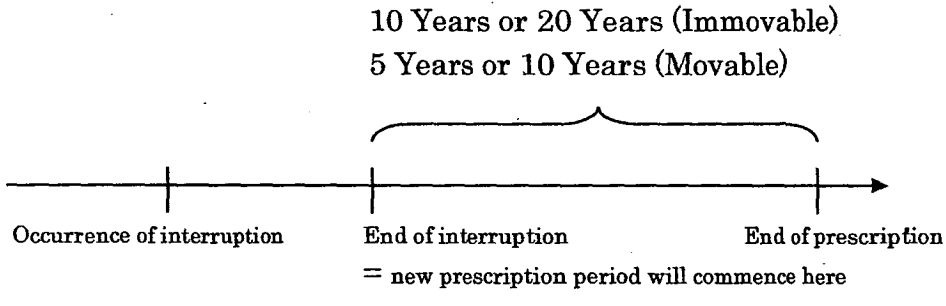
5. Defense

5.1. Interruption of Extinctive Prescription Regarding Claim

5.1.1. Intention

The interruption of extinctive prescription regarding claim is a cease of running of extinctive prescription period in the case where the grounds for interruption exist. In this case, the interruption of extinctive prescription thereof is not only an interruption of running of extinctive prescription period for a period of time, but it is considered that the prescription period that has run so far does not have a legal meaning. Therefore, where the ground for interruption is extinguished, the period of prescription will commence or begin anew. This point is contrast with the suspension of prescription that period of prescription will continue from the time that the ground for suspension is extinguished.

5.1.2. Case of Interruption of Prescription



5.1.3. Grounds for interruption

The ground for interruption is stated in Article 489 of the Civil Code. This Article sets forth three grounds for interruption of prescription:

a) Filing of a lawsuit, participation in a bankruptcy proceeding, or the equivalent exercise of a claim;

b) An act of execution or issuance of a preliminary injunction; or

c) Partial repayment, payment of interest, provision of security or acknowledgement of the existence of the claim by some other methods.

The grounds of (a) and (b) is the ground for interruption because it makes it clear that the obligee has an intention to exercise his right and thus he is considered diligent enough. The exercise of the right refers to the exercise of the person having the right through the court. Where the condition of exercising the right is extinguished because of the dismissal of an action without prejudice, discontinuance of an action (Article 491) and the cancellation of attachment (art. 492), the effect of the interruption of prescription will not exist. But if the right-holder demands the party without the filing of lawsuit upon the demand and does not take any action to file a lawsuit within the period of six months, the effect of interrupting the extinctive prescription does not exist (Article 495). Therefore, the demand stated in Article 495 of the Civil Code is not the ground for interruption, but the suspension of prescription.

The ground of (c) is the positive recognition of the existence of claim by obligor.

So, it is necessary to protect the benefit of obligee who has waited and has not exercised the claim because he believes the obligor's actions.

5.1.4. Effect of Interruption of Extinctive Prescription

Article 490 of the Civil Code states the effect of interruption for two cases as follow:

- Where extinctive prescription regarding a claim is interrupted as against an obligor, such an interruption also occurs to other persons.

- Where extinctive prescription regarding a claim is interrupted against a person who is not the obligor, the interruption is effective only between the obligee and such person except otherwise stated in Article 493 which says that even though an act of execution or preliminary injunction is conducted as against a person other than the (obligor), where the obligor is notified of such an action the effect of interrupting extinctive prescription regarding claim also occurs against the obligor.

For example, X borrowed money from Y. Z has furnished his land as security (hypothec) to secure X's obligation.

In this case, if Y files a lawsuit against X to demand the claim arising from the contract of loan for consumption, it will interrupt the extinctive prescription against every person. However, if Y enforces his hypothec, it will create the effect of interruption of extinctive prescription against only Z if X is not notified (Article 493).

5.2. Suspension

5.2.1. Intention

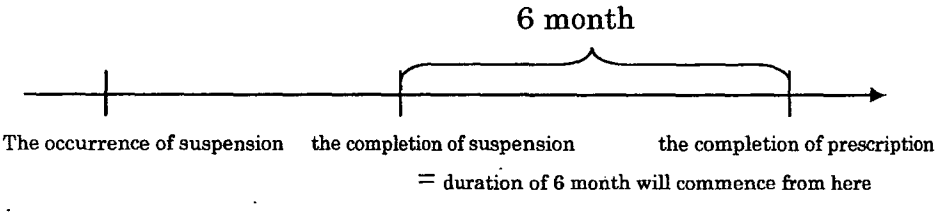
Suspension of extinctive prescription regarding claim is provided from Article 495 to 498 of the Civil Code. The suspension of prescription is a cease of running of prescription within the duration of suspension only. The suspension thereof is just to make a prescription incomplete. This means that it just stops running of the prescription in the final stage that is the time of completion period of extinctive prescription regarding claim.

5.2.2. Grounds for Suspension of Completion of Extinctive Prescription Regarding Claim

Based on Article 495 to 498 of the Civil Code shows the grounds for suspension of completion of extinctive prescription regarding claim in the following:

- Demand (Paragraph 1 of Article 495), but only once demand (Paragraph 2 of Article 495)
- Minor or incompetent persons (Article 496)
- Spouse (Article 497)
- Natural disaster (Article 498)

5.2.3. In Case of The Suspension of Completion of Prescription



(1) Demand

When the period of extinctive prescription regarding claim is nearly over, if the right-holder doesn't have the time to interrupt the prescription such as filing a lawsuit... the right-holder is entitled to receive the postpone of six months of the completion of extinctive prescription upon the demand to the obligor (without filing of lawsuit)

Therefore, this Article determines that the demand is the ground for suspension of the completion of prescription. But the demand for satisfaction shall be made only once. Due to the dismissal without prejudice or discontinuation of the lawsuit, a demand shall be deemed to have been provided continuously from the time the complaint was filed until the time the lawsuit was dismissed or discontinued. In this case, the extinctive prescription period is suspended until six months have elapsed from the date of dismissal or discontinuation. Another

case is deemed as continuous demand during the pendency of the lawsuit where the right-holder asserts his right as a defendant (Paragraph 2 and 3 of Article 495).

(2) Minors or incompetent person

Suspension of extinctive prescription period in case of minors or incompetent persons is stipulated in Article 496 of the Civil Code. This Article is provided to protect the interest of the minor and incompetent person which the extinctive prescription is completed because they didn't take any action to suspend the extinctive prescription regarding claim as they are minor or incompetent person without legal representative within six months prior to the extinction of prescription. Therefore, the extinctive prescription period for claims is not completed within six months after the time such person attains the age of majority or has a legal representative if the minor or incompetent person does not have legal representative within six months prior to the completion of an extinctive prescription period.

(3) Suspension of extinctive prescription regarding rights between spouses

Taking action of interruption of extinctive prescription regarding claim between spouses is difficult; as a result, laws allow a proper time in order to suspend the completion of extinctive prescription regarding claim after the marriage is dissolved. In this case, it is said in Article 497 of the Civil Code that "Where one spouse possesses a right with respect to the other, extinctive prescription regarding such right is not completed until six months elapses after the marriage is dissolved."

(4) Natural Disaster

Suspension of completion of extinctive prescription due to natural disaster is set forth in the Article 498 of the Civil Code. This article refers to that a right-holder is unable to take action to interrupt extinctive prescription because of natural disaster such as storm, earthquake, flood, other force majeure...etc. extinctive prescription is not completed until six months elapses after the time that such force majeure ceases to exist.

5.3. Renunciation of Extinctive Prescription Regarding Claim

The benefit of extinctive prescription cannot be renounced in advance. The benefit of an extinctive prescription the period for which has already been completed can be renounced (art. 487 of CC). This article is drawn up to protect an obligor's interest, which means that any special agreement made by the obligor to renounce the benefit of extinctive prescription regarding claim in

advance doesn't have the effect. However, the benefit of an extinctive prescription the period for which has already been completed can be renounced.

For example, if A, an obligor, borrowed money from B, an obligee. Because he wants the borrowed money, Mr. A agreed in advance in the contract that he won't invoke the extinctive prescription regarding the claim which means that even though the claim is extinguished by the prescription, he still agrees to pay.

The law doesn't allow such agreement prior to the renunciation of benefit of extinctive prescription regarding claim because the prescription is not yet completed. It is the principle to protect the benefit of the obligor. In contrast, if the time of paying debt is over five year from the due time to pay, it means that the benefit of prescription is completed; so, obligor may renounce such benefit of prescription.

6. Extinctive Prescription Period Regarding Property Other Than Claim or Ownership

Extinctive prescription period regarding property other than claim or ownership is 10 years, excepted as otherwise provided in other provision in Civil Code or other laws.

For example, A owns a plot of land and B is the owner of a piece of land too. A and B agree to create servitude. In case that B doesn't exercise his servitude within 10 years, A is able to extinguish the servitude by the prescription.

Section 10 Assignment of Claims

1. Assignability

1.1. General Rule

The claimant may assign the claim unless the nature of claim is inconsistent with assignment according to art.501-1, 2.

Example of the claim whose nature is inconsistent with assignment is employer's claim against her employee (the personality of the creditor is important in employment relationship.), the claim that the debtor shall draw the portrait of the creditor (the change of creditor also changes the content of claim.).

1.2. Special Agreement of Prohibition of Assignment

As explained above, assignment of claim is free and as explained later, the involvement of the debtor is basically not required. Therefore, if the debtor doesn't want the creditor to assign the claim to another, the debtor shall make special agreement with claimant according to art.501-3.

Such an agreement is, however, not almighty because the prohibition agreement may not be asserted against third party in good faith without gross negligence.

2. Requirements for Assignment of Claims

Requirements for assignment of claims are

1) agreement between the assigner (creditor) and the assignee (the third party)

2) consistent nature with assignment

3) no special agreement of prohibition of assignment

3. Perfection

There are two kinds of perfection. One is against debtor and the other one is against other assignee.

3.1. Against Debtor

The notification by assigner or consent by the debtor is perfection.

This notification or consent doesn't require any special form.

The reason why the assigner shall notify is to prevent the false assignee from giving a false notification.

Once notified or giving consent, the assignee shall not deny the effect of assignment.

X has a claim right against Y. X assigned the claim right (sold it) to Z.

1) Before notification, Y can reject the performance against demand of Z.

2) Even if Z gives the notification, Y also can reject the performance against demand of Z because it is not quite sure if X really assigned the claim to Z.

3) After being notified by X or consenting, Z may not deny that Y is a creditor.

3.2. Against Other Assignees

If the assigner assigns the same claim right to more than one party, of course, only one assignee can assert as an assignee against others. (Losing party can only demand compensation against assigner based on breach of duty.)

In case, there shall be a criterion to determine which one of assignment shall be effective among assignee.

That is notice or consent in date-certified writing.

X has a claim right against Y. X assigned the claim right (sold it) to Z1 and then Z2.

First, X just notified the assignment between X and Z1. Then X notified the assignment between X and Z2 with date-certification.

Z1 and Z2 demand the performance against Y.

Then, what if there is more than one assignee who have notified in date-certified?

X has a claim right against Y. X assigned the claim right (sold it) to Z1 and then Z2.

1. X notified the assignment between X and Z1 with date certification of the 1st of November. This notification was handed over to Y on the 6th of November. Then X notified the assignment between X and Z2 with date-certification of 3rd of November. This notification was handed over to Y on 4th of November.

Z1 and Z2 demand the performance against Y.

2. In case 1, the time when the notification reached is not clear.

In this case, criterion is not certificated date but the time when the notification reaches to the debtor according to art.504-1.

If chronological order is not clear, both party can demand to full extent and the obligor can discharge his obligation by performance for one party. In other words, the first come, the first served in this case according to art.504-2.

4. Effect of Notification and Consent

If the consent without objection is given to the assignee, assignee may demand against the debtor and the debtor may not assert the defense according to art. 505.

This article prevents the debtor from raising the objection which he hasn't mentioned in order to protect the trust of the assignee.

X has a 100 dollar claim right against Y. X assigned the claim right (sold it) to Z

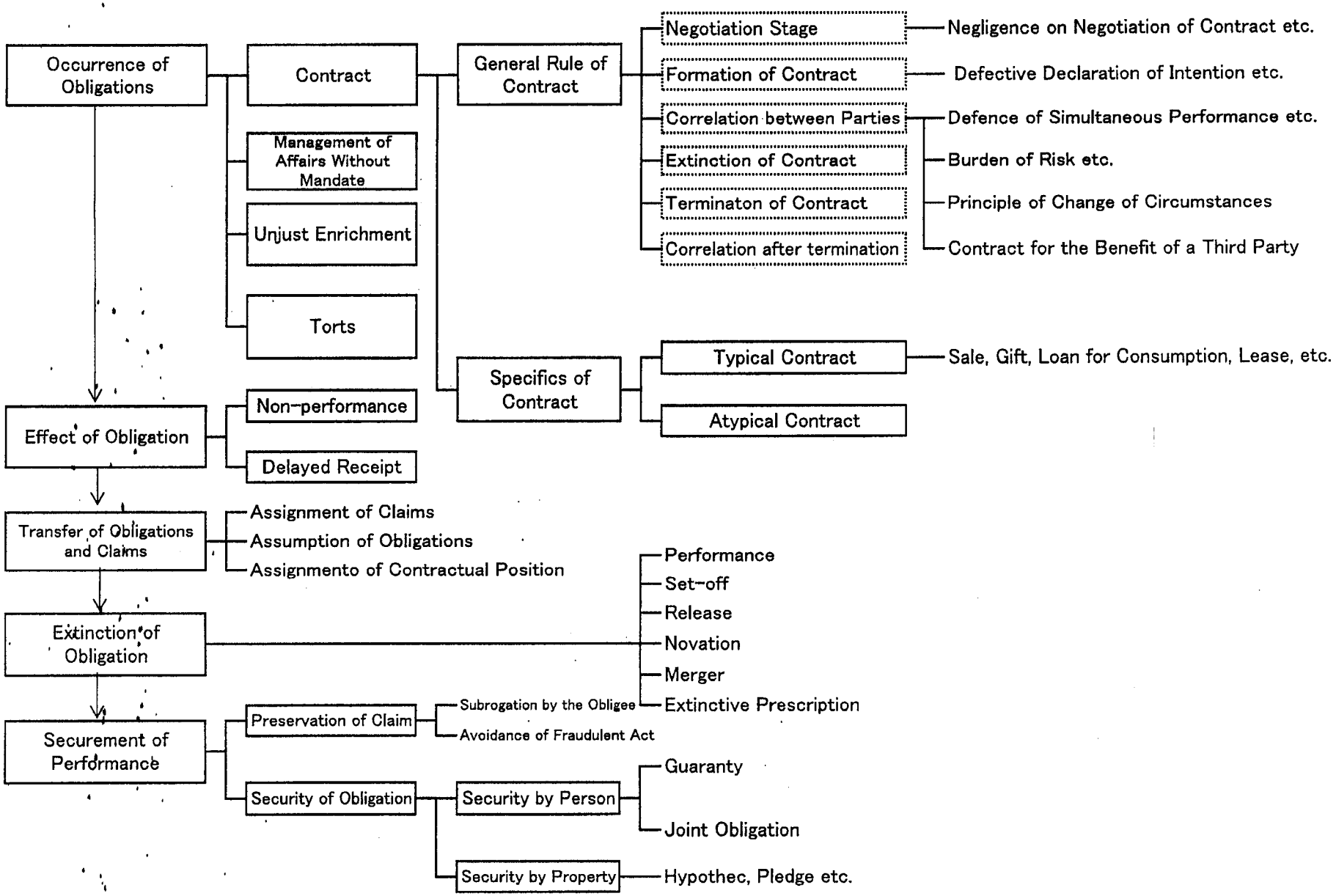
1. X released Y from the 500 dollar obligation and then notified the assignment of "1000 dollar " claim right between X and Z and Y consented it without raising objection regarding release.

2. The claim right of X arisen from the sale contract that X shall sell the car at the price of 1000 dollars. X sold his claim to Y before delivery of the car to Y. Without regard to Y's defense of simultaneous performance, Y consented without raising objection.

3. when the claim right was assigned, the obligation had been already performed. Without regard to such performance, Y consented the assignment of 1000 dollars. In this case, Y needs to perform again for Z. in addition, Y can demand the unjust enrichment against X based on proviso of art.505.

Annex

【Annex 1】 Overview of Claim and Obligation



【Annex 2】 Chalacter of Typical Contract

	For Value or Gratuitous	Bilateral or Unilateral	Consensual or Real or Formal	Type of Contract	
Sale	For Value	Bilateral	Consensual※	Transfer	One-time
Exchange	For Value	Bilateral	Consensual※	Transfer	One-time
Gift	Gratuitous	Unilateral	Consensual※	Transfer	One-time
Loan for consumption (without interest: principle)	Gratuitous	Bilateral	Consensual	Use	Continual
Loan for consumption (with interest: exception)	For Value	Bilateral	Formal		
Lease	For Value	Bilateral	Consensual	Use	Continual
Loan for use	Gratuitous	Unilateral	Real	Use	Continual
Mandate(without remuneration: principle)	Gratuitous	Unilateral	Consensual	Service	Continual
Mandate (with remuneration: exception)	For Value	Bilateral			
Contract for work	For Value	Bilateral	Consensual	Service	Continual
Contract for employment	For Value	Bilateral	Consensual	Service	Continual

※ In case of transfer or acquire of ownership on an immovable, it shall be a formal contract.

【Annex-3 Formation and Validity of Contract】