Title : Law of Obligations II

Contract for a Completed Piece of Work/Mandate/Negotiorum Gestio

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[0:00]

So we talked about contract for completed piece of work last time, and one thing which is a little bit tricky is whether....the owner can terminate the contract; in another term, owner is a little bit technical, it doesn't necessarily mean that that party owns something, it's just the party who asks the contractor to carry out the job, so that's owner.

And if the work is completed, then usually, termination is not allowed. Okay?

But...if the completed work does not serve the purpose, in other words, if it's useless, then termination is possible.

For instance, but, it, it depends whether the work is about construction of building, or installations, on the one hand, and other kind of work, for instance prepare a machinery for example, then the termination is possible, if it is not building or installations, if the completed work is useless, then of course you can terminate it even if it's apparently completed.

But have a look at article 668, article 668, so it says if the purpose of the contract cannot be achieved, due to the defect of the completed work, the contract may be terminated.

[3:08]

But, buildings or other installations to the land.....the contract may not be terminated.

Now regarding the completed work which is other than buildings, and installations, yes, there is no doubt that you can terminate it.

But what about buildings and installations, if it is completely useless?

Do you think it is possible to terminate or not?

If it cannot serve the purpose at all?

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Now usually, if a building is completed, even if the purpose cannot be served, still, the completed building may have some use, some other use.

Some use other than the purpose the owner had in mind initially, right?

That's why there is this provisor.

And that's usually the case if the building is completed.

Although it may not be used for.....the original purpose it could still be useful.

But we can perfectly imagine a situation where the completed building or the completed installations are really useless.

Then can you terminate?

For instance, it's difficult to imagine, but, how about a reservoir?

Reservoir to store oil.

oil tank buried in the ground.

It's completed, but suppose it's leaking, and it's impossible to repair, for instance.

If it's leaking, but if it's possible to repair, of course, you just repair it, that's fine.

But if it's too expensive to repair, and it cannot be used to store reservoir, oil reservoir, what use can it be?

What use can you have?

In that case, can you terminate the contract, and demand the contractor to remove it, and put the ground back to its original condition?

[6:11]

What do you think?

(Students talking)

Yeah that should be possible.

What do you think?

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Completed oil reservoir, but it's leaking, so you cannot put the oil, any other liquid, no liquid can be put there, and does the owner still have to put up with that kind of installations on the ground?

If you cannot put the oil, perhaps you can put some other objects in it, storage purpose?

Maybe?

But is it just, is it reasonable to force the owner to put up with that kind of burden?

I don't know.

If it can be used for some other commercially reasonable purpose, of course you cannot terminate it, but if it's really difficult to find any reasonable purpose for the completed installations or completed buildings, I think in spite of article 668, owner can terminate.

Anyway, we will move on.

Payment for the completed work.

Now it depends on the parties' agreement, okay? Cash or kinds payable upon completion of work and delivery.

That's all fairly easy to understand

Regarding the building project, however, you need to understand a little bit about the practice.

So what happens is the parties agree that payment shall be made periodically, okay?

If the building project requires couple of years to complete, then they would agree that payment shall be made monthly based on the agreed method.

[8:58]

However, the practice in the building industry is that they would agree that the payment is only an advanced payment not a payment for the completed stage of work.

There is some difference between the concept of advanced payment, on the one hand, and payment for the completed stage of work, on the other hand.

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Because, the parties, if the parties agree that the payment is simply an advanced payment, that means that there shall be no payment by stage.

Only, owner pays the contractor not as a payment completed portion but pays as an advance, which means owner lends money to the contractor.

Periodically owner lends money.

How much owner shall lend money they will agree upon the method.

They can agree either just fixed amounts monthly, regardless of the progress of the work, or they can agree that the loan, basically owner offers loan to the contractor, but the amount of loan shall be decided in accordance with the progress of work.

But either way it is not a payment for the completed stage, but a loan.

That's what parties quite often agree, and then they will adjust what happens is that.

So the entire project would require, like, several years, okay?

But every month a certain agreed amount will first be paid to the contractor, but that payment is a loan.

And then the owner shall verify, and usually that payment is on the basis is of the contractor's demand.

Contractor claims that we have spent that much money to complete this much work. And then, owner just makes a loan, an advanced payment.

[11:58]

And then owner verifies whether that claim is justified.

All these expenses, men-power, material, all these claims are verified and there will be an adjustment saying you claimed too much about this item, and all these adjustments will be made.

But then there will be, next month, there will be another loan, another advance, and then new adjustment.

That's quite often the case, but that's the parties' agreement.

If there is no detailed agreement, then the payment will be considered to be payment in respect of the completed stage of work.

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And in that case it's not considered to be a loan for the party.

There is a case 2001 ek 1386, in that case, a substantial amount of advance payment was made to the contractor.

So, at an initial stage, let's say, 30% of the total contract price was paid to the contractor as an advance payment.

And then first the installment date came and about, by that stage 10% of work has been completed.

So let's say the total contract price is 100, and advance was thirty and the ten percent of completed work, it would mean ten… the work which is worth ten has been completed, right?

And the owner says to the contract “I already paid you thirty percent so I don’t need to pay anymore.”

That’s the owner’s argument and court held that “No, owner cannot do so.”

So because this was an advanced which should cover the entire period.

So you can set off only ten percent of that, right?

So only three percent can be set off and then the remaining seven must actually paid to the contract.

[15:07]

So this concept of advance is very important to understand in the construction industry and several courts has several couple of provisions to ensure the contractor to secure payment from the owner.

So contractor can have lien and also contractor may demand hypothec to be registered.

This demands, contractor’s demand of hypothec it can force the owner to register the hypothec, and if the owner refuses to register the hypothec then the contractor can sue the owner and with the judgment hypothec can be registered.

The counterpart has the duty to cooperate so that contractor can complete the work or carry out the work and if the work was disrupted or prevented from being completed because of the owner’s non cooperation; then the contractor can demand full-payment of the contract price.

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That's all fairly straight forward.

What about the risk, here means the unforeseen circumstances which disrupts the work and which prevents the work from being completed or the unforeseen circumstance which destroys the completed work.

So you build a road, for example, and you are the construction company, and you completed a road, and when the road is completed the earthquake happened and then the road was destroyed.

[18:00]

Can you receive the contract price or do you have to build it again?

That's the question we ask.

So what is the rule?

What is the rule?

Okay. Okay. Okay.

Usually the basic principle is that as long as it is possible the contractor must complete the work.

Okay?

As long as it is possible contractor must complete the work but whether it's earthquake or whether it's strike or whether it's war if the war broke out and it's simply impossible to be there then the contracts will be discharged.

The contract will be discharged then it becomes impossible to carry out.

Then the question of risk allocation will kick in and under Korean law, the other party will also be discharged relieved all of the contractual obligation.

That means the builder, the contractor would not be able to receive anything if the other party is also discharged of the contractual obligation.

But if it is not impossible to complete the job, then the contractor must complete even if it requires much more additional expenses on cost on the part of contractor.

The contractor cannot ask the more money.

So obviously it is very unsatisfactory and incomplete.

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It is not a good situation.

So in the building contract, the party is specifically agreed upon various provisions to cope with that kind of unforeseen circumstances.

They also agree about when the contractor can demand more payment on what condition.

[21:00]

So they try to prepare for those unforeseen circumstances, but the important point is that if the work is completed and delivered, delivery is important not the completion is important.

Even if it's completed if it is not yet delivered and while it is not delivered if it's destroyed then contractor must make it again, right?

But if it's delivered, fine that's it. That's done, and if it's destroyed after delivery, the owner must pay.

But the problem is when the work is… if the work is a movable object, then the concept of delivery is quite easy to understand. If you physically hand over, then that's delivered.

But if it's real estate or if it's grew or other installations which you cannot physically hand over, right?

Then notice it is equivalent to delivery.

Notice means contractor notifies the owner saying that this work is completed, now you inspect.

So that's the critical moment, okay?

If that's done; and then if it's destroyed, then contractor is entitled to payment.

So the critical moment of passing of risk is delivery if it's physically able to deliver or notice if it's not possible to physically hand over.

Then notify the owner to take position of it.

Notice means now owner you can come and inspect and you can take position of it, right?

While the work is being done, it's physically not appropriate for owner to take position of it, right?

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But when it's completed contractor notifies the owner to take position of it, and that's the moment when risk passes to the owner.

[24:00]

Finally, owner can terminate at any time and for no obvious reason so that's termination at will.

To say that owner can terminate does not mean that the owner can do so without having to compensate.

Owner must compensate the contractor.

Owner can't terminate but must compensate the contractor.

Compensate what? For what?

What kind of compensation must be made?

If I asked the builder to build the house, my house, half way through I didn't like the contractor.

I terminate. I can terminate, right?

But what do I have to do?

Cost to the expenses, the manpower, the material.

So all the cost, of course, I have to pay that and the profit.

The contractor would have made if the job was completed. I have to compensate, of course.

Simply, this article means, article 673 means that the parties may be released from the contractual bonds freely at any time at will, right?

But the parties must make sure the other party does not suffer any laws.

So that's the idea.

The case 23.7296 is very important. Actually it's very important.

The termination at will is done not on the basis of breach.

So it is not dependent on any notion of fault. Okay?

It's not based on any notion of fault.

Therefore, the terminating party may not claim the other parties negligence or the

BY NC ND

other parties' fault to argue for reduction of compensation.

[27:00]

So no claim of contributory negligence would be allowed if owner terminates, the contract at will.

The owner must fully compensate the owner cannot say "You, contractor you are also negligent. So let's reduce the amount of compensation now I'll have to pay to you."

So no claim of contributory negligence permitted because it is a termination which does not depend on fault in the first place.

So no room for argument… for an argument for that my compensation to you should be reduced because of your fault, right?

Because it's not based on the fault in the first place.

However, duty to mitigate the loss is a different idea from contributory negligence.

So a [?28:10] pantomination by the owner, the contract is entitled to damages. Actual cost spent so far, and the profit would have enjoyed had the work completed, and there is no room for contributory negligence argument.

However, this party is, what you can describe, is the duty you need to mitigate the loss.

The contractor, if the contractor could reasonably use the resources, which will freed by the determination, to alternative contract, or could have sold the materials, the profit he could have enjoyed must be deducted from damages payable by the owner.

Now, this two concepts need to be distinguished, the notion of contributory negligence.

Now that's you have to be a bit careful, on the Korean law, this only means adjustment of damages, ok?

So damages are reduced in light of the fault of the victim, ok?

So victim's fault is taken into account in adjusting, in other words, in reducing the amount of damages. Now, imagine the timeline, ok?

[30:12]

A breach happened here, and that breach caused, so that's breach, that breach caused the loss to the victim, ok? But then the breaching party is at fault, of course!

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That's why the victim is entitled to compensation.

But if the victim also was at fault, then, the amount is adjusted. But these notion of fault, the victim's fault, these notions of fault refer to events which to place already and up until this time. Ok?

Maybe this party, did something wrong here and that party did something wrong there, but in anyway, its events which took place up to this point in time, right?

So that's the notion of adjustment on the basis of victim's fault.

However, do you [?31:30] to mitigate.

That notion of duty to mitigate refers to events which the victim who suffered loss, what the victim should have done after this had had happen?

In another example, let's say steel plate, or several hundreds steel plates were sold, and it was 40, the delivered steel plates are 40. However, the price of steel plate are going up and up and up in the market.

Now if the buyer, purchaser, had money, enough money, the purchaser could have purchased identical quality and quantity steel plates from the market rather than just waiting for the seller to deliver.

That is possible if purchaser has a lot of money and the steel price goes up.

[33:20]

Then if the purchaser had bought the replacement steel plate at reasonable intervals, then the loss would have been contained at that level, let's say, it was 100 per ton.

The contract price will 100 per ton. And the delivery date, and then inspection, oh, it's 40, then within reasonable time span, when it was about 120, if the purchaser had enough fund, right?

If purchaser had bought when the plate was 120, then the loss was contained at that level only, right? The loss would have been only at 20.

If the purchaser didn't do it, and now it is 150, and if the purchaser claims, "Look! Due to breach of your contract, I suffered now 50 loss."

Then the seller can argue you failed to take reasonable steps to reduce your loss.

If you have bought it at about that point, you could have bought it 120, and your loss would have been only 20, yeah? Since you didn't take that step, you claim that you have suffered 50, but I cannot pay you that much, I will only pay you 20.

That's the typical notion of duty to mitigate, right? That is what the party could have done after the breach had happened.

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It had nothing to do with victim's fault.

Leading up to the breach, leading up to the loss, so these two concepts need to be distinguished.

So in that case the court held that no room for an argument on the basis of victim's fault, but the duty to mitigate must be applied.

The case was about commissioning a sculpture, and the owner who commissioned the work terminated the contract halfway through.

[36:10]

And the contractor who is actually sculpture artist, the contractor claimed damage.

And the owner claimed that you are also at fault. And the court rejected that argument.

Instead, the court held that "Look! The contractor had prepared the stone which he was going to sculpt, and the contractor also prepared some base stand on which the sculpture will be placed, now those materials the contractor can sell or the contractor can use for other sculpting job, it's just a chunk of stone, which can be used for other purposes."

So those benefits must be deducted from the amount of compensation, ok? Any questions about the contract for completed piece of work?

(Student speaking)

Now moving on to mandate, mandate is a very, very versatile contract, which can be used for almost infinite range of situation.

Whenever you ask someone to do something for you, that is a contract of mandate.

So basically if a party requests the other party to do something for the requesting party.

It's contract of mandate.

[39:08]

It is not about the result. It's just the process or just carrying out the work, not about bringing about the result. Ok?

So even if it failed, still as long as efforts, reasonable efforts are made, contract of mandate is fulfilled. It's based on the trust, confidence between the parties.

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And in the origin it's a free service. It's between friends, you can ask a favor and you agree to do a favor to your friend.

So that's the origin of this type of contract. Like this typical expression, the colloquial expression in English, "Will you do me a favor?" that's the idea of that.

So fee arrangement is not a necessary element of this type of contract. It's free service.

However, if you incur expenses or costs to carry out the requesting party's request, then that cost and expenses need to be reimbursed. That is clear.

Fee is something completely different from expenses. Ok?

Fee is just a compensation for your skill or your service. That must be distinguished from reimbursement of expenses. So expenses must be reimbursed but fee need not be paid unless specifically agreed upon.

If there is no specific fee arrangement, their relationship is free service only expenses need to be reimbursed.

Agency is conceived in Korea, on the Korean law, in a very theoretical manner, agency is explained not as a contract, agency is explained as a theory or as a power.

[42:19]

So the party who makes a request is called "mandator."

And the party who accept to carry out the request is mandatarius.

It's a Latin term but there is no suitable English term for this so I just call use this "mandatarius."

In French, it is "mandataire." Now, this is a contract between these two parties right?

But since it is mandators' affairs, quite often this party may have to undertake legal obligations or legal rights on that parties behalf, on the behalf of that parties.

These are the three parties here.

Now in order to do that, this party should have the power of attorney to assume legal obligations or to acquire legal rights in his name.

Now on the Korean law, that power is explained separately from this contract of mandate, right?

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The reason is that not every mandate requires power of attorney.

Because the request, the favor may consist in some other non-legal just doing things, not necessarily, concluding contract.

[45:00]

So mandators' request may consist of any lawful manner of carrying out the mandators' affairs.

So even factual things, just factual manner of doing business or economic factual legal economic, non-economic, it includes everything.

But very often, contract of mandate would involve power of attorney being conferred upon the mandatarius.

Because mandator would implicitly allow mandatarius to assume legal obligations or legal rights to the extent, it is necessary to do to complete or to carry out the request.

93.4472 cases some are interesting, suppose this case involves a person who set himself on fire to commit suicide.

So police rushed to the scene and police took the suicide victim to the hospital.

So this man had severe burns all of his body and police brought that victim to the hospital and hospital emergency gave treatment and then there was more elaborate treatment to keep that man alive but ultimately that man died.

And the hospital incurred huge amount of hospital bill.

So who is one to pay?

The hospital's argument is that we carried out the treatment because you asked us to do.

"You" means the police.

"So you are the mandatory, and we are the mandatarius."

[47:55]

"If you did not ask us to do it, why would we have treated?"

"This is not our business. This is your business!"

"So you have to pay us because this is our expenses incurred in carrying out your

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request.”

How would you respond to that?

Do you think it′s convincing? The hospital′s argument.

What do you think?

Ultimately the court held that the lower court held accepted that argument.

Lower court accepted that argument.

Lower court found that there is even a statue to which force the hospital to accept the request from police to give treatment, the hospital are not permit to refuse to treat to patient.

So it is hospital are not the choice and also the police made a request, so it is mandate, contract of mandate, for police must pay.

That′s the lower court′s rule. Supreme court rejected that argument.

Saying that, it′s not police′s business.

It′s not police′s business.

Then how are you going to explain this situation?

Perhaps hospital was just carrying out the affair of the victim without any request from the victim.

Charge of business, Negotiorum Gestio.

So in reality, they might have been a police officer who specifically ask the doctor to treat this man you know, but that does not count.

The court held that it is not a request, that is not a contract of mandate.

[50:56]

You cannot say that there is a victim, so the situation is like this.

There is a victim and maybe his family members also there.

But then, there is a police who carried this man to the hospital, and there is a hospital.

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The supreme court's view is that even if police specifically ask the hospital to treat the man, that is not a contract of mandate.

Because it's not police affair.

It's not state's affair.

The state has no such business. Then what is it?

Well, both police and hospital just need some business which is his business, but without any request from that man.

So police just was also in the position of Negotiorum Gestor.

Gestor is the party who carries out somebody else's affair without the request.

So it's either that the very man or his family members that their affair, and if they ask the police "Please treat this man," then it's definitely mandate.

No doubt about it.

But police was just acting as a gestor, hospital was also acting as gestor.

There is no mandate because this party did not make any request.

So hospital can demand reimbursement of expenses, not from police, not on the basis of contract of mandate.

But against the victim, or victim's successors, on the basis of Negotiorum Gestio, on the basis of Charge of business.

[53:54]

So you need, how should I say, a sophisticated outlook about the dispute situation rather than just mechanically pursuing logical concept and just jumping at some elements of the dispute saying "Oh, this is the request and this is mandate."

Not that kind of, that's bit too primitive to simplistic view.

You need to have a far more global view and what would be the consequence if you hold that is a mandate, what would happen.

Anyway, so mandatarius' duty of care even if it's free service, mandatarius must exert good manages level of care.

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We have a case where sales agent sold heavy plant to purchase who later became bankrupt.

And there is no way of collecting the money from the purchase of these heavy plants.

And the manufacturer which is a seller sued the sales agent claiming that because of your negligent handling of my request I suffered loss, and that claim succeeded okay because sales agent was the mandatarius.

And mandatarius should have ensured that the adequate security is obtained before handing over the things sold.

So that's an example of what happens if the mandatarius carries out the request the negligent.

Another case is it takes management company.

[57:04]

Management company means the company which runs the apartment in this case it's an apartment, and the apartment management company were held liable to the residence of the apartment because they didn't properly investigate what is the better electricity supply contract.

So they just remained with the older unfavorable electricity supply contract, and the residence had been paying higher electricity bill.

And if they have diligently studied alternative contract, the resident could have saved the electricity bill.

So that's now the two more cases are a little bit more difficult.

Not to republic maybe it is not to republic.

Could you check whether it's judicial scrivener or whether it's notarize in judicial scrivener

Two thousand dot six one six seven…

So it is not to republic.

It is a parol legal assistant.

Licensed parol legal assistant something like that.

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But they have certain level of expertise, of course.

They must qualified, they must sit for the qualifying exam, and they quality is controlled by the professional party of parol legal, licensed parol legal.

[01:00:12]

So what happened was that a… the.. there was a hypothec under the name of A. Okay?

So A is the creditor, and A is credit is secured by this real estate; and then A's husband wanted this hypothec under his name, so A's husband ask the parol legal "Please cancel this and put hypothec under my name."

Obviously between these two they agreed.

I agreed that this hypothec should be in husband's name, so that's what the husband specifically asked the parol legal to do.

"Cancel this and then set up a new hypothec under my name."

And obviously the owner of the house also agreed that A should no longer be the hypothec owner and hypothec should be in B's name.

X is also in agreement, and B specially asked the parol legal to do it.

The problem, however, was that after the hypothec there was an attachment.

Another creditor C attached this estate, all right?

Now this attachment happened after the first hypothec, so hypothec was registered after this property was attached, and that is the situation.

And then B ask the parol legal to cancel this and then put hypothec under B's name.

Now if this happens, this will go away and this hypothec will be useless because of this attachment no disposal against, no disposal can win against the C, Okay?

So this hypothec will be basically useless the parol legal just did exactly what he was requested to do.

He had it canceled and he put in a new hypothec which is useless.

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So B sued the parol legal. You should what have you done even if I ask you ask to do, that's the point.

[01:03:10]

The court agreed the parol legal was negligent.

B does not have any legal knowledge where the parol legal has the professional expertise.

So what B wanted is just to change the name.

So in that case you just don't cancel this hypothec leave it alive and just transfer the hypothec to B instead of canceling this and put in a new hypothec after the attachment.

That's just so absurd, that's so negligent, so stupid.

If you don't study serious civil law, can't believe you end up doing that, and you have to pay you have to pay that will be the consequence of not studying civil law carefully.

All right so the duty, the parol legal had a duty, contractual duty, okay?

Contractual duty to explain that the existing hypothec could have been assigned to the husband without losing the priority of the attachment.

Another case importer of rice seed requested a customs broker to declare that this product is exempt from the customs duty.

And customs broker just did exactly what he was asked to do without carefully studying whether rice seed is indeed exempt from the customs duty or not.

And once it was declared to be customs a exemption was declared, customs authority disagreed and customs authority imposes tax and then very late payment tax, and penalty tax, and so the importer have to pay a lot.

And the importer sued the customs broker, 관세사.

Of course, customs broker, they are also professional party, and they also had level of duty commensurate with their expertise.

They claimed to have expertise.

Therefore, they must live up to that claim.

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That's the basically the idea.

[01:06:06]

Regardless of whether fee has been received or not, or whether fee has been agreed or not, madatarius must exert level of care which is the care of good manager.

And the lawyer is also madatarius who carries out somebody else's request, and the lawyer's mandate comes to an end when a case is concluded by a judgement.

On the Korean law, lawyer's mandate terminates when the case is concluded by judgement even if it is the lower court, even if the case is not final the lawyer's mandate terminate.

But this case shows that the duty of care includes even the service or advice which must be given even after the judgement.

Mandatarius must account to the mandator which means whatever mandatarius received in the course of carrying out the requested business.

Mandatarius must hand over to the mandator.

That's one of the duty to account.

Must hand over to the mandator what was received in the course of carrying out mandator's affairs.

Sub-mandate is permitted only in unavoidable circumstances.

Otherwise it would be breach of contractual mandate.

Madator's obligation is to reimburse the madatarius expenses.

[01:09:06]

Now it is the mandator's obligation to reimburse upon demand.

Okay?

And mandatarius can demand advance reimbursement or after having spent the…

This is a bit important.

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We will do it next time on Monday.

We will start from the reimbursement of madatarius expenses because in real life situation there are many interesting cases about this.

Very important point.

cc BY NC ND