Title: Law of Obligations

Mandate Negotiorum / Gestio

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[00:18]

Last time, I told you a little bit about the relationship between mandate and the theory of agency under Korean law.

Agency under Korean law is not about a contract.

It is a way of explaining the relationship between the parties because the relationship of agency can be created not necessarily by a contract most notably between parents and a child.

Parent has the power of attorney to act in the name of the child.

So in that case, there is no contract but there is a relationship of agency so Korean legislator decided to adopt the German approach and Korean civil code has provisions about the relationship of agency rather than the contract of mandate.

French civil code, on the other hand, does not have any provisions about the relationship of agency.

They talk entirely about mandate and other relationships where agencies created by statue, they just stipulate case by case, but anyway, so that′s the theoretical aspect of mandate and agency.

Mandatarius′ duty to account, duty to account means when the requested business is terminated or not necessarily when it is terminated but when it is appropriate and when it is required by the contract.

The mandatarius must hand over to the mandator what mandatarius has received.
To give you an example, if I asked my friend to buy a house so that I can move in,

and he bought the house but he does not have to buy in my name, right?

[03:17]

He can buy the house in his name.

That′s still a mandate enough.

There is no doubt about it.

What if my friend liked that house so much, and decides to have it for himself?

What if he says "Okay, I′m not going to ask you any money I just, you know, I bought this house, I like it and it′s my house, it′s my money, I didn′t ask you to do pay any money so I want to keep it."

Can I force my friend to hand over, to convey the house to me?

What do you think? Welcome back.

So what do you think?

He bought the house.

In the beginning he bought it in his name, with his all money, intending to ask reimbursement from me, right?

But then he changes his mind.

It′s his money.

He is not going to ask me to reimburse him, so he bought it in his name with his money, he wants to keep it.

Can I force him?

No, you can′t.

You think I can't.

How about you?

(Student speaking)

Because even if he bought in his name...

(Student speaking)

for your benefit.

So even if he bought it in his own name, I can force him to convey the ownership to me.

(student speaking)

Yeah I think so. I think so.

That's what contract is all about.

You cannot change your mind basically.

If my friend started out buying the house intending to hand it over to me and seek reimbursement from me, he cannot change his mind.

If he wants it, tough luck, he cannot have it.

Also, you must understand that contract of mandate does not necessarily involve agency, okay? So it's enough that I ask my friend to buy the house and he can choose the right method of doing it.

[06:08]

So he has a choice, either buy under my name in the first place using the agency mechanism, or he can buy in his name and then he has the contractual obligation to hand it over to me.

That′s the importance of duty to account, okay?

So mandatarius must hand over what he has received in the course of carrying out the money mandate.

Mandator′s obligation is to hold mandatarius free of any harm or any loss, so mandator must reimburse the mandatarius′ expenses.

Now there are important points to remember.

So reimbursement of expenses.

That′s perhaps the most important contractual obligation of the mandator.

Mandator is the party who makes request, okay?

There are two types of reimbursement.

One is after the fact.

After the mandatarius has incurred the expenses.

Mandator must reimburse, okay?

There is another kind of reimbursement which is advance.

Advance, it′s not really reimbursement but advance payment that means if mandatarius requests the mandator saying in order to carry out, I would need this much expense and demand the mandator to pay in advance.

This is very important you know.

You might think that yeah of course you can either ask reimbursement after, so after the fact, or before. Fine.

But in reality, it can be very interesting and important.

[09:03]

There was a case.

Let′s say a company A is a car manufacturer and company B bought it, okay?

Company B bought it.

But in their contract of takeover in the takeover contract they negotiated about various aspects of the car manufacturing business including, let′s say recall of vehicles which had already been sold by A, so A company was in business for many many years.

A company has been selling cars, right?

They manufactured many many cars.

Now A company is bought up by B.

They decided to, they decided that A company does not completely disappear.

But B company purchases most of A′s assets and clientele and everything and they negotiated about the vehicles which had already been produced and sold by A.

B company will do the recall service because A will no longer be in business, right? So that′s part of the deal of course.

Now vehicle recall could take place. You don′t know exactly what kinds of defects will emerge ,right?

But anyway, B will carry out the recall and then between them, they agreed the expenses of B company′s carrying out the recall of cars sold and manufactured by A.

How will A pay to B about that expenses?

So they also agreed about that, and in order to meet that expense, A company set up a fund and as and when B carries out the recall, B can withdraw money from that fund , some kind of escrow account, right?

Now that fund has some kind of a validity duration because A company does not want to keep the money indefinitely, so after certain years that escrow account will be liquidated and whatever remaining amount should go back to A.

[12:00]

That′s the arrangement.

And when the expiry date of the escrow account was reaching about to be over, B company realizes that there are going to be a lot of people who will steal the money recall.

Even regarding some known defect, let′s say time flies like this and then at this point a defect was discovered about a particular type of car manufactured by A and then the recall was announced and people start to bring in the car.

But then not everybody brings in, right?

So it will initially...a lot of people will bring it in, then it dies down, you know, the number of recall request dies down but it will continue, okay?

So there are bound to be expenses whereas this expiry date is about to be here then what about this expense?

That was a topic of big arbitration and the question is, ″can company B get the money from this fund in respect of expected costs like in this period?″

Can it get it from there, or can company B only get the money from the fund in respect of recalls which had actually been carried out when this escrow account comes to an end?

So that was the dispute.

Company A obviously argues that the agreements was, must be interpreted to place an absolute cut off point and tough luck if people did not bring the car in by that date.

The rest it′s entirely B′s responsibility.

That′s company A′s argument and I was asked to help company B.

They will have in difficulty how to prepare that argument and then I said ″Yeah, that looks like mandate.″

What... How... How is it a mandate?

Company A made a request to company B to do the recall of the cars which were manufactured and sold by A, so doing...company B is also car manufacturer, right?

[15:00]

And they also will produce and sell cars and their cars will also have some defects and then do the recalls of those cars will be company B′s business right?

But what about the cars already manufactured and sold by A? Carrying out recall of those cars, is it company B′s business?

No. It′s company A′s business and A asked B to do that business on behalf of A, so in that sense it is mandate, right?

Yeah, even experienced lawyers have difficulty getting that point.

But anyway, I thought it's a mandate. Okay?

It's a takeover contract, but in essence it's plain and simple mandate.

So, company B can obviously demand reimbursement after the effect, meaning after having carried out the recall, that's no doubt. There is no doubt about it.

But also, advanced reimbursement is allowed under Korean civil code.

Advanced reimbursement means, look, in order for me, company B, to carry out your request I would need this much of expenses, so you pay me now.

That is also possible. Advance reimbursement is possible, I think.

We'll see how that case resolves.

The award has not yet been out, but the arbitrary does out... now debating.

How much must be reimbursed? If the mandatarius spends money unnecessarily, then it cannot be reimbursed.

So, what can be...

What the mandatarius can demand is reimbursement for expenses which are necessary to carry out the mandated business?

Guarantor, they are also mandatarius, right?

If a principal debtor asks someone to be a guarantor, and that person accepts to be guarantor, then a contract of mandate is completed.

[18:06]

So, if the principal debtor cannot pay, and if the creditor compels the guarantor to pay, and if guarantor pays, then guarantor can seek reimbursement from the principal debtor.

So that's also reimbursement of expenses necessary to carry out the mandated business.

This point is not readily visible under Korean civil code, because Korean civil code talks about obligations of a guarantor without talking about the contractual relationship between guarantor and principal debtor.

So students who study civil code may have some difficulty understanding the contractual relationship behind the guarantor-ship.

But it's in essence reimbursement of expenses incurred in carrying out business.

Can you argue, let's say, B is the guarantor, and A is the principal debtor, and here is the creditor, right?

Can you argue that, since guarantor undertakes the obligation to repay in his own name, it′s guarantor′s obligation as well as principal debtor′s obligation. Right?

But since it′s guarantor′s legal obligation, it is his own business.

Therefore it cannot be mandate.

Can you argue? What do you think? You. Yes. Did you get my point?

Because you cannot have a contract of mandate, where, if it not your business.

Mandate means you ask someone to carry out what is not his business but your business, right?

″Why don't you, why don't you invest in real-estate market? Buy some house!″

If I say that to you and you go out and buy the house in your name. it is not mandate isn't it?

It′s your business not my business.

I just gave you a suggestion or advice and you decided whether to do it or not.

So in that sense it′s not my business right?

So in that case even if I may have done something which might appear to be a request but it not real request.

So the idea is that mandate can be recognized only when a...X, Y and X makes a request to Y to carry out X's business.

[21:40]

Right? That's what mandate is all about.

In this case, B incurred a legal obligation under his name. So it's B's business.

How about that argument? Anybody?

[Student Speaking]

Yeah, civil code has a explicit article allowing B to seek reinvestment from A.

[Student speaking]

Umm, So that is, that is clear.

My question is, is the relationship a contract of mandate?

What if A asks B "Could you please be my guarantor?". And then B said "Yes I'll be your guarantor" in that case It cannot be...

[Student speaking]

But in that case still B incurs that in his name.

Can you argue that it cannot be mandate? I think it can still.

Even if B incurs that in his name B would have not done it If A did not ask B to do it and ultimately it is A's business.

We are not, when we say business, this should not be interpreted with rigid analysis whether B incurs the debt in his name or not.

Globally, it was none of B's business in the first place if A did not make that request.

A's request is "please be someone who will step in as my guarantor."

That's A's business enough and B incurred obligation simply because that is the way to carry out A's business.

There is no other way to carry out A's business apart from incurring that debt in B's name.

So then there is this question.

C creditor demanded repayment what if that debt, the principle debt has already been extinguished for instance

[24:32]

What if for instance the limitation period ran out for example, okay?

Limitation period ran out.

A however was not exercising it or A did not realize or A for some reason was not...

In any case, C demanded the repayment, B paid up without investigating whether the limitation period ran out or not.

Can B seek reimbursement from A?

Can a put up a defense to B saying "you should have investigated whether limitation period ran out."

What do you think?

[Student speaking]

How, why?

[Student Speaking]

Co-extensiveness.

A bit awkward word.

Co-extensiveness.

B's obligation the extent of B's obligation coincides with the extent of A's obligation

So co-extensiveness.

But my request to you is to explain this situation with reference to contract of

mandate.

How are you going to explain? Relying on contract of mandate,

Also in the civil code, is simply said in the civil code, that B can make use of A's defense. Right?

When C demands B to pay up, B can. That is B can. But it does not say B must.

So can...Suppose I′m B. And I ask A. Yeah I didn't have to.

It is your debt and I paid. So give me back my money.

So how are you going to explain?

B didn't investigate whether the limitation period had run out or not.

And just rashly paid up.

[27:35]

And now seek repayment, reimbursement from A

How about you?

[Student speaking]

I think that the point. If B was negligent then A can argue that the expense you incurred which is the amount you paid to C.

That is an expense which is incurred for B to carry out A′s request. Right?

But that expense was not necessary.

You unnecessarily paid up. So I will not reimburse you. So that's possible,

If some... this debt had all... somehow already been paid up for instance.

So it's extinguished.

Somehow C was confused whatever for their reasons C demanded payment and B without reasonably investigating whether this debt is still in existence or not, if B repaid, again, B cannot C reimbursement from A

So civil code simply says "When B repays, B can seek reimbursement" But that's very very incomplete and inadequate.

It's just very rough principle, in reality there are a lot of consider.

And everything boils down to the relationship of contract, contract of mandate.

Whether B exerted the required level of the care in carrying out A's request.

Okay. There is a very special type of guarantee which is called first demand guarantee.

[30:02]

First demand guarantee is a contract between C and B. Contract between C and B

This contract entered in to upon A's request.

A wanted B to conclude first demand, first demand guarantee with C.

But essentially it's a contract between these two.

Now what they agree is that whenever you ask me to pay this debt I will just pay without really investigating.

This is done out of relationship between C and A, let's say there's an construction project in Saudi Arabia, builds a road or something.

And C is the Saudi Arabian Government, and A is the construction company.

And the owner in this contract for a completed piece of work, the owner wanted to have some means of forcing A to fulfill the contract.

And what if A fails to carry out the work properly, C needs some security, right?

And C asks A, "You should provide us first demand guarantee".

Which is, if A breaches contract, then C will ask this bank the agreed sum of money, and then the bank will just pay without investigating whether A really breached the contract owner.

So there's, let's, for example, there was a massive protest and democratic movements in the context of Arab Spring and it became quite difficult to continue the construction project so A stopped for several months, and the government demanded the bank right.

C breached the contract and now you pay the sum up.

Actually A does not at all think that it breached contract, and A does not at all think that A owes any money to C.

[33:08]

But C believes that A owes money to C but C demands the guarantor to pay.

In that case, does B have to investigate whether A indeed breached the contract or not?

If B does not investigate and just pays off, can B seek reimbursement from A?

Those are interesting issues. Okay?

The rule is that, if, between C and B, there is a first demand guarantee agreement, then B cannot, and must not, investigate whether A breached or not.

If the moment C makes the demand , as long as it is not fraudulent demand, B must pay without actually investigating whether C was telling... or C has the claim or not.

B does not investigate the substance of the claim, B only has the duty to refuse

when it is obviously fraudulent claim from C.

See this is very complicated problem.

The idea is that it is ultimately a business deal between these two parties, Okay?

And lots of things can go bad, go wrong and dispute can arise, Okay?

And who breached the contract, and whether what... between them, there is a long contracts, many hundred page long contract and, you know, many grounds to argue that you owe me this, C owes A this and A owes to C this much amount...

Now that kind of dispute needs to be settled according to whatever dispute settlement clause they agreed.

Most often an arbitration, international arbitration... right?

But the purpose, the very purpose of the fist demand guarantee is, if there is a dispute, then, the dispute resolution process should begin with C having already money in his pocket.

[36:04]

What it means is that, without that, if dispute arises, they will fight, right?

While fight is going on, it could go several years, right?

While fight could go on, C has no money, right?

Only when C ultimately prevails then C will start the collection process, which would again take many years, right?

Without that, that's what is going to happen. And people don't like that.

To reverse the situation, which is, as soon as dispute arises, C has money, and then

fight.

When ultimately C wins, fine, when ultimately C looses, then A have to start the collection process from C.

And that's what these two parties want in the first place.

So the court, when there's this kind of agreement, should not really investigate whether C breached the contract or not.

This process should not involve any dispute about the breach of contract between these two, no.

The bank should not be dragged into the dispute between C and A.

The bank simply just pay up, and then the bank can, of course, demand reimbursement when, in the first place, when A asked the bank to do this, the bank will demand A guarantee, some other guarantee "you should provide guarantee, we will be the guarantor, but you should provide guarantee. In case we meet this demand, we will pay up right away. So we need some security from you."

That's how thing are done, right?

So basically if dispute arises, C loses money, and having lost money, they fight.

And ultimately if they win, they'll find a way to recover.

So it's a special type of guarantee, and special type of mandate.

Termination at will.

Now, this is also very important and interesting topic you need to study very carefully.

The basic principle is that either party can terminate the contract of mandate at any time.

[39:10]

You don't have to pay damages in respect of termination.

You only need to pay compensation only in respect of the timing of the termination.

When, because of the timing, the other party suffered loss.

Not because of the termination itself, but because of the timing of the termination.

It's a very subtle distintion.

And you will see, it's reflected in these two cases.

The first case involved the situation where mandator asked the mandatarius to carry out the value-added tax refund .

You know if you... Value-added tax looks at the whole process, in this economic world, there will be a lot of steps, so...

Let's say, if A company produces transistor, or some kind of memory, and A company may sell that to assembly, another company which uses that to assemble some parts, and then it will also sell to C which will use it to ultimately make a mobile phone, something like that.

There will be many steps, right? People will produce and supply some goods...

Or construction, many different construction materials will be supplied to these and then they will build a house or building and then they will, they will hand over to that... the ultimate owner.

At each step, the parties will have to pay value-added tax.

[42:15]

But then, they will also have refund in respect of the value added tax they had already paid, when they transferred the thing to another party.

So at each step there is a payment of value-added tax, and refunds of value-added tax which you had already paid.

There is some kind of change.

And in this case, the party who is building, I think it's an apartment, they did not report their business properly, so they had to pay value-added tax when they buy all these materials, but when they sell to the others, they could not get refund from, refund of the tax they had already paid.

Now they asked a tax attorney to carry out the refund procedure, so that's mandate, contract of mandate, but after that they made inquiries for themselves and they discovered that it's quite simple and easy to rectify the situation.

So they terminated the relationship, and tax attorney sued this association. Saying, "You and I agreed that I will get a six hundred million, yeah, 600million, when the refund is properly done. It's about six billion won refund ultimately this corporative, building, housing corporative was going to get, about six billion won VAT refund and tax attorney was going to get 10 percent.

Quite substantial contract.

And tax attorney claims "Because of your termination I lost this fee."

And the court held that "Well that's... that's what civil codes stipulate. The party can terminate the mandate at any time as long as it is not an inconvenient moment."

[44:57]

Now this mandate was entered into it at this point, and the party's agreement was that "When it's successfully concluded, when the requested business is successfully concluded I will get six hundred million fees."

Now, terminated prematurely, meaning before the business is concluded, if the terminating company must compensate this fee, then it's basically preventing or depriving the right of termination.

You cannot describe this termination as having been made at an inopportune moment.

The timing, if you describe this termination, saying that it was done at a moment which is disadvantageous to the mandatarius, any termination which is done before ultimate conclusion would be disadvantageous.

So that means that the terminating party will always have to compensate with the agreed fee. That is a wrong interpretation.

However in my view, I think, before I tell you what my view is...suppose, tax attorney did a lot of work, gave the other party a lot of useful information and other party used that information and did it themselves and terminated.

Do you think that court's conclusion would still be the same? I don't think so.

In this case, the mandator did not really rely on tax attorney's work, they studied for themselves, they made inquiries for themselves, and now they realized that it's very very easy and simple.

So they terminated, the court felt that in the first place that fee was excessive.

It was not a complicated job.

And it's very excessive fee and that's why court concluded that this is not termination done at a moment which adversely effects the mandatarius.

[47:57]

They held that mandatarius is not entitled to any damage because mandator did not depended on madatarius′ service and it was really very straight forward in the first place.

The other case, it is about a director of a company.

That case is also very interesting.

If you get a job at a company, you enter into employment contract.

And employment contract has a great deal of protection under the labor law.

And You get promoted, and you get promoted... division chief, and then whatever... and then you get promoted to director.

Then technically it is no longer employment contract.

You can no longer invoke protection from labor law.

Because the moment you become director, this is just contract of mandate.

If it is not a employment contract.

Technically... so this case dealt with the situation like this, so the person who used to be employee and who used to enjoy great deal of protection, now was promoted so high and now he has no more of protection under labor law.

And this guys was... the contract was terminated.

He thought that he was dismissed.

He was... you know it′s unfair dismissal but actually he no longer has protection under labor law.

Instead, now he has to face the civil code provision where termination at will is

allowed... Yeah.

But in this case the court allowed this person′s claim of damage.

[50:40]

Saying that this mandate, contract of mandate, is for the benefit of the mandatarius as well and mandatarius was entitled to a lot of perks like support for children′s educations and mandatarius was entitled to severance payments and retirements pension, that′s all part of the mandate′s package and the party′s also made special covenant not to terminate the mandate for two years.

The court took all these circumstances into a account and concluded that the termination was at a moment adverse to the mandatarius and therefore mandatory which is the company, must compensate.

But the logic is quite difficult to reconcile with the earlier case.

All these perks you know, the retirement pension and whatever, if termination just destroys all these benefits and because of that termination must be concluded as having done at an inopportune moment.

Then why not apply the same logic here if termination destroys the fee, it′s necessarily done at an inopportune moment.

I think these two appears to have a very similar situation but court′s conclusion was completely different.

The reason is as I said in this case, this party did not get any benefit.

And the fee was excessive in the first place, whereas this one, although it is technically contract of mandate, still, there is a large element of employment contract as well.

So the court was approaching it very similar to dispute about unfair dismissal case.

So the thing to remember is that even the directors who are no longer under the protection of the labor law, still they can get some protection under Korean court's interpretation of contract of mandate.

If mandatarius has already incurred on obligation to a third party in order to carry out the mandate, mandatory may not terminate with impunity.

[54:01]

That's easy to explain. Coming back to that situation where principal debtor asks a bank to become a guarantor the bank can say "yes, I will be your guarantor" then contract of mandate is concluded right?

While C and B has not yet concluded guarantee contract, either party can terminate without any consequence.

B can change his mind. "I said I would be your guarantor but no I don't want to."

Fine, no problem.

A can also terminate, "I asked you to become my guarantor, no now I have another guarantor I don't need your guarantee."

Fine, but if B and C signs guarantee contract which would say B will pay if A fails to pay.

If that is signed, then B incurred legal obligation then A cannot terminate.

A can terminate but A will have to compensate.

A does not have to compensate the full amount you know if A pays back B will not

suffer incur any loss.

But if B does have to pay repay to C, then B can seek reimbursements under the having of damage even if A terminated the contract of mandate.

Termination by operation of law, death ,bankruptcy, over party will automatically have the effect of terminating the contract of mandate.

Mandatarius loss of full capacity will also have that effect.

We have two provisions six nine one and six nine two which you need to study carefully. Lets have a look at six nine one.

[57:00]

So emergency situations then even after the termination the mandatarius or it′s legal agent or mandator or its successors, oh sorry the mandatarius or its successors or legal agent must carry out the job.

While the mandator or his successors can take care of the businesses for themselves.

Then six nine two if either mandator or mandatarius either of the party is not aware of these terminating facts, then although the contract of mandate is terminated, the parties may not rely on termination to refuse or resist the demand of the... now.

A asks B to let′s say sell the house. A′s house.

Or B is the agent appointed by A to manage A′s affairs.

A is a climber for instance.

Or a travels extensively.

A is in the yacht racing or something but any way B is the Agent appointed by the A.

Now at this point, A dies. B does not know A died.

[60:00]

Now at this point, B sells A′s property to C .

Now can A′s heir who is D. Let′s say, D. Can D claim the property from C from here?

Saying when you brought my dad′s house from B, my dad already passed away and that house belongs to be.

And There fore you cannot keep it I didn′t authorize B to do that.

Can A′s heir put forward that argument? If your C′s lawyer how are you going to defend C′s position?

C brought it from B.

Emergency? Six nine one, emergency.

Is there anything emergent there? Is there any urgency there? Any other idea?

Pardon? Notification. How about 129? Article 129.

Can C not depend on article 129? Saying B had power of attorney and when A died, that came to an end, but the counterpart, I did not know, and difficulty with 129.

No comment? But I think article 129 has a bit of a difficulty here, because C thought that B is A′s agent.

[63:04]

Right? In reality, it is not even A′s property at the time it was sold. It′s D′s property. B never claimed that he represents D. Right?

I mean if C had reasonably believed that B is representing D, then maybe 129 could be involved. Maybe C can rely on 129, but B never represented, B never told C that he is representing D. B told C that he′s representing A and it′s A′s property. That′s what B told C and what C believed.

But in fact, it′s D′s property. And how can you.. How can C rely on 129?

(Student answering)

I think 129 is applicable when for example, when A did not die, but A terminated the mandate to B, saying you know, you don′t...you no longer need to be my agent, stop it. Right?

And somehow B represented to C, I am A′s agent and then sold it and it′s still A′s property.

Fine, 129′s situation.

No problem but here, it′s somewhat different.

B claims to C that he′s A′s representative.

C believed that B is A′s representative.

C believed that it′s A′s property.

In fact, it′s D′s property.

I don′t think 129 covered this kind of situation.

So, how can C be protected? B didn′t realize that A died.

So in that situation, when D sues C, saying you must return the thing.

Then C can put forward a defense, relying on 692, even if C is not a party to this mandate agreement.

And even if 692 only talks about the relationship between the parties to a contract of mandate, but actually, 692 extends to the heirs as well.

[66:09]

So, A died, and B ends A′s heir, A′s heir cannot rely on A′s death, because the heir did not notify the mandatarius. So you cannot rely on your father′s death.

So that proof′s the argument that C can put forward.

So you cannot deny the legal effects of the disposal which was done by B, because you haven′t notified. And why you cannot deny, because 692.

Okay, there are a number of other situations where mandatarius duty of care is applicable.

Partner in the execution of a partnership business.

Have a look at article 707. We will study partnership more, in more detail.

But for the moment, have a look at 707, and very carefully, what it says is, ″A partner,

who carries out partnership business."

It says that. "A partner who carries out partnership business."

Look at article 706. First paragraph talks about executive partner, an executor.

[68:52]

Now, 707 does not talk about executive partner.

Article 707 talks about A partner, so whether you are executive partner or not, you may be in a position where you carry out partnership business and, in that case, you are under the duty of care.

So, article 707 applies to any partner, not only to executive partner, but any partner who carries out the partnership business.

There is no contract between A partner and partnership itself, because partnership under civil code is not a legal entity.

There can be no contract between partnership itself.

Only there are contract between partners, but this obligation owed by A partner in carrying out partnership business.

But that obligation is not owed to a specific other partner, but all partners.

Director in carrying out company's business...

There is a commercial code article 382, but in fact, company has a legal personality, so most often there is a contract between company and director.

And that contract will define first of all the obligations of the director and commercial code is supplementary to that.

But then there is a question. Can the company agree to use the level of care with a

particular director?

Is commercial code sort of subsidiary and therefore that special deal is valid or not.

You know the commercial code is not like civil code? Commercial code, most provisions in commercial codes are mandatory.

Let′s say company has 5 directors. Right? So D1, D2, D3 D4 D5.

🔊[72:01]

And only with D5, the other directors, they all owe duty of care of good manager.

But only with D5 the company agreed, you don′t have to be that care. Is it possible? Is it valid?

I don′t know. What do you think?

(Student answering)

Good point. But what if that decision, that contract went through Board of directors′ approval.

What if...they think this director is so brilliant, like even better than Steve Jobs or whatever.

And we need to offer some great incentive, so you just do whatever you feel like and you don′t worry about, you know, being negligent. Just work for us.

(Student commenting)

Yeah... But then against law means against mandatory provisions of law, I think.

Right? So it will again, you will again have to face my question. Is it mandatory provision which cannot be altered by even Board of directors′ unanimous approval?

(Student commenting)

Is it? Let′s look at the article 382 of commercial code.

It only says the relationship between the company and director should be governed by provisions in civil code, dealing with contract of mandate.

[75:06]

And provisions in the civil code is not mandatory.

But the mandate, you can... between mandatory and mandatarius they can agree, you know? You don′t have to be that care.

Of course, even if you deliberately cause loss to me, you don′t have to compensate.

That would be null and void. Right?

But I will observe you.

I will forget about your simple negligence.

That′s perfectly valid agreement.

So I think this is doable. This is doable.

Although your point is perfectly valid, very important.

Company law involves not only the interest of that abstract entity company and that particular director, it involves shareholders and creditors of the company. Right?

So most provisions are mandatory, and also your point is very good.

Board of Directors, if they resolve the possible resolution which is against law That′s not null and void.

But against law means against mandatory provisions of law, and this does not happen to be in my view, mandatory. So the company can agree upon a different level of duty with a specific director.

(Student commenting)

Fiduciary duty to the company, you mean.

(Student commenting)

Well, let′s look.

If one of the directors did something wrong, and after the effect if the company wants to observe that director′s liability, then they need a special procedure under company law?

But beforehand, agreeing with a reduced level of care with a particular director, I think it is possible.