

# Law of Obligation II

## Deposit(Arrhes)

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And don't write www.

And you should write straight away, 'lawlec'..

Excuse me, what do you think lawlec could possibly mean? [student: 'law lecture?']

Yes, yes, that's what it means.

And korea.ac.kr...that's the web site which you can go to, to have a look at the lecture handout.

And lecture handout just gives you some outline information about the topics which will be covered, and I give some cases, so make sure that you actually go and have a look at the facts of the cases.

You know in Korean case reporting, you have the summary of rulings, right?

And then the judgment itself.

Long time ago, the Korean judgment tended to be very brief and they gave very little information about the facts of the dispute.

Now the trend has changed, and judgments tend to give more and more detailed facts of the case, the facts of the dispute, which I find is the right direction, because legal rules cannot stand on its own, it always interact with the facts, so it's very important that you do have a look at the facts of the case.

So don't just look at the summary of rulings, which is not very different from what I wrote in my lecture handout.

Make sure that you have an idea about the facts of the disputes, why they are fighting, what the parties strive to achieve.

What do they want to get? And what the other party resists, and how legal rules come in and deal with the clash of interests.

So those are what I ask you to do.

Just to familiarize yourself with the facts of the cases I cite in my lecture handout.

Okay? That's it, as far as the preparation for the course, for you, is concerned, and there will be mid-term exam and end-term exam.

Attendance is not checked, so it's entirely up to you whether to turn out or not.

Any other questions as far as logistic aspects of this course is concerned? No? Okay, so this course is about Korean contract law.

I offer two courses, one is Law of Obligations I and this is Law of Obligations II.

In the Law of Obligations I course, I cover the general themes, such as...in your view, what would form the general themes of Korean contract law? What kind of topics come to your mind when I ask you questions like this? What are the general themes

of Korean contract law? What kind of topics? Contract, what is contract? Come on, there is camera but it's not facing you! Contract, what is contract? I mean, seriously.

Okay, what is contract? [student answer] To do something, or to give something.

Alright, and what could be the legal issues arising out of such an agreement? Whether the contract is properly formed, so formation of contract is an important part, in the course of forming a contract some parties may be mistaken, or a party may cheat the other..

So fraud, mistake, or a party may put a gun at your head and like, 'sign this contract or else', that kind of undue influence, duress, and uh..also the content of the contract may be at issue.

For instance you and I can perfectly voluntarily and freely agree to kill him.

So that is an agreement, and is it enforceable? That kind of question, so substance of the agreement itself, so whether an illegal content of an agreement may be enforceable...so those are various issues arising out of formation of contract.

What other topics come to your mind, as a general theme of Korean contract law?

[student answer] Okay, let's think in terms of life of a contract.

We were talking about how contract comes into existence, so it's..as if it were a birth of an agreement, right? Once it comes into existence, then what? What should happen?

[student answer] Yes, so performance phase, we have performance phase, and with regard to performance, we have to examine what would constitute the due performance or proper performance and what fails to meet the agreed terms of a

contract, so whether a contract is properly performed or not, so that forms under the topic, then comes what?

[student answer] Yes, yes, we'll talk about termination, just after this.

Breach, yeah breach of contract.

So a contract may be formed and performed, and if one party believes that this is not proper performance, then that party will accuse the other party of having breached the contract.

So what does it mean, and what constitutes breach, right? Then termination might be an issue because you can terminate the contract on the basis of the other party's breach.

So those are sort of broad general topics which I've covered in Law of Obligations I course.

Now, this course deals with more specific types of, number of important contracts such as...such as? What are the important types of contract, in your view? What kind of contracts do people enter into? [student answer] Yes, contract of sale is probably more important and most widely resorted to, so contract of sale.

What else? What other types of contract interest you? Sale, purchase, that's the only thing you do in your life? Nothing else? Everything is buy and sell, is it? Is it the case? What other types of contract we can think of? Contract of service, maybe, yeah? Contract of service? But under Korean law, we don't have this kind of concept of contract of service.

What do we have instead? You ask some service of someone, right? So what..

pardon? Employment, hmm, that is somewhat different.

We have contract for a completed piece of work, and contract of employment.

These, both of these deal with services, right? As she initially pointed out, if you want some service from someone, you could basically think about these two forms of contract.

We will study obviously, we will study in great detail about this type of contract.

We won't be studying that much about this because this forms part of much more uh..

this is uh, this forms part of another branch of law, which is..yeah, Labour Law.

But yeah, sit down, what are you doing? Over here, there are empty seats, yes.

So in this case, the relationship is continual relationship, okay? And the task to be performed is not predetermined by the contract itself.

Mostly, most typically, what the employee contract to do is, what the employer directs the employee to do.

So it's quite versatile, you can basically hire someone and then ask that person to carry out what you decide to ask that person.

Of course, there is this notion of job description.

For instance, I'm hired by...not by you, by the 학교법인.

I don't know what it.. it's an Educational Foundation of Korea and 중앙 Educational Foundation.

That's my employer, and I am employed.

But in entering into employment contract, my employer proposes a job description.

So they say broadly what I'm expected to perform as part of my employment contract.

So I expect that I should be giving lectures, giving..teaching, and I am expected to do research of, my area of expertise.

That's broadly the job description, but within that jobs description my employer can decide quite a lot of things.

But this one is only for a specific work, okay? So that's another important type of contract.

What other types of contract you can think of? [student answer] Yeah, borrowing and lending.

So, contract of lease.

But then here again, contract of lease, about residential dwelling or commercial premises, they form a very important area on its own right.

It's different from borrowing some movables.

They deal with your...people's livelihood, or their living condition, and they form part of Tenancy Law.

But um..and also there's partnership agreement, that is also important form of contract.

So those are some of the types of contracts we'll be covering in the course of this work, this lecture.

But then of course, there can be contracts which cannot easily be categorized as one of those types of contract which our civil code stipulates, okay? Civil code stipulates sale or contract of donation or lease, partnership, or contract of mandate...

Limited range of types found their way into civil code.

But that does not mean that you cannot enter into contract which does not fit any of those categories.

You can, right? You can.

Suppose you do, suppose you did enter into a contract which cannot fit nicely with any of those existing types of contract.

Then how are you going to deal with a dispute, if a dispute arises from such a non...atypical contract? There is no civil code provision, so what are you going to do? If, if parties entered into a contract, and that contract cannot..does not fall under any of the exiting categories of the contract, what are you going to do? There is no civil code provision applicable to such a contract, so what are you going to do?

[student answer] Mm-hmm, okay.

So his suggestion is that first, we should look for provisions of civil code, or other code, or any other statutes which are closest to the contract itself, which can be analogously applied to this contractual relationship.

Secondly, we should look for general provisions.

Any other ideas? What about you, any other ideas? How are you going to deal with such a contract, which does not fit with any of the existing types of contracts? It's neither sale, nor hire, nor mandate...

[student answer] Yes, yes, that's it, that's it.

You're pointing at the right direction.

Look at the contract itself, what the parties have agreed, the terms of the contract itself.

That should be the most important place where you have to look at.

Actually, even with contract of sale, where should you look at first?

[student answer] Exactly.

Because, I tell you, loud and clear, I am sure you have heard this before, what is written here in civil code, they are basically useless if the parties agree otherwise.

Okay? So, what is most important is the terms of the contract itself, not the civil code provision.

You see, the civil code provision, they are all..they kick in when parties do not explicitly agree.

So they are, is it what, second order of importance.

The most important, the first order of importance is the, what the parties have agreed.

The contractual terms themselves.

They are the most important.

Important texts you will have to study.

If a dispute arises, the first thing you have to ask is, 'let me have a look at your contract.' Okay? That's the first thing you have to do.

And also that's the first thing you have to do in answering my questions in the mid-term exam and end-term exam, see? So, okay.

That's it, these are all preliminary introductions.

No questions about mid-term exam, end-term exam, you are all familiar with this? If you haven't taken this course before, you could go to this web site and you will be able to see previous exam questions, so you know what to expect.

The format of the exam is..

I have not yet firmly decided whether it should be administered in one and..or not, in seventy five minute written test format or twenty four hour take-home exam.

There is a possibility that I may choose for take home exam format for end-term exam, whereas mid-term exam might be taken in seventy five minutes.

Another good news is that we will continue our lectures during the midterm exam period, yes? So there will be no break for you guys, we will continue our lectures.

And even better news is that apart from 추석 holiday, I..where there will be no lecture, other public holidays, we will just ignore public holidays and then just continue our lectures.

That way we will end this term quite quickly.

If you are not happy with that, you can just, you know, choose not to show up.

That's it.

Okay, right.

Contract of sale.

(~22:24)

Deposit.

Contract deposit.

Excuse me, what is deposit? Contract deposit.

In contract of sale, what do you mean by contract deposit? [student answer] Trust, yes? You sound very serious.

Trust? Do I trust this seller? I don't trust him? Why should I trust this seller? All I care about is what I'm buying, I don't trust him.

He might be just, you know, just an awful person but what he's selling is very trustworthy, reliable, then I'm only interested in this, not in him.

And what is more important, once I get hold of this, you know, having paid my contract price, I'm not going to see him ever again.

So there is no question of trust involved in contract of sale.

Okay? Would you revise your answer then? Contract deposit, just avoid using the word trust, it's very, you know...

Just, just tell us what contract deposit in sale contract could mean.

Just what, what is it? Give us an example.

Contract deposit.

Let's say he and I agree that I buy his mobile phone at the price of one hundred thousand won.

And he agrees to sell it at that price.

That could form the core element of our agreement, right? But what is deposit?

[student answer] Okay, so you are going too far.

All I'm asking you, let's ask him again, you're going too far, don't go too far.

What is deposit? Contract deposit.

[student answer] No, it's not consideration..

just, I..he and I agreed that he's going to sell this phone at the contract price of one hundred thousand won, right? Then I pay him ten thousand won.

Right now.

Just, part of contract price.

Usually about ten percent of the contract price.

So I give him that.

And actually he will hand over the phone, let's say one week from now.

The balance of the contract price at the same time, right? The contract deposit is an amount of money, or if the contract price is not in money terms but instead, let's say a bag full of rice, then it's a very difficult question whether that is a contract of sale.

But let's for the moment just assume that we're talking, dealing only with a transaction which involves money, okay? Because buying this phone with a bag full of rice, it could more appropriately be characterized as, yeah, barter or something.

But then my, rice or this grain, that could be somewhat similar... that could be different from other, any odd object, because bag of rice is very close to money, but anyway that's a very complicated question.

Let's just focus on money alone, okay? So contract deposit is part..an amount of money which is handed over on the occasion of entering into contract.

That's it. How much? Well, it's..how much, how much, what amount? [student answer] Yeah that's usually what happens, but ultimately it depends on, it is up to the...parties to agree, yeah, yeah, yeah.

Agreement is the king, right? Or queen.

So we, we can agree that ten thousand won will be the deposit, and I give him ten thousand won.

And that is contract deposit, okay? And once that happens, all the issues that she began to mention will arise, but we will study little by little.

So it's a voluntary payment largely governed by trade practice.

Okay? So there is no law or provision or mandatory requirement that it shall be ten percent, or..or one party must give contract deposit to the other party.

There is no such provision, okay? So I said trade practice.

What is trade practice? Yeah, trade practice.

In my lecture handout I wrote 'governed largely by trade practice', but what is it? It sounds pretty, you know, grandiose, but in fact it's nothing serious.

It's just..what happens?

[student answer] Yeah, yeah, yeah...the kind of trade which is in question, and what usually happens in that kind of transaction, that's what I meant.

Nothing serious, okay? So if it is buying and selling a house, what usually happens in that kind of house sale practice? And if it's second-hand computer, what usually

happens in that kind of, that sort of transaction, that's what I meant, okay? Then my question, first question, is, what if, he and I agree to buy and sell this computer and I didn't pay any contract deposit? Is it a valid contract of sale for this computer?

[student answer] Please answer yes or no.

For this question only, okay? It was a simple question, it is valid contract.

In other words, contract deposit is not a requirement of sale contract.

Okay? It has nothing to do with the validity of sale contract.

So without deposit, a sale contract can perfectly validly be entered into.

That's the first thing you have to remember.

Then, second question is, why do people nevertheless pay deposit? If you don't need deposit to have a valid sale contract, why?

[student answer]

Pardon?

[student answer]

Okay, good, good, good.

Certain things that contract deposit does, evidence, evidence of what? [student answer] There was an agreement, okay?

An evidence that there was an agreement.

If, however, there were witnesses for example, then you don't really need this evidence because there could be witnesses who can testify that 'I saw that professor Kim and that guy were agreeing to buy and sell this, that computer'.

Then, yeah, that can be another piece of evidence.

So deposit is not the sole piece of evidence, but it is very useful piece of evidence.

Evidence of existence, and evidence of what, what else? Perhaps seriousness of the parties' intent, because this is a very simple example, very, very slimmed down and skeletal portrayal of an agreement, you know.

He and I talk about this, and agree to buy and sell, that's it.

But in a complex transaction, there will be, typically, quite lengthy and complicated negotiation.

And when did the parties finally made the decision to buy and sell, is often quite difficult to determine.

So you need some kind of marker point.

Parties are negotiating, right? And not very happy or 'yeah, that's a good idea, but then I have to consider this, and that..' and there would be, you know, various kind of exchanges, but then finally when both parties might have come to a stage where they both express that 'yes, we want to go ahead'.

But you need visible marker.

Money, alright? So that can act as a marker point which testifies the seriousness and also most importantly testifies the existence of the agreement.

So that's useful.

That's why people exchange deposit.

What are the other functions of deposit? So that is one function.

What are the other...? [student answer]

Ah, okay.

So, so contract is formed, let's say, formed at this point.

And performance is due at this point, let's say.

And that performance could be the final performance, whatever is left unperformed must be performed here at this point.

At one go.

Or, that performance could be the first of many performances which will in the end make up the entire performance.

Whichever way, there will be a time which lies after the contract is entered into.

Okay? That can quite often happen.

Most typical example would be buying a house.

So you agree to buy and sell a house, and you hand over the deposit here, and then you pay first installment or second installment, and the final payment.

At this stage, you also receive this..

buyer receives all the documents necessary to effect title transfer at the same time as the balance is fully paid.

So that, that can happen, right? So what she says is that contract deposit can give parties - not only one party, but both parties, both seller and buyer - the power to terminate..

this is very, very interesting and important..the power to terminate this contract at will.

What is at will? Termination at will.

Yeah.

In Korean legal parlance, professional terminology, '끌리는대로'.

At will, okay? Very serious, you know, parlance, it's '끌리는대로'.

In other words, in the absence of any breach, or in the absence of any fulfillment of agreed terms for termination, in short, for no reason.

This is great power, okay? So there is somewhat apparent contradiction.

On the one hand, deposit is evidencing the seriousness of the parties' intent to be bound by this sale contract.

We are, we are absolutely serious.

I really mean it, I really mean to buy this.

And to show that, we can exchange deposit.

But then, it does something apparently completely the opposite.

We can terminate this contract whenever we want.

Until, until, one party performs the contract.

So, during this period, the destiny of contract is uncertain.

Neither party is fully committed to the contract.

So in one sense, it strengthens the existence and bindingness of the contract and in other sense, it weakens, considerably weakens the bindingness of the contract.

The situation becomes very fluid during this point.

Had there not been contract deposit..do you..

He and I agreed to buy, that I buy his computer, okay? We didn't exchange any deposit.

But we agreed that I will pay the full price which he asks, which is two hundred thousand won, one week from now, and at that point he will hand over the computer.

That's our agreement.

No deposit was exchanged.

Now, my question is: can I terminate the contract before that one week period? No way? [student answer] If I do purport to terminate, it would be a breach of contract, he can just ignore my, my termination, and he can just insist that I have to pay him money, saying he's willing and ready to hand over the computer, right? In other words I have no right, no power to terminate.

If I handed him, let's say, ten thousand won, as and when we entered into that contract, then what do you think? [student answer] Yeah, yeah, yeah...so that's uh, an interesting point.

So, however there will be complicated issues.

If I haven't given him any deposit, and I say 'I don't want it, I want to terminate.

Oh I don't want it.' Then if he wants to insist that I have to perform, then he will have to face the risk of me saying to the judge, 'Sir, actually we didn't really agree.' Very serious risk, right? Then he will have to prove that there was really an agreement.

Then I will say 'No, no, no, no, we were talking about it, but in the end, you know, we just said 'alright,' but I didn't mean that I was going to buy it.

I said 'alright' because he was saying some nonsense, so I said I didn't want to have any argument with him, that's why I said 'alright.' I didn't mean to buy it..

Look, we didn't even exchange deposit.' I think that would be a killer argument.

He won't..he would have enormous difficulty persuading the judge that there was a contract.

So in reality, without deposit, exchange of deposit, he would have enormous difficulty enforcing the contract.

But if we do exchange deposit, he risks this possibility of me terminating the contract, but at the same time, he also enjoys the power to terminate.

And we'll see some cases where the dynamics of the parties are at play when market price goes up or market price goes down.

See, at the time the contract is entered into, both parties, like everybody, operate under the then-prevalent market situation, right? And they all predict what the market situation will be when the contract is performed, because there is this time gap.

And the most important function of a contract is that they eliminate the uncertainty between the parties.

They cannot eliminate the uncertainty of the economy as a whole.

No one can eliminate the uncertainty.

Everybody has to accept that it is unpredictable, right? But by entering into contract, these two parties are bound.

They have to stick to the terms which are made at this time.

And those terms will not change over time.

And actually, that's the whole point of contract.

You want to reduce the risk within the sphere which you can control.

That means between you two, there is no risk.

But the rest of the world keep changing, right? And if the price goes up, seller will be very unhappy, yeah? Called seller's remorse, 'I shouldn't have sold it at that price', yeah? If the price goes down, buyer's remorse is at play.

But that's what contract of sale is all about.

And we'll see what contract deposit does in this kind of situation.

Okay? So around ten percent of the contract price is usually handed as contract deposit.

Contract is binding even without deposit, unless the trade practice suggests otherwise.

In some areas, the practice is such that without deposit you cannot have any binding contract.

In some areas it could be.

But then in other areas of course you can have contract without deposit.

But it all depends on the trade practice.

She very helpfully pointed out that deposit functions as evidence of the contract, and also it reserves the right to terminate at will.

But this right to terminate is exercisable only until a party begins to perform.

Have a look at article 565.

So it says money, or other things, could be used as contract deposit, okay? If that happens..now, there is a very important expression here, in this provision.

The literal translation of the first part of the paragraph 1 would be, 'where one party to a sale contract 'hands over', right? It says '교부.' And '교부', hands over, literally means hands over, alright? Because we will have a case where the parties agreed to hand over money instead of handing over the money.

And we'll see whether that counts as deposit as well, but provision itself clearly states that where one party to a contract hands over, actually hands over the money, alright? Then, unless the parties had agreed otherwise, one party may give up the payment or the receiving party may pay the double the amount of the deposit and terminate the contract, until the counterpart begins to perform.

So that's article 565 paragraph 1.

Okay? There is two more possible uses of contract deposit.

Which are not always the case.

The first two, evidence of the contract and reservation of the right to terminate at will, those two are always what the contract deposit does.

Whereas these two other uses of contract deposit, it all depends on what the parties really agreed about this deposit, okay? One is liquidated damage, and the other is penalty.

Okay? Now, liquidated damage, what does that mean? Liquidated damage? [student answer] Good, good, good.

Predict, the parties predicted, as best as they could, up until this point...until they enter into contract..and not only predicted, but then they agreed that this much shall be the damage.

They really don't know, but they predicted as he's..he's suggested, they predicted, and not only predicted, they both agreed that that amount shall be the damage.

No more, no less.

So that's liquidated damage.

In other words, the parties entered into agreement here, right? They could terminate at will, or one party may breach a contract, then terminate..termination might happen as well, okay? Or one party may repudiate the performance of contract saying 'I'm not going to perform this contract.

I don't want this contract.

Fine go ahead, I don't want this contract.' That's another possibility which is different from termination at will, okay? Whatever happens, there may arise a question of damage.

One party may suffer loss, right? One party...either, if one party terminates at will, the other party might suffer some loss, or if party A breaches a contract, and on the basis of that breach party B terminates the contract, party B may have suffered some loss because of party A's breach.

So loss may be an issue of course, whether it's termination at will or termination on the basis of breach.

If that happens, you can terminate and also you can claim damages, separately.

They are two different issues, okay? But the parties may agree that if such a termination occurs, the loss shall be deemed to be only this.

No more, no less than this.

That could be another uses of the contract deposit.

But again, this depends on the parties' agreement.

And only when there are clear indications that parties want the deposit to be treated as liquidated damage.

Only then can court use this amount as the liquidated damage.

So it's not always possible to claim that 'this is the agreed amount of damage, therefore I cannot pay more'.

That is usually not possible.

But if there are clear indications that parties wanted the deposit to be treated as liquidated damage, then it can be, it can be so.

But then, there is a bit of overlap.

Remember, if one party wants to terminate the contract at will before performance is due, then the other party may suffer some loss, or we can imagine that the other party might have suffered some loss.

But what happens is that terminating party basically gives that amount to the other party, isn't it? If it was receiving party who wished to terminate, the receiving party must pay double the price.

Therefore, this amount is actually additionally paid, and that can more or less cover the loss.

Or if the buyer who paid deposit wished to terminate at will, the buyer has to give up that amount.

Therefore the seller would enjoy that amount, and that's usually...that usually covers whatever loss seller might have suffered as a result of the termination.

So usually they overlap, okay? But then, some extraordinary circumstances may happen.

For instance, they both knew that price is going up pretty rapidly, they both knew...or, they both knew the buyer was going to resell it at whatever margin or..they both knew some other special circumstances which would result in more loss than what they agreed, if they had known.

There could be circumstances where the parties already knew that if this deal does not go ahead, the other party will suffer more than this, okay? In that case can the other party claim that loss, which is more than the amount of deposit? I will give you an example.

I'm buying a house, or a hotel, okay? Buying a hotel.

And the seller knows that I have this plan of running this hotel and also I..the seller knows that I am going to buy these building materials to decorate the hotel.

And I'm going to spend quite a lot of money, right? But our deposit, contract deposit is, let's say, just one million won.

But seller knew clearly that I was going to spend more than one million won to buy the building material necessary to redecorate the hotel, right? And the seller terminated at will.

Now I suffered, I wasted, let's say, about ten million won.

Can I claim ten million won? What do you think? [student answer] Yes.

Suppose there isn't any indication.

There isn't any clear indication that we are going to treat that one million won as a liquidated damage.

We didn't talk about it.

[student answer] Yeah...what do you think? What do you think? Can I claim my actual loss? I wasted, you know it's...

[student answer] I'm asking...

Yeah? You think so? I can claim the actual loss rather than, this, just...deposit amount, one million? So you can be my lawyer.

Thank you.

But what about you? Do you think...

Be the lawyer of the seller.

What kind of argument can you think of? [student answer] Yeah, you knew that I was going to, I was going to buy, you know, right away.

This is cutthroat competition, I cannot afford to let this hotel, you know, sitting idle.

I have to immediate start building work and everything.

You knew that, yeah, yeah.

What kind of argument can you come up with? [student answer] Oh, seller could perfectly well expect the amount, exact amount.

Come up with something else.

Anyone? [student answer] Yes, that's it, that's it, yeah that's it.

Yes.

What is the point of deposit, there is this possibility of termination at will, and both of us agreed to accept that there is a possibility to terminate at will.

So, it...

[student answer] No, it is not performance.

Buyer's performance, what could be buyer's performance? Buyer's performance is pay the purchase price.

What I spend is not about this.

I spent my own building materials.

I didn't pay to the seller.

I paid to building material suppliers.

So this spend, expenditure had nothing to do with the buyer's performance.

So buyer's performance has not begun at all.

[student answer] Fraud, fraud? Okay, let's say A and B.

One is fraudster and the other is victim of the fraudulent maneuver, alright? If fraud could take place, the victim must be left in the dark about some crucially important point.

In this situation, nothing is left in the dark.

Everything was laid out, plain on the table.

[student answer] What unjustified enrichment did seller enjoy? The building materials are in the buyer's yard.

No, no, buyer just bought building materials in readiness for the redecoration.

Nothing is done to the building itself.

No no, the buyer has not yet redecorated it.

Buyer just spend a lot of money buying up building materials, all ready to start working, once he..

because maybe the price went much higher? You see, when, when you agree, you have to take the consequences as well.

If you want..

yeah, if you...

if you're a buyer, and if you intend to spend a lot of money before you began to pay the purchase price, if you intend to spend a lot of money, you should have gone to much higher price.

If you see that there is a risk that seller might terminate the contract at will, and if you are going to suffer quite a lot because of that, then you should have gone for much higher.

See? You pay the cheap deposit, very small amount of deposit and then you just spend a lot of money, you lived your life very dangerously.

Okay? You took the risk, you cannot play this, yeah..

so although I said a while ago that clear indication is needed for contract deposit to be as liquidated damage, you have to take this also into account.

So, in most cases it is impossible, it is impossible to claim loss resulting from termination during this period.

And as a measure of fact, contract deposit works as a liquidated damage because all other damage, you accepted the risk of other damage.

Penalty is completely different however.

Penalty is different from the notion of damages, and penalty is separate from damages.

And Korean court, although does not take the view that penalty agreement is null and avoid, under Korean contract law, penalty agreement is valid.

In common-law jurisdiction, penalty agreement is null and avoid, okay? But under Korean contract law, it is considered to be part of freedom of contract.

So the court does not invalidate penalty agreement, but court frowns upon penalty agreement.

Does not like it.

So court insists that parties make it absolutely clear that this is penalty agreement.

Which is, damages will be claimable separately from this payment.

This is in addition to damage payment.

So if that is very clearly set out, then contract deposit may act as penalty clause.

Okay? Alright.

92 다 23209 case, the ruling is that you should be a bit careful about this.

In the absence of an explicit intent to treat the deposit as liquidated damage, the deposit may not be so treated.

I said, this is the example I gave you.

Liquidated damage.

We are not talking about penalty.

Penalty, if deposit is to be treated as penalty, you definitely need very, very clear agreement that this is penalty, alright? But this case is about whether deposit can be treated as liquidated damage, which is different from penalty, alright? The court says that we need clear indication.

That is the ruling, but as I gave you the example, in reality, even if there isn't any clear indication, it is not easy to claim loss in excess of what the deposit amount.

Because of risk-taking is involved.

Okay? So you should be careful about brandishing this ruling blindly.

The sentence itself says 'clear indication', and even if you...

even if the parties didn't make it clear that this contract deposit shall also act as liquidated damage, usually you cannot succeed on the basis of this, this ruling alone.

Because your client stupidly spent money knowing that there is risk of contract being terminated at will and your client had accepted that risk, and yet spent the money at his or her own risk.

Yes? [student answer] I don't...oh that's a very good point.

The deposit kind of ceases to...

deposit comes to an end when one party initiates performance, and when one party initiates performance, deposit fulfilled its purpose and it will have no more use.

So it cannot be treated as any loss occurring after that stage.

Any breach or/and resultant loss after this stage must be dealt with without any regard to deposit.

Yeah.

Very good question.

Of course the parties can agree, saying contract deposit shall be one million.

Uh...in the event of one party's breach, we hereby agree that the loss shall be two million won.

So, the parties can enter into separate agreement as to liquidated damage, completely independently of the deposit.

In that case, yes, that should apply here, this, this agreement should apply here.

If they don't say anything, and they just say contract deposit shall be one million, and this deposit shall act as liquidated damage for example, then a breach, let's say..one party initiates performance, and then a breach occurs, the loss from this breach, this agreement has no power to govern it.

Okay? Because when the party initiates the performance, the whole thing is fully fulfilled and it disappears.

Good.

Moving onto 72 다 2243.

It's also quite interesting case.

Seller must actually tender double the amount of deposit if the contract is to be terminated.

I told you, briefly, but we will also look at this.

Now, negotiation, and then contract is formed here.

And deposit is actually handed.

Deposit must be actually handed to the other party, right? I told you, and it is stipulated in the civil code.

Now this case is not about this stage.

It is about a stage where seller wants to terminate at will before buyer begins to perform, right? And if the seller wishes to terminate, seller has to actually tender double the amount.

It's a case about brewery, uh..막걸리 양조장, was sold at some price, alright? But seller regrets, perhaps he loved that brewery so much, and he regrets having sold the brewery, does not want to sell it, alright? So I think the deposit was something like, five..uh...five million won, or five hundred thousand won...let's say five million won.

Deposit was five million won.

And the contract price was much bigger, maybe fifty million won, whatever.

So seller received five million won deposit, and regrets and terminates the contract, and seller only paid 5.5 million won.

Seller should have paid ten million won in order to terminate this contract, right? The seller said, 'I will give you more, but I give you 5.5 now, I terminate'.

That is..but buyer wanted.

Buyer ignored the seller's purported termination, and buyer insisted that seller should perform.

The court held that the seller must actually tender double the amount if the termination is to be validly made.

I think you definitely need to look at this case because, if I remember correctly, in the end buyer did not buy.

And buyer, instead, sought damages claiming that seller breached the contract.

And uh, buyer claimed, successfully I think, successfully claimed damages more than five million.

Because it was not, uh, the buyer's claim had nothing to do with termination at will.

Okay? There was an attempted termination at will from seller's part, uh..side.

But that attempted termination was declared by the court to be ineffective because double the amount of deposit was not actually handed over.

Instead, buyer successfully established that seller breached the contract, and claimed loss from seller's breach, and here, you are not bound by deposit being liquidated damage or any of that rules.

They are inapplicable because we are not dealing with termination at will, okay? 2004 ㄷ 11599, has anyone had a look at this? From next time I will ask you to explain these cases, alright? So please make sure that you have a look at it.

A party may begin the performance even before the agreed time.

If that happens, the deposit can no longer entitle a party to terminate the contract at will.

Just, I will explain only up to this part.

This is a case where the price, it's a real estate sale contract..and after the contract was entered into, the market was going crazy and real estate market was, the price was soaring, very high.

And seller regrets having sold it at a very low price.

And seller actually told the buyer to pay more, alright? Seller was a bit stupid, actually.

But maybe seller was just being kind, or whatever.

Seller kind of regretted, and the price goes up and up, and the contract was entered into at this price, and seller contacted the buyer, 'you should pay more', you know..

then buyer got the sign.

What the buyer did? They agreed that first installment shall be paid at this date.

Buyer rushed into paying first installment.

Here, before the agreed time.

And seller, I think in this case, actually, after receiving the first installment, returned the double deposit and claimed that this contract is terminated because the agreed first date of performance has not yet arrived.

So seller was claiming that 'I still have this power to terminate at will, and I do exercise my power.' And the seller gave double the amount of deposit.

Buyer of course, would...have none of this.

Would refuse to receive that, that, and insist that this contract is binding, and I will pay my second deposit, and final, whatever...so lawsuit was brought.

So the question is, is the seller entitled to rely on the agreed duration of this power to terminate at will? This is a power and this is to the benefit of the seller, isn't it? So the seller's argument is that 'I have this benefit which was unjustly cut short by the unwarranted voluntary performance of the buyer.

Therefore, this early performance should not deprive me of my power to terminate at will.' Sounds reasonable, isn't it? What about seller's side of the argument? He thinks that buyer's...ah, seller's argument is reasonable.

What about buyer's argument? What about buyer's argument? [student answer]  
Okay, okay, that's roughly what the court ruled.

The court ruled that the duration of power to terminate at will should not be taken into account whether early performance is detrimental to the creditor.

In this case, the creditor is seller.

Seller has the credit to receive contract price from the buyer, right? So buyer is the debtor here.

Buyer has the obligation to pay.

Now, payment of the contract price, there is nothing detrimental to the seller to receive the payment earlier than agreed.

In other words, court does not take into account the duration of power of termination at will being cut short.

That does not count.

In short, usually a party may perform earlier than agreed.

But once that performance happens, deposit dies.

Its life.

Okay? Deposit comes to an end of its life.

Any questions? So see you on Monday.