

Law of Obligation II

Option Contract

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Right? The parties may agree that well, you can exercise the option two years from now onwards, right? So, ten years from the moment option becomes exercisable? [student answer] When the parties agree and when the option arises, so even if the option is not yet exercisable, ten year begins to tick, right? Okay.

Now, multiple parties.

Okay? Right, so for example, he and I jointly become buyers of an apartment belonging to her.

And we have equal share, so I have fifty percent share and he has fifty percent share.

And when the time came where we can exercise the option, he was busy you know, studying hard, and I had plenty of time, so I exercise half of my share and I demand her to convey fifty percent share of her apartment.

Can she resist? Can you resist? He and I become joint buyers, and we have..you know, internally, you have fifty percent share, I have fifty percent share, and all I'm asking is fifty percent share.

Can you resist? You can't resist? Mm? Yes? So you have to, you have to convey fifty percent share, that's what you think.

What about you, do you think she can resist? 'I refuse to convey any share to you, Dr. Kim.' Does she have any ground to resist? Did you understand my question? You didn't, okay, okay.

What do you think? Why, on what ground she can resist? Yes? Right.

That's what I wrote in the lecture handout.

Why is it so? Why is it? Can you think of the reason why the court insists that he and I jointly exercise the option? I cannot separately exercise the option and demand transfer of fifty percent share.

Why? Why is it so? Any idea? Can you think of any idea? Why I cannot exercise only to the extent of my share.

How many contracts are there, here? Only one contract, okay? So If I, dependently of him, exercises the option, I didn't tell you the contract price actually, the option price.

Let's say this is like ten million...apartment's so, whatever, hugely expensive one.

And if I alone can exercise, you know, the option, then he may have to come up with the money, half of the money as well.

And maybe he does not want.

I want half of it, maybe he does not want any of it.

What does that, what does an option mean? The party who has an option literally has an option not to do it.

He must have an option not to do it as well.

Just as I have an option to do, to go ahead and do it.

So...네, 고맙습니다.

So, when option...an option is jointly held, all holders of that option must jointly act.

Because we are not talking about two separate options.

If I separately have an option with regard to fifty percent of the share in your apartment, then of course I can exercise it on my own.

But we are not talking about that kind of situation, we're talking about one option jointly held by two parties.

So I cannot even seek fifty percent share.

We jointly must exercise.

Once we jointly exercise, then he may go ahead and he may go away and I can only seek transfer of fifty percent share, that is no problem.

Once we jointly exercise, okay? So that's what 83 다카 2282 case means.

Alright, let's continue with this example.

So he and I jointly hold an option regarding her apartment.

And both of us were busy and time went by, and ten years have lapsed.

Now you want to cancel our, let's say we registered our option.

So your title deed, your real estate registration shows that he and I hold an option to purchase your apartment.

But then, ten years have lapsed.

Now you want to cancel that registration.

And you don't know where he is.

So you decide to sue me alone.

Can you do that? No.

What do you think? Yes.

Good, good, so there we have, you know, these, our two contributors of very sharply opposing views.

Now, could you tell us whether she can just bring a lawsuit against me alone, leaving you out? [student answer] It's hard to tell.

Well, according to the court, yes she can.

Court takes the view that this is a matter which need not be concluded at one stroke.

She can persuade one by one.

So she can bring a lawsuit against me alone, and she may win, okay? But what if she brings a lawsuit against him, and she loses? There is a possibility, right? Maybe there are some other facts which emerged, and he may win and I may lose.

But court takes the view that that's okay.

In that case I think he alone can exercise the option.

And that's okay.

That's okay.

So for the purpose of exercising an option, the holders of an option, if there is one option, then all the holders must jointly act.

But to cancel a registered option where option holders are numerous, that lawsuit to cancel registered option can be brought against individual holders.

It does not have to be brought against all the option holders.

That's the case 94 ㄱ 22682.

Oh sorry, 2000 ㄱ 26425.

So that's the...now, option contract to secure debt.

Excuse me, how does one..how is option contract used to secure a debt? If you are a creditor, how are you going to use an option contract to secure your credit? So I borrowed money from you, let's say, you know, five million won.

So, option contract.

How can you use it to secure your credit, to make sure that I repay you? Let's say I have a motorcycle.

So, what are you going to do? [student answer] Yeah, me.

Yeah.

No, I have a motorcycle, not you.

Yeah I'm borrowing money, I have a motorcycle.

You acquire..pardon? Yes.

Yes, yes.

You acquire an option to purchase my motorcycle.

At what price? At a price which usually, if you think that your..

the money you lend me, which is five million won here, right? Plus the interest until the repayment date, is..you know, if the total amount of principal amount and interest altogether is around five million won..well, around the price of that motorcycle, then you and I can agree that you will have an option to buy that motorcycle at a price of five million won plus interest.

But we already decided what, exactly what amount.

So that you don't have to pay me any more to get that motorcycle.

But usually the thing which is subject to such an option contract is way more valuable than the principal amount and interest, right? So I have a very nice car which is like, ten million won.

Worth, which is worth ten million won.

He will acquire an option to purchase it at a price equal to the principal plus interest.

That way, he can make sure I do everything to find some money to repay him.

I'm under a great deal of pressure, right? I am in danger of losing my thing which is far more valuable than the principal and interest.

That used to be the case before civil code 608, article 608..uh, 607 was introduced.

Have a look at article 607.

So it..according to the civil code provision, 'where there is an option contract to acquire property right in lieu of repayment of principal, then the price for the...the agreed price of the property shall not exceed the principal and interest.' So that basically means that if he and I agree that he shall have an option to purchase my car which is worth, let's say, ten million won, even if we agree..even if we agree that he can buy that car at the price of five million won plus interest, our option agreement shall be invalid to the extent that the market value of the thing exceeds the principal plus interest.

The meaning of..to say that it is invalid means that I have to return that surplus amount.

So option contract to convey title of an asset in the event a loan is not repaid, that's how option contract is used to ensure that debt is repaid.

The portion of the asset's value at the time of the option contract which exceeds the principal and interest is invalid.

So the agreement between the parties becomes partially invalid if excessively valuable thing is agreed to be conveyed in case the debtor cannot repay.

Article 607 is inapplicable to option contract to secure a debt.

Other than an obligation to repay a loan.

So that can arise from various reasons.

If I buy something from her, if I'm a purchaser, I have a debt to pay her the contract price, the purchase price, right? So that's a debt also.

But if I borrow money from her, then I have a debt to repay the loan, right? So this is that and this is that.

But article 607 applies only to debt which arises out of a loan, okay? So it does not apply to other kind of debt.

It applies only to loan repayment debt, okay? Court is willing to interpret the main contract to convey the title as creating a lien for the creditor.

The creditor is thus required to return the surplus to the debtor.

The..civil code clause 607 which invalidates, which partially invalidates the option contract, the purpose is to ensure that debtor is entitled to recover the excessive amount.

Debtor cannot retain the property but um..now, the example I gave you is about an option to buy movables.

So there is no way of registering the ownership or registering the option to purchase.

Option to acquire, let's say, my motorcycle, okay? About cars, yes you can register the ownership of cars so that's different matter.

But about, let's say, a very valuable machine, yeah? Then there is no way a printing machine, for example..

it can be very, very expensive you know, very high-tech printer which manages to, you know, print newspaper for example, right? Hundreds of thousands copies in an hour, very ultra fast printer.

It can be very, very expensive, but there is no way of registering the ownership.

And there is no way of registering the option to acquire the ownership, right? Then that kind of movables, it is not easy to use it as security.

Why is it not easy to use as a security? Louder please.

Because it is not registered.

If it is not registered, what can happen? [student answer] There is no notice, okay, so, third parties won't know whether there is an option or not, and then, what can

happen? [student answer] Yeah, I can sell it to somebody else, then what happens? The purchaser in good faith acquires the ownership, right? So since there is no way of notifying, no way of giving public notice that this particular thing is subject to his option - there is no way of notifying this - therefore it is fairly easy to become a purchaser in good faith.

If there is a purchaser in good faith, under Korean law, that purchaser acquires good title.

That means the creditor loses the security, right? He only has me, and I might be penniless.

So that's..

it is not easy to use movables as a..in order to secure debt.

So, immovables.

Most typically real estate, which is very valuable to many people.

Lands, building, right? So you can register your option to purchase..on the land registry, real estate registry.

Whether it's building or land, if you have an option to purchase that building or purchase that land, you can register your option.

Just as you can register your ownership.

So in the registry, you know that there are two sides, right? Two sections.

So section A.. the entries in section A deal with ownership, right? And entries on section B deals with charges, various burdens on this real estate.

Burdens which are imposed on the owner of this real estate.

So B is a section on charges, and A is ownership.

Now, if you have an option to purchase, do you have an ownership of that estate?
What do you have? Option, yeah, an option.

This is a personal right, yeah? It is not real right.

It is personal right.

Which is exercisable only against a particular person, right? You only have a personal right, but you can register your personal right in the ownership section.

Why? Why? [student answer] Yes? Option to become an owner.

Buy ownership, that's a bit awkward.

Option to become an owner, right? Option to purchase the property.

And um..but I think it's just a question of a policy.

You can decide to register the option on the charges section as well, just as well.

But at some point, people who run the registration service decided to..decided that option to purchase should be entered in section A.

But in other countries such an option will be typically registered as charges, because it's a burden, it's not ownership, it's a burden.

But um..now, what happens if you, if you borrow money and your creditor insist to..insist on having an option to purchase your land and that option is registered, what happens if you cannot pay back? There is a statute specifically applicable to this: Act Regarding Registration of Option to Secure Debt.

It was passed in 1983.

So basically, because of that statute, this option is treated more or less in the same manner as if it is a hypothec.

Mortgage, yeah? It's called hypothec.

So your creditor, who has the option, has a choice.

Either ask the court to auction this property, okay? So the person who has uh..registered, he has the option to acquire the property, cannot simply exercise the option and become the owner.

No, you cannot.

You can no longer do that because of this statute.

If this option is to secure a debt...if it was an option which was entered into from other reasons, then this statute does not apply.

So you can just exercise your option and you can register your ownership without any of these procedures.

But if the option was to secure a debt, you have to take either of these two part, one is to demand auction and when once auction takes place, court-supervised auction takes place, then all secured debtors will participate in the distribution of the proceeds, okay? According to their orders.

And there is priority which is determined by the date of entry.

Which charge was registered earlier, so the earlier charge takes precedent over the later charges, okay? And this option is treated just like mortgage, okay? The other possibility is a settlement.

And this, the statute gives fairly detailed procedures to be followed.

So basically, creditor must give a notice of settlement to the debtor, when the debtor fails to repay at the due date, okay? The notice must set out the credit amount, including the amount of secured credit owed to other creditors who have priority.

The valuation amount of the property, the balance...so, let's say there is...the first priority mortgage which secures ten million won.

Okay? That's the earliest one.

And then let's say that was entered in 2005.

And 2006, this option was registered, okay? And then..the val..now, in order to, the notice of settlement must specify..you owe me 15 million, plus interest is now 1 million.

So 16 million.

And this property has 10 million debt which is prior to my option.

And the worth of this property, I value this property at 30 million.

So the balance is 5 million.

So would you accept this? So that's the notice which must be given, yeah? Why prior debt is included here?

Because private settlement means this person will become the owner if the debtor accepts this calculation.

Okay? That means..that means, think about this.

The creditor is entitled to receive 16 million won, but the debtor failed to pay it, right? So what the creditor proposes is that 'okay, I'm not going to ask you 16 million, actually I'm going to give you 5 million more.' Alright? But if you calculate 16 million plus 5, how much is it? Is it 21?

There is something wrong, I, I, sorry, I miscalculated..so 26..so I offer you 4 million because it's 16, 10, so that's 26, right? Since this property is worth..worth of the property..worth 30 million, the difference is 4 million.

So that's the money I'm offering.

So I offer you 4 million more.

I forget about 16 million and on top of it I offer you 4 million.

So what the creditor is investing is 20 million.

And he's going to have 30 million worth property.

Why is it? Because when he successfully registers, now it's 2011, right? His ownership, that creditor becomes the owner.

This prior charge will remain on this property.

And this creditor may have to repay, you see.

That basically the creditor will use this fund to pay up and cancel this charge.

Now this notice, secured creditors having an inferior claim must also be notified.

They may demand auction of the property before the balance is paid out to them.

Now if there is an inferior charge, inferior meaning inferior to the option, okay? That was the first charge, 2005, and then in 2006 this option was registered, and let's say 2007 there was a second priority mortgage here.

Which secures 2 million won.

Okay? Sorry, let's say which secures, again, 10 million won.

Okay? Now, this notice of settlement must not only be given to him, but to him as well.

The second..

Basically, what it says is that well, the only thing that remains is 4 million, and I'm sorry, you only have 4 million, although your mortgage is intended to cover 10 million, you only have 4 million, and your mortgage will be canceled.

The rest, 6 million, you have to get the money from the debtor in whatever manner you can.

You cannot rely on this property.

That's what this creditor is claiming.

Look, they are all creditors, alright? They are all in the same position or similar position.

The difference is the priority.

Now this particular creditor is proposing to settle all these credit, secured credit in this manner.

He says 'my credit is this much, my..

the creditor who has priority over me has 10 million, and this is worth 30 million, so you only get 4 million and you should forget about your mortgage.' That's what he is proposing.

Now, if he does not agree with this creditor's valuation of this property, he can do what? Louder.

[student answer] Yeah, yeah, yeah.

But then whether to demand auction you have to be careful you know, what kind of price can be achieved as a result of auction.

So if this creditor's valuation is really very low, then you should go for auction.

But if this is more or less reasonable, if you demand an auction and what if auction cannot produce even 30 million, you will end up even much worse off, right? Yeah.

So once that settlement notice is accepted - accepted means nobody raises any challenge or objection for..what, two months, I think? There is a period.

Then all the charges will be cleaned up, alright? And option holder becomes the owner of the property.

Debtor can repay the debt before receiving the balance.

That means even when this notice of settlement was accepted, even when the debtor didn't raise any objection for ..what, is it two months or..let's have a look at the...two months, right?

So even when the debtor didn't have any idea how to repay the debt, so the debtor kind of resigned..'oh yeah..

I will just accept it..' so the debtor didn't raise any challenge, right? But still, before the balance is actually paid to the debtor, the debtor, let's say, won a lottery.

Wow! Then the debtor can repay the original debt.

And that's it.

The debtor can retain ownership.

Because this is essentially..there is an accord between debtor and creditor.

So debtor's obligation is to pay money here, in this case.

The borrower.

The borrower's obligation is to pay money.

Now, what happened was that they entered into an accord..what is called 'accord and satisfaction' arrangement.

Which means, well instead of paying money, instead of carrying out that obligation to pay money, I will sell this house to you at the price you designate.

That kind of thing.

At the price you designate in the manner according to that statute.

They didn't specifically say it, but what happened was this.

So instead of paying money, debtor agreed to convey property, right? But this arrangement is only partially binding in the sense that when everything was actually done, then this original obligation to pay money is definitively discharged and disappears.

But until this accord, the agreement to convey the property instead of the debt, until that procedure is complete, until the last minute, the debtor can always pay the original plus interest.

Because this accord and satisfaction does not change the original obligation.

It is not novation, alright? This is 경개 in Korean, whereas accord and satisfaction is 대물변제합의, alright? So they are different.

So this accord and satisfaction does not remove, does not get rid of...

this original, the initial obligation is always there.

So if that initial obligation is fully satisfied, then this has no binding force whatsoever.

So that's why debtor can..until the last minute, if debtor somehow managed to find the fund, can just repay the principal and..plus interest, then all this becomes happily resolved for the debtor.

And also before the lapse of ten years from the repayment date, or before the property is conveyed to a third party in good faith.

Let's have a look at article 11 of 가등기담보법.

So until the debtor receives the balance...yeah, but, you..the debtor can no longer do this when ten years have passed from the repayment date.

Okay? Once the balance is paid up to the debtor, debtor can no longer try to recover the property, yeah? If the option creditor proposes this settlement and pays the balance to the debtor, then definitively the ownership changes, okay? But if that balance is not paid, then the debtor can always repay the original debt.

If the debt..the balance is not paid, actually the debtor has a claim against the option creditor.

So debtor can resist the conveying of title.

Arguing that we should perform simultaneously.

Until you pay me the balance, I won't have to convey the title of the property.

So that, that is another important point.

Okay, any questions about the option contract? No? When you don't study well, you don't have questions, yes? Alright.

Now, let's move onto sale..seller's obligations.

Okay let's now start fresh...

Now, have a look at article 563, okay? 563.

If you look carefully, there is an expression 'transfer'..a seller shall transfer..well one party transfers to the other party..

재산권, okay? Property right, I don't know how to translate 재산권.

Right which has value? Or, assets? Or..

재산권, I don't know how to translate it.

What is clear is that it is not 'ownership' because we do have a legal term legal term for 'ownership', which is 소유권.

But obviously, article 563 or the legislators of civil code, Korean civil code, must have thought long and hard how to define sale.

And they chose to avoid using 'ownership' in defining sale.

I don't think this is accident.

I mean they knew, perfectly knew well what 'ownership' meant.

And they knew the word 'ownership'.

They didn't use the word 'ownership'.

And if you look at article 568, again it talks about seller having to convey rights which are the object of the sale.

They were very consistent in avoiding the term 'ownership'.

So if I buy this book from him, do I not become the owner of the book? What do you think? If I don't become the owner, what's the point of me buying it? I might as well just borrow it.

Then why do you think our civil codes avoids the term 'ownership' in explaining sale contract, or defining sale contract? Why? [student answer] 569...

Uh, hang on.

This article 569 talk about ownership.

So it doesn't talk about ownership either.

It just talks about rights..

That's a good try but, you know, but that article 569 does not seem to help you much..why? Any, any suggestions? [student answer] Pardon? Ah, because you can sell rights which are..other than ownership.

Yeah, that's another good point I think.

But then it becomes a bit awkward to talk about selling the ownership, you sell some things rather than you sell the ownership..

but anyway, normally you sell things, right? But then you can sell rights, like right of way, you can sell..well, your..some kind of option, you can sell your option also, right? So in that case we cannot talk about ownership, but other rights.

So that's, that's good point.

Another reason why legislator of our civil code avoided using 'ownership' is..sale is about the obligation, the bond between particular parties, okay? It's obligation whereas ownership is real right.

So the institution of sale is entirely a question of obligation created which can be exercised against one particular party, right? So they wanted to maintain a theoretical coherence of the system.

They don't want to involve this notion of real rights, which..which works under a completely different logic, yeah?

Real right..in explaining real right, we don't talk about sale, we don't talk about seller's obligation or buyer's rights also..in talking about change of ownership, we only talk about...what? We only talk about registration.

Pardon? Yeah, title..and some scholars talk about real contract, something like 물권행위 which I find is ridiculous, but we only talk about the cause for change of ownership, the so-called 'causa.' And then registration or change of possession.

Then we explain how ownership changes.

We don't talk about what kind of contract.

But of course, those various types of contracts whether it's sale or donation or exchange..various types of contracts may be the cause for the change of ownership, right?

But we don't specify, we don't need to specify which contract, when we talk about transfer of ownership.

So, we didn't talk about the obligations or contract when we discuss and explain ownership change, right? Likewise, here, when we talk about contract, we don't need to talk about ownership, okay? So.

And, plus, that other reason, make sure that 매매, the sale, can be applied as wide as possible range of transactions, right? So it would be unwise to involve the notion of ownership.

But then of course there is a Roman law tradition also.

Where Roman jurists consistently avoided talking about ownership when they explained sale.

So our civil code basically took over that approach, the approach of Roman jurists.

So how to explain then, the seller's obligation, if you don't involve the notion of ownership?

If seller..what does seller have to do, if I buy that book from him, what does he have to do? He have to make sure that no one bothers me in enjoying and, you know, using this book, ever.

If it's..if I borrow him, then when the lease period, when the period for returning comes, I have to return, I can no longer enjoy this, right? But when I buy it, he must ensure that nobody bothers me about me using this and possessing this, ever again.

Not only in my life, but generation after generation, right? So no one ever bothered me.

What is the best way to do it then? ...

Evicted means I am evicted from thing, this thing.

That means that I lose possession, not that I carelessly lost it or misplaced it, but that somebody else who has superior claim than my claim over this successfully acquires the control.

Then I'm evicted, right? So seller's obligation is to make sure that that does not happen.

That's seller's obligation.

So if some other person comes up and demonstrates that he has stronger claim than mine, then seller will have breached its obligations.

Then I can sue him and claim damages.

We don't talk about ownership, alright? When we talk about sale.

It is only about what that particular person must do to me.

We don't talk about ownership because ownership, it's about everyone in the world.

Which has nothing to do with contractual obligations.

When we talk about sale, we have always to focus on what he is obligated to me.

And what I am entitled to claim against him, that's all that we can talk about.

That's another reason why civil code does not talk about ownership.

All that seller has to ensure is that I can enjoy this without anybody bothering me with a superior claim than I have.

So he, if he has the ultimate claim of being the owner, then he can simply transfer that position to me.

Then he can be quiet.

He can have peace, right? Not only him, but generation after generation.

His descendants can also have peace.

Theoretically, I buy this thing, and he does not convey the title, but he makes sure that no one bothers me.

That is a..perhaps, hypothetically possible, but I wouldn't accept it.

Why? He..I can trust that he will do it while he's alive.

But I don't know his children, you know? Whether his children will also make sure that I can enjoy this.

I don't know whether he will have descendants, for instance.

See? So most usually and almost invariably seller will just convey the title and that's a way of discharging seller's obligation.

It's simply a way, most convenient and most satisfactory way of discharging seller's obligation.

But seller's obligation does not in itself involves ownership transfer.

Ownership transfer is a way, a method of discharging seller's obligation.

So, title and possession need to be transferred.

Compare, um..transfer of title alone will not be sufficient.

Because as he pointed out, possession must be conveyed first and foremost.

Okay? And 2000 □ 8533 case demonstrates that ownership is not the central part of seller's obligation.

Conveying ownership is not the..central to seller's obligation because that involves a case where the property is attached.

So attachment is recorded in the title registry, okay? Attachment means someone who has credit against the owner...let's say the owner is X.

Someone who has credit against X wishes to make sure that this property is available when it is time to enforce the debt against him.

So availability for enforcement of judgment.

That means the ownership still remains with X, okay? So X can convey the ownership.

Let's say this property belongs to X.

X can perfectly well convey the ownership to Y, there is no problem of conveying the ownership itself, even if it is attached.

But in that case, the purchaser demanded that seller should cancel the attachment..not only seller did complete the title transfer so the property is under Y's name, but buyer, in that case, claimed successfully that seller should 1) transfer this title, 2) cancel the attachment.

Because the sale contract was entered into...at that time, there was no attachment.

And buyer bought a hou..a property which was not subject to any attachment.

And what is the seller's obligation then? Well, seller has to convey the title, which the seller did here, seller has to convey the possession, which the seller did, here.

Then what more do I have to do? That's what the seller claimed.

But from the buyer's point of view, well, in the meantime you've got your property attached.

You have to make su..you have to, you know, have it cancelled.

Otherwise, you are in breach.

That's the purchaser's argument, which is true, which is right.

Because, although title have passed to Y, Y may not claim that he is the owner against..whom?

Against the creditor here, A, who is the creditor against X.

Now, Y is registered as owner.

Attachment does not prohibit or does not invalidate title transfer.

Everything can be done normally, right? But there is only one exception.

Y is the owner in the eyes of everybody in the world except for one person in the world, who is A.

So A can ignore Y's title and A can treat X to be the owner.

So in that sense, seller did not convey the title 100%.

There is tiny bit missing, yes.

That part.

That portion is missing.

Normally ownership means you can be owner, vis-a-vis everybody in the world, right?
And your descendants can also claim that.

But here, there is this one, which is missing.

Buyer..87 다키 1029 case is slightly different but in a similar line.

The buyer may withhold the payment of the amount secured by hypothec until the hypothec is cancelled.

This is again, when the sale contract was entered into, the property was not burdened by any charge.

Okay? And buyer was buying a clean property.

That's what buyer is entitled to claim against the seller.

So after the sale contract was entered into, a hypothec was registered.

A charge was registered.

Seller conveyed the title, no problem.

And seller in this case can assert..

I mean the buyer, who is now the owner, can assert his position as the owner against everybody in the world without any exception.

But there is this charge which was not part of the thing sold, alright? So the purchaser can withhold amount, an amount which corresponds to the worth of this hypothec.

Usually the maximum amount secured by this hypothec, okay? So that amount, the purchaser can withhold, refuse to pay.

Until hypothec is cancelled.

Okay? The title transfer is already done, okay? Now, next Monday there won't be any lecture.

It's 추석 holiday, but we'll meet on Wednesday, okay? And then we will dive into the seller's warranty which is very important and I urge you to study very carefully, okay?