Law of Obligation II

Sale and Repurchase

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Fully satisfactory.

It should not be annoying.

Is it part of your understanding of commercial..ah..practice.

How about you? You also thought that it is defect? Ah..okay.

But I would have no difficulty accepting that it is a defect if hard disk drive is not working at all, okay? When you're buying and selling second-hand computer, you'll expect that it is working condition..it is in working condition.

And in this case, I think it is in working condition..so in that respect it might not be easy to conclude that it is a defect.

Another point to watch out would be that it stopped to working only after seven months, right? I..I don't know whether um..they are.

It is difficult point um..there is no clear cut answer.

You could argue that it is a defect.

But then you can also argue that it is not defect.

But which a..aspects will be relevant in your view.

In determining, whether it is a defect or it is not a defect which element would be.

Expectation? Yes, but expectation of the parties to the contract will be influenced by what circumstances.

Good! It’s mainly price, I think.

If it is ..but if the price was..at a level of a junk or second, not second-hand computer, but just you know people might buy computers who are broken, for instance, right? If that was relevant price, then we cannot conclude that it is a defect.

But if the price is for usual second-hand computer, then the question becomes a bit more difficult because second-hand computers can last for many many years, but then it could be a bit faulty, so that then it becomes very difficult.

In this case, the price was like six hundred thousand Korean won, and that’s pretty high price, I think.

And you could expect that it should work..

Yeah, so it’s essential that you discuss these issues, these points rather than just conclude that it is defect or conclude that it is not defect.

I want you to talk about how you think, right? I’m not too much interested in your conclusion.

I’m more interested in the way you think and the way you lead your discussion to your conclusion.

The conclusion itself.

It is not very important.

Okay.

So that’s the defect aspect, suppose, assuming that it is a defect, then what about the cut-off point? The limitation period.

Do you think the purchaser in this case met the deadline for bringing the breach of warranty claim?

You think the purchaser missed the deadline, okay.

Six months after the sale contract, but then it will all boil down to when the purchaser realized, yeah? But assuming that it is the kind of defect that you can immediately realize, then most probably, the purchaser missed the six-month cut-off period.

If we conclude that the purchaser missed the six month cut-off period, then can the purchaser bring breach of contract claim? What do you think? Breach of contract? What breach was made there? Did seller breach the contract? What was your discussion? (Student) So, you concluded that there is breach of contract as well as breach of warranty? (Student) So if you missed the deadline, then you can claim the same thing on the ground of breach of contract? That's your view or..(Student) That's the only difference.

So, you're saying that if you missed the deadline for bringing breach of warranty claim, then you're even better off because you can bring breach of contract claim, and then you can demand not only the direct loss, but also extended loss.

(Student) The fault.

Yeah.

The defend...the causation.

I think it must be proven in any way.

But the defendant cannot avoid having to pay compensation even if the defendant proves that he was not at fault if the claimant brings breach of warranty claim, right? But if the claimant brings breach of contract claim, defendant has a room for avoiding the liability by demonstrating that he was not at fault.

But the problem here is that was there a breach, I mean if you are going to conclude that there was a breach of contract, you should be able to say that the seller did not keep his promise.

But what promise did seller make? What agreement was made here? It is pretty difficult point.

If we understand the parties' agreement to be that regardless of the quality that particular object needs to be delivered, then it was fully performed, right? That was what parties' agreed in the first place whether it's poor quality or good quality that particular notebook needs to be delivered, if that's what the parties have agreed, there was no breach of agreement.

So you cannot argue that there was breach of contract.

Yeah.

I..okay..What about the..amount of compensation? Assuming breach of warranty

claim can be brought, let's assume that it is a defect, and let's assume that there is no exclusion of warranty, okay? Then, what is the..let's talk about exclusion of warranty before talking about the figures, about the numbers.

So in this case, the seller clearly excludes liability for defects, right? So, how do you.. how do you assess the exclusion of liability? (Student) Yeah, I think that's..that's how you can approach this issue.

The excluding party..the party who intends to exclude liability whether that party knew about the defect or not.

That is important, right? Whether the other party knew about it or not, that is not very important.

If the excluding party didn't know about the defect, then this is perfectly valid exclusion of liability, right? (Student) Yes.

Because six months run from the moment when buyer realizes, that's this thing he brought has a defect.

Yeah.

So if we assume that this is a defect, and the..exclusion of warranty is invalid, because the seller knew about that specific defect.

And also if we conclude that six months limitation period has still not run out, then we need to talk about how much purchaser can claim.

Now, the market value is three hundred fifty thousand.

Let's say that..that is the accurate market value.

And what the purchaser paid is six hundred thousand Korean won.

So according to Charles in this Yild law school student, he suggested that..the difference between the market value and what purchaser paid, that can be claimed as damage.

Do you agree? (Student) Good! Very good! I think so.

The reduction of price under breach of warranty claim must be worked out exactly as she suggested, right? So reduction is allowed only to the extend of defect.

We don’t..we don’t need to talk about the market value of the thing sold, and in this case if successful in reduction of price claim, then he will end up having paid 500,000 won in the end, right? He paid 600,000 won, if he gets 100,000 won back, then he will end up having bought this computer, which is worth only 350, but he paid, he would have paid 500,000 won, but that's just, that's how he bargained.

That's..that's how it should be, okay? So that's it, and if this is breach of contract situation, then we can talk about extended loss.

The files and the documents, it's all lost, right? Because of the faulty hard disk drive.

Now you, have you discussed this issue? This aspect? (student) Ah.

The seller didn't, couldn't foresee that that kind of loss would occur to the purchaser if hard disk drive just becomes dead? (student) Uh huh.

If you don't store photos or documents on your computer what else, what do you store? Do you store on your computer something which is utterly useless? (student) What do you think? Assuming that we can talk about breach of contract, do you think that this counts as extended loss which must be compensated by the seller? I lost all my valuable documents and photos.

(student) She foresaw that the kind of loss would occur? Hmm.

There are the question of causation, right? And foreseeability.

They are quite closely related to each other.

Do you think there is causal connection, if hard disk drive fails, people suffer, and quite a great deal of, well, valuable documents..is there a causal connection there? You think there is causal connection.

But you think there is no foreseeability.

Hmm.How about you? You..causation, yes, it's..right, right, okay, and then you also think that there is foreseeability as well? Hmm.

I think physically there is chain of causation.

That is not to be doubted.

But then the concept of causation is not only physical, it is rather normative assessment.

What would usually happen.

Have you not thought about the possibility of back up? It is, I mean physically, inevitable that if hard disk drive no longer works, you can't have access from that hard disk drive, but then people do back up, right? Although in reality, not many people do it, but if you think that this computer is somewhat unreliable, well you could protect yourself, right? You could invest a little bit, you could buy some external hard drive and back up your files if they are valuables files, for instance, if..

(student) I still haven't worked out, to be honest.

I still haven't worked out the relationship between causation and foreseeability.

Especially if causation is a normative concept and if we are going to conclude that causation requires not only physical link, but also how..what will ordinarily happen.

But for the moment, this is how I understand: let's say a breach occurred, okay? A breach occurred.

And let's say in this case, hard disk failure.

In this case, the breach consist of hard disk failure.

And if that happens, files will be lost.

File, loss of file.

From that very hard disk drive.

But then there is this possibility of back up.

So how likely is it, or how reasonable is it to expect people to back up? And if you conclude that the purchaser was reasonable in not taking any measures to protect his own files, if you think that it is reasonable not to back up at all, then you have to conclude that there is a causal connection and you normally don't even need to talk about foreseeability.

Because it's just a ordinary outcome of what..the breach.

Foreseeability becomes relevant when, from a breach, some loss occurred, but there was some special circumstances.

So because of these special circumstances, the loss is much bigger compared to the situation where there were no special circumstances, okay? Then you need to talk about foreseeability, okay? In my view, the hard disk failure will lead to a loss which is equal to the loss of value of the hard disk drive.

Not the files.

I don't think you can claim that the seller of hard disk drive should pay for the files, no.

Yeah.

What is the direct result, what is the most ordinarily..what is the loss which will most ordinarily happen if hard disk drive fails? Well, you will end up with a hard disk drive which does not work, okay? The loss is, the difference between the working hard disk drive and a junk which is not working.

So that difference, that is the loss.

Not files.

I mean, files, you will have to look after yourself.

That's what happens in most cases.

Basically, what happened here is that the purchaser didn't take any precaution.

The purchaser didn't invest anything.

The purchaser was lazy.

The purchaser was very childish.

The purchaser was stupid, ridiculous.

And as a result he suffered a great deal of loss.

He cannot put the blame on the seller for all his shortcomings, right? That's how you should..you should expect people to behave as a grown-up, okay? That's a fundamental assumption of contract law.

Here, the purchaser was being childish, and he suffered.

Of course he, you suffers a great deal.

Like the example of a greenhouse, the farmers who relied on heater.

Burner which will warm the greenhouse.

And they didn't take any precaution about power cut, for example.

They should have bought some emergency backup generator, right? They didn't do anything and then they tried to recover the loss from the seller of the burner, I think that kind of claim should fail in almost every case.

Because in that case, the breach, of course the burner went dead, okay? The burner broke down.

What will be the ordinary loss? Well the difference of burner's value.

The properly functioning burner and the broken down burner.

That's the loss.

Whether the burner can be used for any kind of..an infinite number of uses, and burner seller, how can he know that this burner will be used for warming up greenhouse or whatever, right? What about this burner was used to maintain the temperature for this hugely valuable scientific invention, for example? Some kind of stem cell research and..no.

(student) Uh huh.

Oh, you think that this should be included in the loss.

(student) And then set off must be made, taking into account the purchaser's negligence.

I tend to disagree, I tend to disagree, we should just conclude that the files, that is loss which is not foreseeable.

So there should not be any further need for talking about set off.

It should be just outside of the foreseeable loss, that's what I think.

People who sell computers or people who sell hard disk drive, they simply cannot expect what will be stored on the.. if purchaser tells the seller saying 'look, I'm going to store very very valuable file and I just want to make sure that your hard disk drive

does not fail,' what do you think the seller will respond if purchaser makes that kind of demand? If you're a seller, if you sell hard disk drives, and I come to buy the hard disk drive from you and say ‘look, I am going to store documents which is worth like several billion dollars and I want to make sure your hard disk drive does not fail.’ What will you say? (student) Yeah.

(student) Would you agree to put that kind of terms in the contract? Who would agree? (student) Ok.

Let’s say, let’s say in the contract they put down: if this hard disk drive fails, the seller shall compensate the purchaser up to let’s say, one million USD.
Do you think that the, then the price will be the same? No it won’t be the same.

Right? It will never be the same if no, no same person who is selling hard disk drive will agree to put that kind of clause in the contract.

So if there isn’t such clause there, even if the purchaser told seller in the cause of negotiation, ‘look I’m going to use this very, very important purpose.’ If there’s no such a thing, what do you think? Basically the seller just ignores that kind of request or that kind of one-sided wish of the buyer.

You cannot have this kind of remedy merely by just one-sidely telling about the…
Basically if I were the seller if purchaser comes with that kind of request I’ll just say, ‘no. don’t buy it from me. I’m not prepared to offer that kind of protection for you, it’s up to you to get your own protection.’ Right? And this notion of extended damage and foreseeability it should all be taken into… worked out together with what the price was negotiated, the level of price is where...

I think that’s more less what we need to talk about.

Ooh, I found a mistake.

Yeah.

I found a mistake.

What do you think? Have you talked about this mistake? Resending the contract, have you? (student) Why? (student) They didn’t? (student) You sound almost like, you’re talking about fraud.

Yeah at least it didn’t… didn’t utilize fraudulent means of negotiation.
I think that’s true.

At least didn't tell any lies, right? What was claiming probably, what was not claiming, that at least does not lies to him, but was simply claiming that he was mistaken.

Yeah.

(student) Ok what do you think? Have you talked about the topic of mistake? (student) But minor mistake maybe? (student)
A hard disk drive is not a material part of computer….

(student) Ok.

Well when you want to talk about mistake, you must first of all establish what has been represented, what was said, what was described, what was expressed, ok? And then you have to compare what you had in mind, ok? So expression and what intent.

Now what was expressed here? Well the second-hand computer.

And this is second-hand computer.

So there is no direct divergence there is no difference, there is no discrepancy.

And if it had been expressed that this is second-hand computer in perfect condition, then maybe there is some… but in this case there was no such expression in the first place.

And what mistake will be there? As far as what had been expressed and what had been represented and what had been said, ok? The reality exactly corresponded to what had been expressed.
So there wasn't any mistake.

It was just a case of Bob having a one-sided wish, ok? He didn't even know.

He didn't even have a clear idea of what is being expressed.

So I don't think this is a case of mistake at all.

The contract was to buy and sell a second-hand computer of unknown quality, right? And that's the reality, and reality corresponded exactly to what had been agreed upon.

Yeah? So what had been expressed was sale and purchase of a second-hand computer whose quality is not guaranteed.

That’s what had been expressed and agreed upon.
And honestly I don’t think there is any breach of contract either.

Yeah.

(student) Yeah, yeah.

That’s what the parties have agreed and seller fulfilled that agreement.

(student) Because? (student) So you’re puzzled.

It’s a very good question though.

It’s a very good question.

We have in the contract regime, ok? This is a, maybe the most fundamental point.
So, contract is essentially what the parties agreed.

Ok? What the parties agreed.

And here the contract parties can agree about anything, everything.

It doesn’t matter what the quantity, quality especially about the quality.

The parties can agree to buy and sell something very, very bad quality or good quality, whatever.

It’s entirely up to the parties.

And there is no, objective criteria there.

It’s entirely up to the parties.

But, under the contract law, we have this question of merchantability.

Uhm merchantability issue.

There is some kind of objective standard, objective quality which is not part of what the parties agreed.

We do not even look at what the parties agreed.

We just look at the expectation not that particular party's expectation but the kind of expectation people have about that sort of transaction.

So this warranty works not on the level of agreement.

It works independently of what the parties agreed.

So what I am saying is that, there may be a situation where there was nothing wrong about the party's performance as far as the agreement is concerned.

That's what they agreed and they performed.
But still, if the thing sold falls short of the kind of expectation, which can validly be intertwined, then warranty will arise.

Warranty question will arise.

So these two are independent principles working under the contract.

So this warranty issue, is distinct from agreement between the parties.

It does not require the parties' agreement.

So… (student) Yeah.

(student) Merchant case is somewhat different because it is sale of, an unascertained good.

It is not sale of a specific good.

You see, it was mushroom germs, ok? Mushroom germs.

But when it was delivered, well that was the… the thing became specific.

But the contract itself was, a contract of unascertained good.

So, in that case, the bad germination rate was not only a warranty issue but also breach of contract issue as well.

Whereas here it is entirely a sale of specific good.

So warranty issue will arise but it is very difficult to say that there was breach of agreement, breach of contract.

In the mushroom case, both will arise because it's in the first place it was sale of unascertained good.

A lot of cases I… in fact unascertained goods.

But this is fundamentally different strains.

There are two different strains working here.

As I said, this warranty liability originated from Roman legal institution which started out as a remedy for sale of slaves in the market.

Ok? That remedy was not available if it was sale which was done at some other place.

It was available only at marketplace.

It was almost like a ministrative protection.

So the remedy was available regardless of what the seller represented, ok? So there was some minimum quality standard… must be fulfilled.

And the remedy was to just to ensure that things which are sold in the market has some minimum quality standard.

It had nothing to do with what the parties agreed.

Well that's the origin but still I think these two different, fundamentally different currents are at play.
That you should understand.

Now, is that okay now? Can we move on? Today we will briefly go through sale and repurchase.

This is a type of transaction which was negotiated, which is negotiated and concluded as one transaction.

It is not two transactions, right? Most frequently what happens is that I need some money.

I have something but I need some money.

So I am A.

And I have some let's say a house.

I need money so B is willing to offer me the money but B is just lending me the money so he wants some security.

So what we can do we can agree that alright he gives me 100 whatever million or.

And I sell him this house but when I can pay back, he will resell the house back to me that whole thing that whole arrangement is agreed at one go as one transaction.

That's sale and repurchase.

In other words, this is seller and he has the power to repurchase and they will agree about the sale price and repurchase price.

Sale price is exactly the money I need or the money he is willing to lend me.

And repurchase price is the money B wants to receive at the end of the repurchase which would be that amount plus some additional amount which may be the interest.

Most often it may be the interest.

So the parties often stipulate the repurchase price either in absolute terms or the parties agree about how to work out the repurchase price because it depends when the repurchase is exercised.

So that's um..the difference you need to distinguish, now, before talking about buyback option, let's stay with sale and repurchase.

It is one transaction.

And once that is done, the ownership passes to B and they will register of course.

B's title will be registered.

But B is in a very, B's title is very vulnerable.

It can be reverted to A at any moment when A exercises the repurchase right.

So it is not really permanently B's property until the repurchase is possible while the repurchase is possible.

Basically you can consider it as somewhat different arrangement.

Again A needs money and B is willing to lend the money to A.

A has some property.

You can do this as well.

This is different.

B lends money and then B and A enter into an option contract, option contract whereby B has an option to purchase if A fails to pay back.

And they agree about the purchase price but that has nothing to do with sale and repurchase.

The property just remains in A's name all along until B exercise the option.

But this one is A sells the property and has the power to repurchase.

Now something very similar is A sells the property, sale, and additionally A and B enters into an option contract whereby A has an option to buy back this same property.

And they can agree about the buyback price.

This is different from sale and repurchase in the sense that sale and repurchase, the parties' intent was that this is one transaction, one contract.

Whereas this one, just two contracts, sale is sale and option contract is option contract and you can exercise your option in 10 years, I think? So it can last for 10 years.

Whereas this one, repurchase must be exercised within 3 years or 5 years in the case of movables.

So when the parties make this kind of arrangement, contract interpretation may be an issue.

Sometimes you need to interpret the parties' transaction as a sale plus buyback option in that case buyback option can be exercised for much longer period.

Sometimes you need to interpret the parties' transaction as a sale and repurchase.

In that case, repurchase must be done within 3 years.

When sale and repurchase is about immovable, the title will pass to B and B's title in the real estate registry, B's title will be entered into, it used to be A's property, now it's B's property, right? But that property has a condition.

Some kind of, that title is in fact not 100%, it is qualified by A's repurchase right.

So sale and repurchase is registered as a subentry of the sale transaction.

So to that, to B's title the limitation, or the qualification of B's title is entered into, which is A has the power to buy back.

Whereas buyback option, it is where it recognizes that B has full title, B's title has no restriction, but then B and A entered into an option contract.

So that's a separate entry whereas sale and repurchase is a subentry to B.

Article 590 talks about repurchase price.

I already told you that parties themselves would agree upon a specific purchase price.

But article 590 would become applicable when parties simply did not agree at all about specific repurchase price.

So a sale price plus buyer's expenses.

That means when first B decided to buy this property B would have invested a little bit in valuing, evaluating the worth of the property and some other contract cost, contract expenses.

So the cost incurred by B in buying this property that's what he will recover and nothing else and the...

Seller, this one, can exercise the repurchase right by tendering the agreed repurchase price or if there was no agreed repurchase price then sale price and buyer's expenses.

There is some dispute whether the title automatically reverts, it is registered under B, okay? It is registered under B and A now tenders the money, repurchase price.

Once that is done even though on the real estate registry, B is still the owner.

In fact, the title already reverts to A.

That is a view.

Another view would be even if A tenders the price, the title still remains with B and only when A is again recorded as a owner.

A requires the ownership.

That is another view.

And I think the first view is more convincing.

That’s why some people even explain sale and repurchase as a sale accompanied by an agreed termination of the sale.

So according to that view, if A tenders the repurchase price, the original sale is terminated.

That means the title reverts automatically.

You don’t need to change the registration.

Another point is that once B’s, once repurchase is registered here.

Then while A is not exercising the repurchase right, it is B's right, ok? But very vulnerable, very unstable, ok? precarious.

And what about the validity of subsequent transactions? Let's say after this state, if B sells it to C, ok? If B sells it to C, A can exercise the repurchase right against C.

Yeah? And C will lose the title, the moment A exercises the right.

Ok? And what about the second section B? This was entered, let's say, first of May 2011.

And in section B, X bank acquired hypothec once on first of June, ok? And then A exercises repurchase right on first of July.

What happens to this hypothec? Well you can’t cancel it.

So, these right is very very precarious, alright? And the people who buy this property, knowing that it is qualified with repurchase right, they know what will happen if A exercises the repurchase right, ok?

Suppose the repurchase registration will have the repurchaser price as well, ok? Let's say it says two million won, ok? In fact, between A and B, they agreed that A must tender three million one.

They might have agreed differently.

But they registered a different figure.

Then if this property is sold to C, where is a..yeah 'assignee of a registered right of repurchase, may rely on the registered amount of repurchase price.

Regardless of the actual repurchase price agreed upon by the seller and buyer.' Now C will not know, what was being agreed upon between these two parties, ok? C will only rely on what was registered.

This is a little bit, let's say, between them they agreed one million as repurchase price.

But they registered two million, ok?

And C will work operate on the basis of what was registered.

And that’s what C will have paid to B, when he acquired this, the title of this property, which has this repurchase right.

In other words, C expects that when A exercises the repurchase right, he will at least get this much money from A, right? And if A exercises repurchase right and tenders only one million, C can refuse.

So that’s what, what this says.

There is some article 594 and 595, these two deal with a.. what happens B invests money to improve the value of the property in the mean time.

B can recover that expenses on top of the repurchase price.

So that investment of B, shall be dealt with separately.

It is an investment which was not planned or agreed upon.

But then the parties may agree that B should not invest.

That’s also possible.

If there exist such agreement, then B can not claim any expenses.

But if there was no agreement as to what we can do, then B is entitled to reimbursement.

It will happen when B thinks that it is increasingly unlikely that A might exercise the repurchase right.

Then after 5 years, it will definitely become his property, right?
So, at some point B may decide to improve upon it, hoping that it will be definitely his property, And if A exercises then B can recover that expenses.

595 is about a property which is jointly owned.

So A was, let's say 50% owner of a machinery for example.

Or a house, 50% owner.

And the.. A sold his portion only his portion, this house is owned by A and X.

And each has 50% share.

And A only sold his portion to B with repurchase right, ok? And in that case, while the property that portion is in B, now it is owned by B and X, right? 50%.

But B's right is qualified by A's repurchase right.

While it is in this situation, what happens if they decided to divide physically, the property.

Let's say they decided to build a wall in between, and have separate entrances.

And they divided this property into two properties, let's say.

What happens? Or if they agree to sell it, and split up the price.

And they sold it, let's say, a very ridiculous price.

Let's say two million whatever, ok.

And they each split one million.

And in fact the market value could be three million or something, right? But they did a very poor valuation and they did it.

A still has that repurchase right ok? And what happens to that repurchase right? A has a choice.

A can exercise the repurchase right, with regard to that physically divided portion, if A wishes that.

Or A can have repurchase right against the money, B will receive as a result of this splitting, dividing of the jointly owned property.

But that choice is possible only when..well anyway that is one choice.

Another one is, A can ignore the split.

Ignore what had happened, which means A can ignore and still demand that B should pay, A will offer whatever the repurchase price they agreed in the first place, ok? But now B only has, let's say one million won.

And A will offer the repurchase price and B will give back one million won, yeah?

But if A is not happy about that.

He can ignore that this division is not, as if it does not exist between these two.

In reality it was done already, right? So A can claim damages, right? And it says in article 595, A can ignore it, if B had not notified it, to A about the dividing of the property.

But that notification there, what does it mean? It means that B must notify to A, before the dividing was done, or before this thing is sold.

Only then B can rely on what was done, as a result of auction or as a result of dividing.

The reason is, A must be notified before this division or auction is done.

So that, A can decide whether to exercise repurchase right, before this thing is done,

so that he can have influence on what on the destiny of this property.
If A became co-owner once again, A could influence X not to divide, A could influence you know, A could influence the auction process.

A could be the joint owner, right? And A could have a say.

Let's say A used to have 60%, and X had 40% only.

And A sold that to B, with repurchase right.

And B had 60% ownership, right? And then B decided to divide up.

But B must notify to A, before this thing is divided up.
So that A has a choice to whether to exercise to repurchase right or not.

So the signature provision only talks about notice.

But that notice means notice which is given to A, before this property is auctioned or this property is divided.

That is to provide A with an opportunity to decide whether to exercise repurchase right or not.

Ok, we will move on to higher purchase next time.