

Lecture on Contract Law

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Professor emeritus of Nagoya
University(from 2008)



Self-introduction

- I am a professor of Meijigakuin University in Tokyo.
- 12 years ago, however, I was a professor of Nagoya University.
 - During these periods I was going to Asian countries, State of Mongolia, Vietnam, Cambodia, Laos, Uzbekistan and China to cooperate development of civil law.
 - Fortunately, these activities were evaluated from this university, I became to an emeritus professor of Nagoya University in 2008.
- So, I am both a professor of Meijigakuin University and an emeritus professor of Nagoya University because emeritus professor is life long post.

I. Planning of the lecture

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Professor of Meijigakuin University

1. Aim: to master the legal way of thinking
→IRAC(Issue, Rule, Argument, Conclusion)
2. Methods: mutual communication
3. Contents: contract law and cases
4. Evaluation: exercise and presentation
(no written examination)

Schedule of lecture

Evaluation by presentation

	1 st day	2 nd day	3 rd day	4 th day
1 st period	Introduction	Validity of contract	1 st Presentation	3 rd Presentation
2 nd period	History of Civil Code of Japan	Performance of contract		
lunch				
3 rd period	Best 30 articles of Civil Code of Japan	Non-performance of contract	2 nd Presentation	4 th Presentation
4 th period	Formation of contract	Unjust enrichment		
Preparation period				Close(Coffee and Cakes)



1. Aim & way of studying law

- The aim of law is to resolve disputes peacefully.
- The final goal of studying law is to master the way:
 - how to read precedents which apply law to facts and improve law adjusting to facts.
 - how to select the important facts among them.
 - how to create a persuasive proposal of resolution for dispute, based on law and precedent.

IRAC: Legal way of thinking

-Royal road to learning-

I: Issue

R: Rules, Reference

A: Application (to apply a rule to the issue)

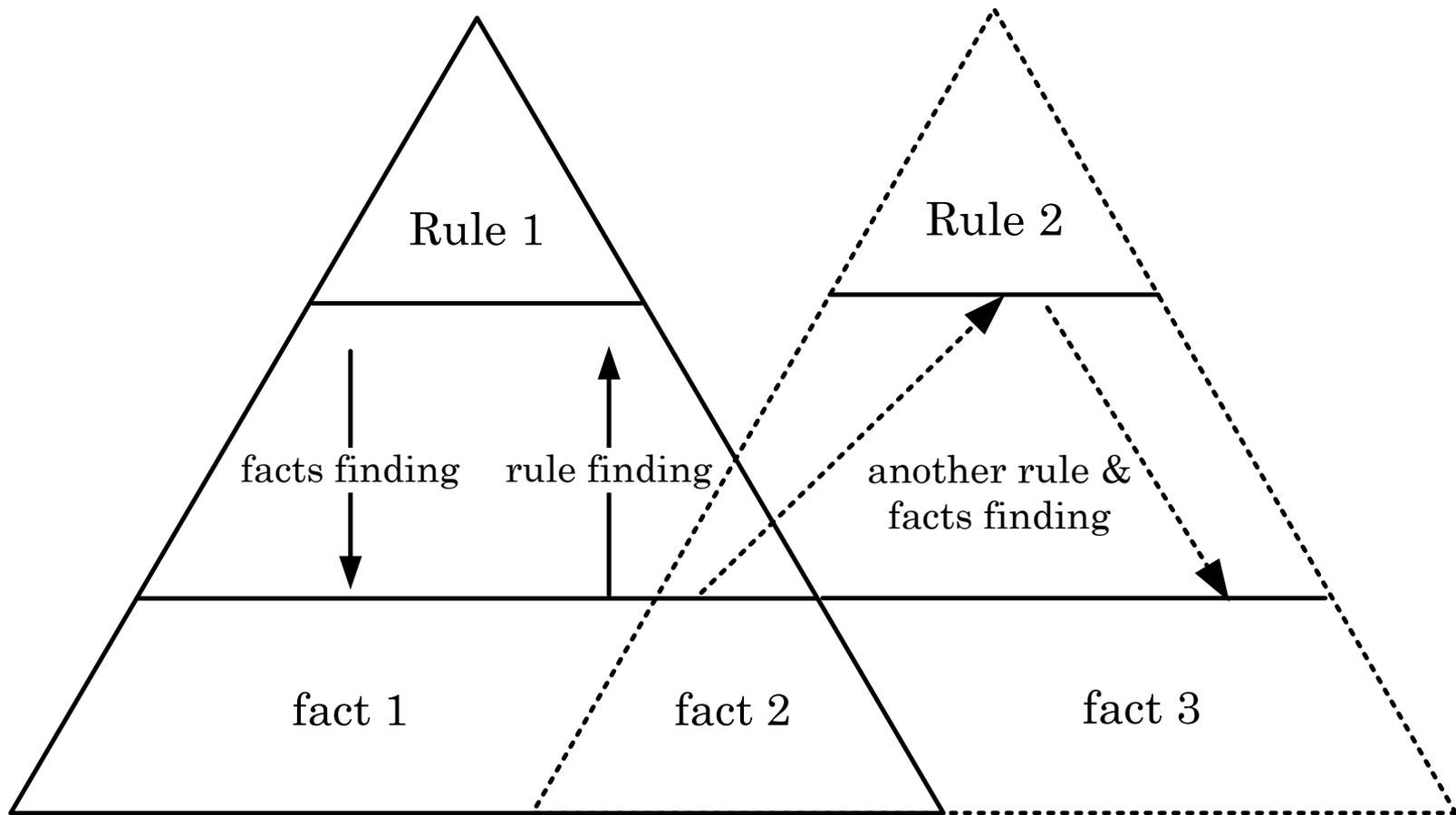
Application1 → a tentative conclusion

Application2 → opposite tentative conclusion

Argument (to argue pros and cons of
tentative conclusions)

C: Conclusion

Top-down and Bottom-up way of thinking



IRAC as the legal way of thinking

Analyze, argue and draw your Conclusion

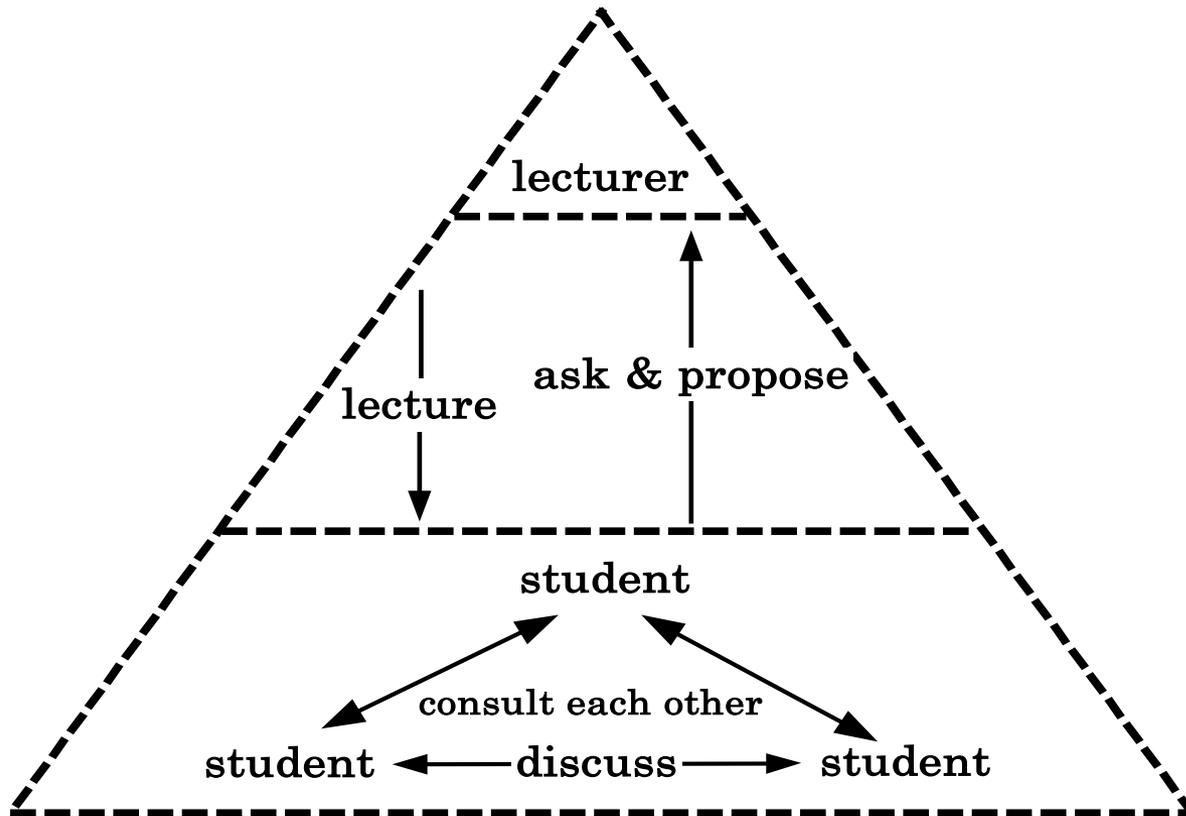
Analysis	Issue		Finding data & facts
	Rules		Finding Rules
Argument	A	Application	Application of Rules, Tentative conclusions
		Argument	Argument against / for tentative conclusions
	Conclusion		Finding final conclusion

2. Method of lecture and study

- Mutual communication is the best way to master law.
 - Vertical communication
 - Giving lecture and understanding
 - Asking question and answering mutually
 - Horizontal communication
 - Asking questions and answering mutually
 - Solving assignments by discussing each other



Vertical & horizontal communication



3. Contents of the lecture

■ Introduction

- What is civil law?
- History of the Civil Code of Japan
- Comparison with Civil Code of Japan and the Uniform Law (CISG, UNIDROIT Principles and PECL)

■ Principles of contract law

- Formation and content of contract
- Validity and performance of contract
- Non-performance of contract and remedies



4. Evaluation

- Mutual evaluation is necessary to master the legal way of thinking.
 - Methods of Evaluation
 - Exercise of cases
 - Presentation in groups from the view point of comparative study of laws
 - Exercise 1: sample and the most difficult exercise



1st Example of exercise

■ Facts in Japan

- Today 'A' indicates to 'B' 31 August as the deadline for acceptance of its offer.
- 'B' knows that the normal time for transmission of letters by mail to 'A' is 2 days and sends its letter of acceptance on 25 August.
- Owing to a strike of the postal service in 'A''s country, the letter, which shows the date of its mailing on the envelope, only arrives on 1 September.
- On 2 September 'A' informs 'B' that it considers the offer as having lapsed.

■ Question

- Contract is concluded or not?

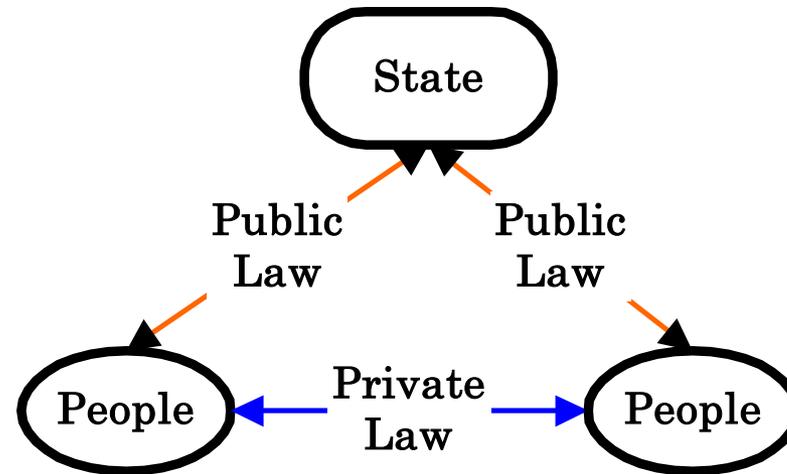
II. What is Civil law?

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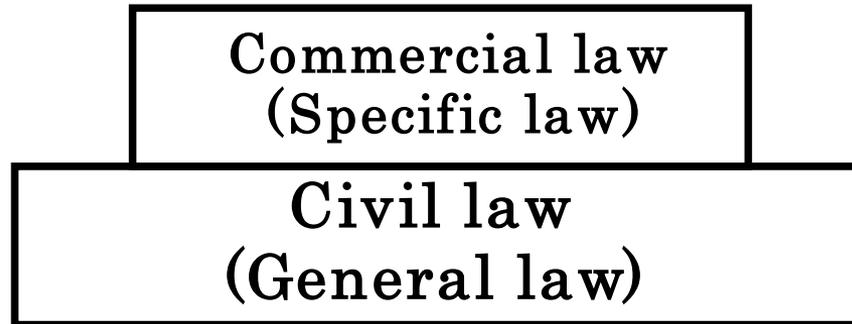
Comparison with
public law,
special law,
criminal law and
procedural law

Public law and private law



- Legal fabric is woven with warp and weft
 - Public law controls relationship between State and people (**vertical relationship**).
 - Private law controls relationship between people (**horizontal relationship**).

General law and specific law



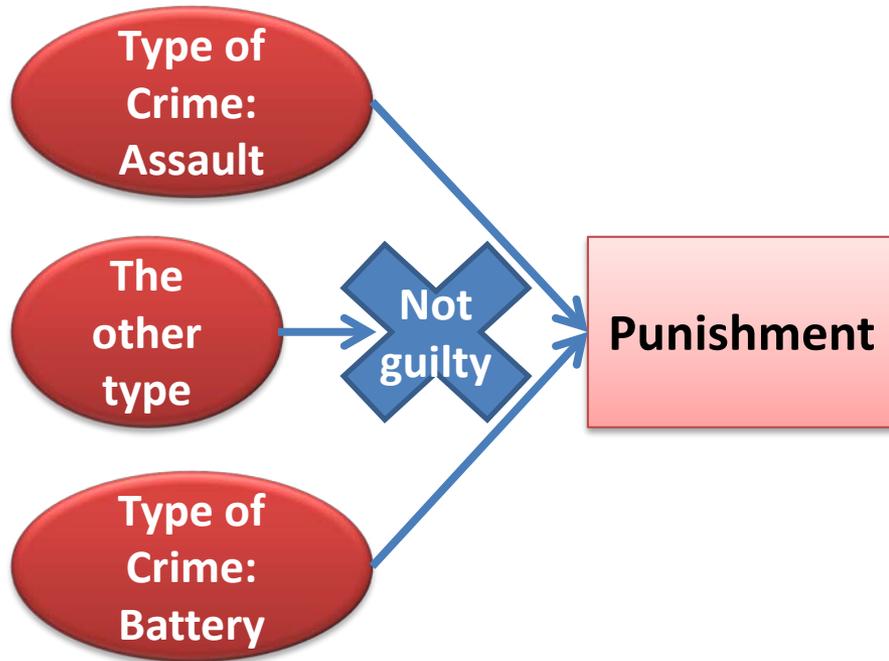
- In application, specific law (commercial law) takes precedence over general law (civil law).
- In structure, general law (civil law) fills up a gap of specific law (commercial law).
- In lawmaking, legislator cuts a special law short due to general law.

Criminal law and Civil law

- The same act may be both a crime and a civil wrong.
 - If you entrust your bag to a someone, and he runs off with it, he commits the crime of theft and also two civil wrongs – the tort of conversion and a breach of contract with you to keep the bag safe.
- Criminal law punishes a criminal and civil law takes a remedy to a victim.

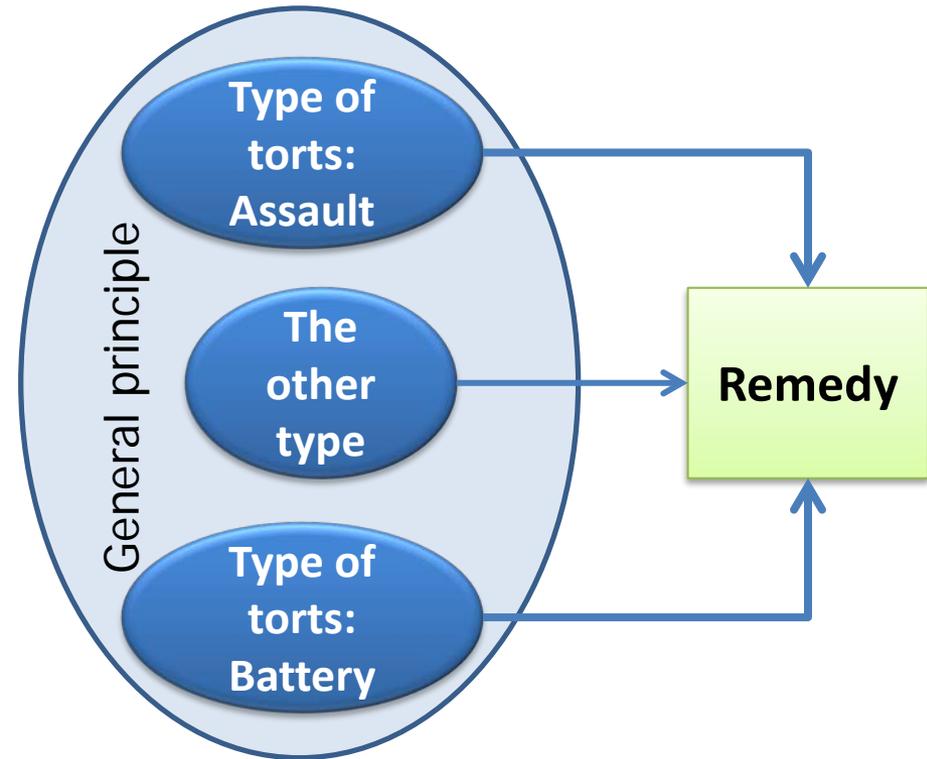
Difference between Criminal law and Civil law

Criminal law
(Legality principle)



Typology

Civil law (Remedy)



General principle

Substantive and procedural law

syllogism

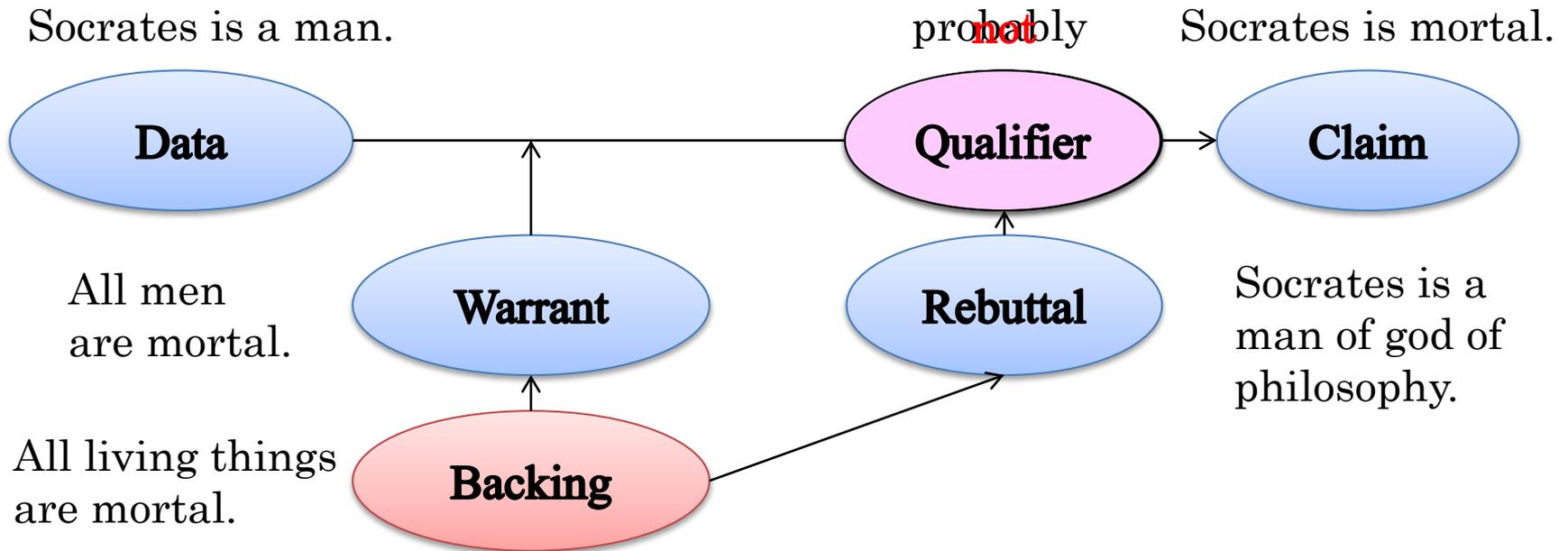
Major premise: The human is mortal.
Minor premise: Socrates is a human.

Conclusion: Socrates is mortal.

- Legal syllogism
 - (1) Rule,
 - (2) Subsumption of facts under a rule
 - (3) Conclusion (judgment)
- Rule is substantive law, subsumption and conclusion takes place according to procedural law.

From Syllogistic to Toulmin Diagram

- **Syllogism**
 - Major premise: All men are mortal.
 - Miner premise: Socrates is a man.
 - Conclusion: Socrates is mortal.
- **Toulmin Diagram**



Conclusion

- Civil law is the general and substantive law of private laws.

	Public/ private	General/ special	Substantive/ procedural
Civil law	private	general	substantive

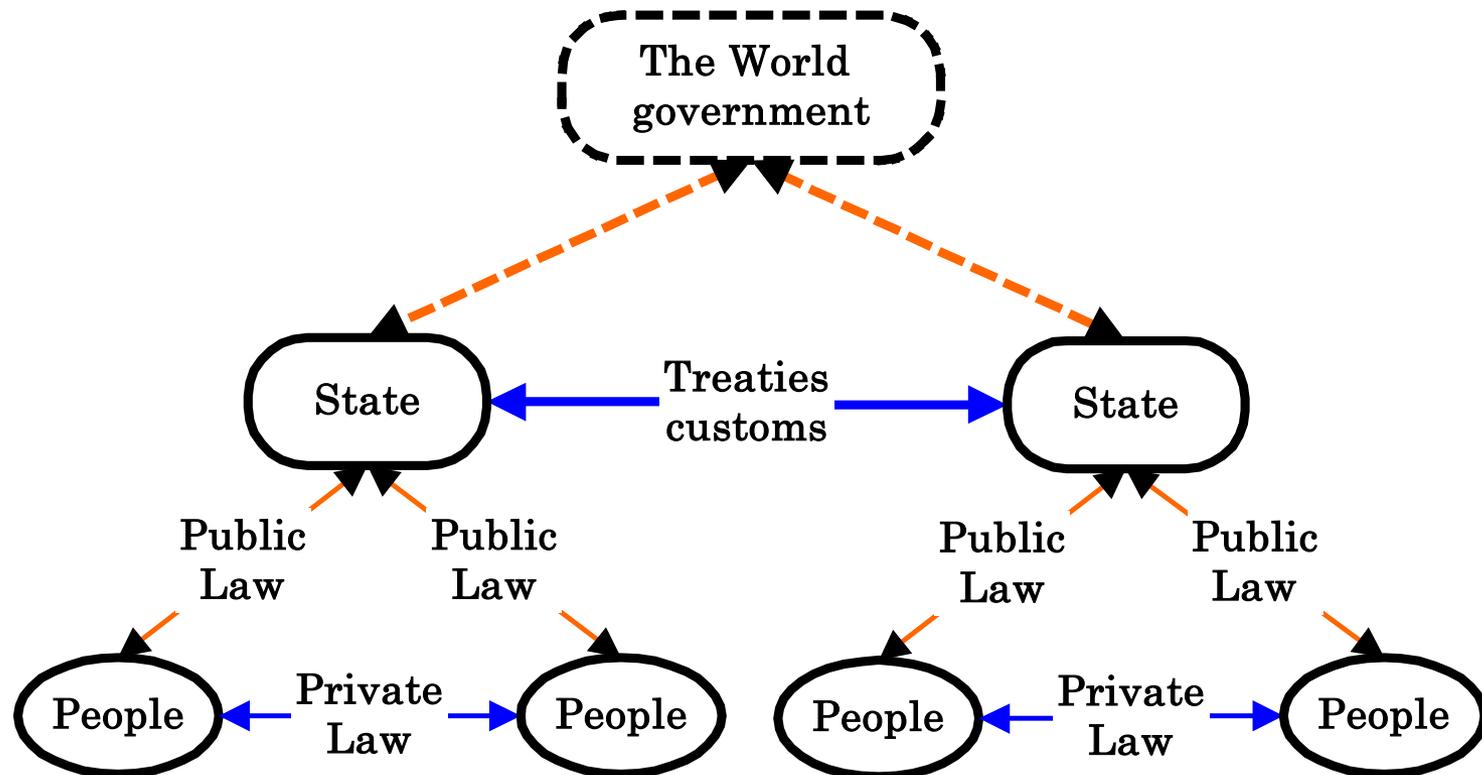
Exercise 2

- **Fill in the blanks.**

	Public/ private	General/ special	Substantive/ procedural
Constitution			
Civil law	private	general	substantive
Commercial law			
Civil procedure law			
Criminal law			
Criminal procedure law			
Labor law			

Exercise 3

- **International public law is a public law?**

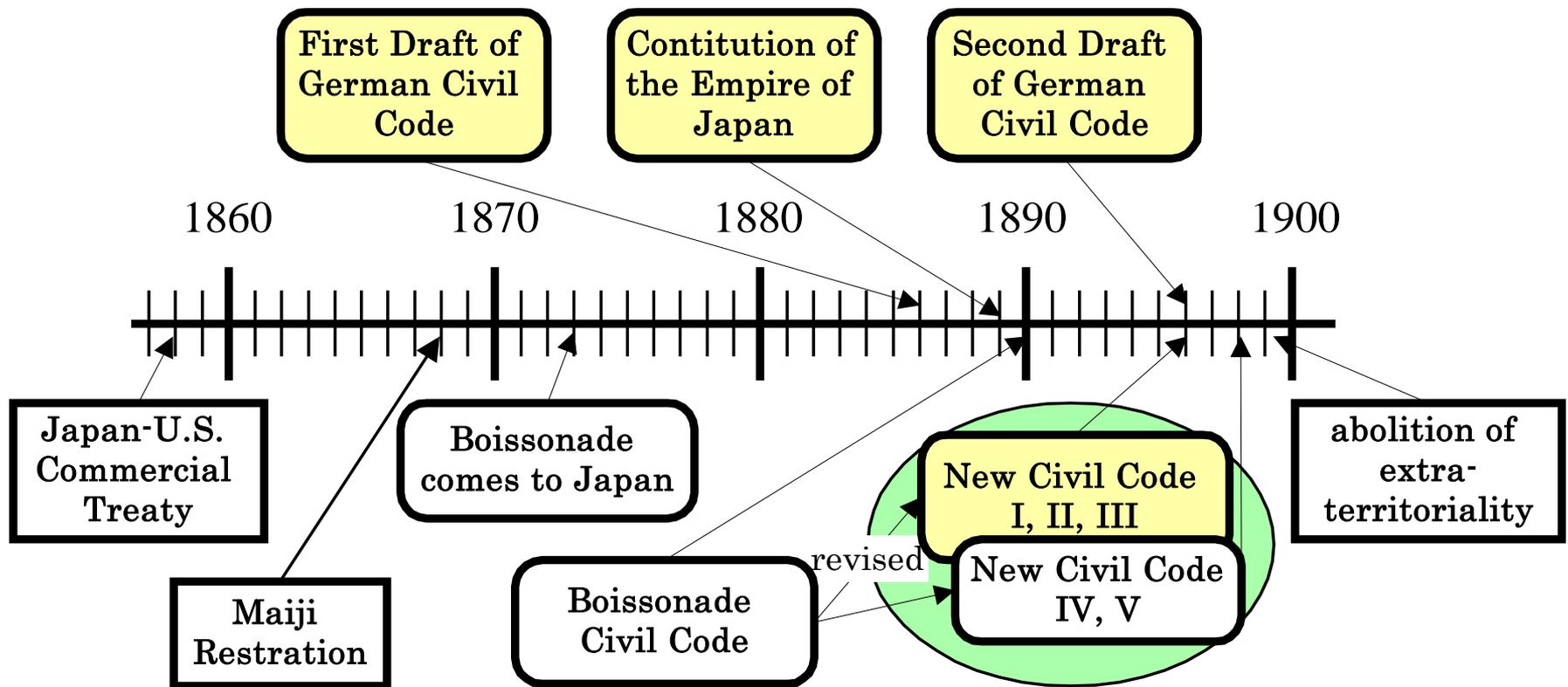


III. History of the Civil Code of Japan

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Enactment as a result of
comparative study of law

1. Outline of the historical background of Civil Code



2. History of Enactment of Civil Code of Japan

Year	Japanese	Oversees
	Events	
1858	Japan-U.S. Commercial treaty	
1868	Meiji Restoration	
1870-1		German-French War
1873	Boissonade came to Japan	
1887		1st Draft of German Civ. Code
1889	Constitution of the Empire of Japan	
1890	Boissonade Civil Code	
1896	New Civil Code I,II,III	2nd Draft of German Civ. Code
1898	New Civil Code IV, V	
1899	Abolition of extraterritoriality	



3. Enactment of Civil Code to revise unequal treaties

- Signing of unequal Japan-U.S. Commercial Treaty(1858) and Meiji Restoration
 - “Translate the French Civil Code with all possible speed, never minding mistakes!”
- Boissonade came to Japan at invitation of the Meiji Government(1873)



4. Boissonade Civil Code (Old Civil Code of Japan)

- Promulgation of Boissonade Civil Code (1890)
- Controversy over Code leads to Postponement of Old Civil Code (1892)
 - French school of jurists
 - The idea of natural law expressed by Boissonade
 - English school of jurists
 - The positive law(customs and case law) is more important.
 - Some Japanese nationalistic scholars joined this opposition.
 - "Boissonade civil code will destroy the tradition and beautiful morals of Japan."

5. Enactment of New Code of Japan (1896, 1898)

Member of drafting committee	Boisso-nade Civil Code	Specialty
HOZUMI	con	English barrister
UME	pro	Doctor of French civil law
TOMII	con	Doctor of German civil law



6. Enactment as a result of comparative study of law

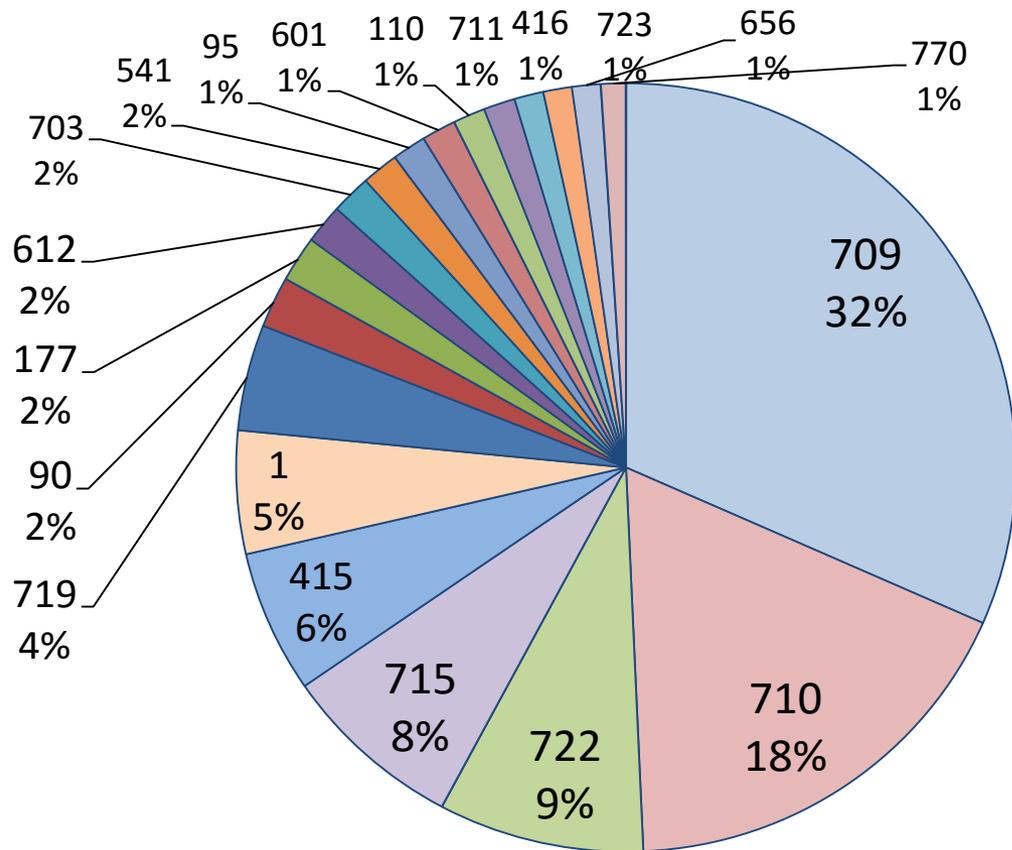
- Absorption of various provisions of other European countries
 - Doctrine of *ultra vires* -> Art. 43
 - *Hadley v. Baxendale*(1854) -> Art. 416
- Great effect of the Draft of German Civil Code on revision of Boissonade Civil Code
 - German Pandekten system
 - General principles and basic rules are singled out and put at the beginning of the Code, each Book or each Chapter.
- Civil Code of Japan as a revision of Boissonade Civil Code

7. Comparison of the Three Civil Codes

Boissonade Civil Code	Institutional System	German Civil Code	Pandekten System	Civil Code of Japan	Pandekten System
Book 1	Person	Book 1	General Provisions	Book 1	General Provisions
Book 2	Property	Book 2	Obligation	Book 2	Real Property
Book 3	Acquisition of Property	Book 3	Real Property	Book 3	Obligation
Book 4	Security of Obligation	Book 4	Family	Book 4	Family
Book 5	Evidence	Book 5	Succession	Book 5	Succession

8. Best 20 of Civil Code of Japan

from the view point of frequency of application(1945-2013)



9. Best 30 Articles of Civil Code of Japan

from the view point of frequency of application(1945-2013)

No.	Articles	No.	Articles	No.	Articles
1	General tort law	11	Unjust Enrichment	21	Liability of land
2	Compensation	12	Termination	22	Prescription of tort
3	Comparative Negligence	13	Mistake	23	Duty of Care of Mandatary
4	Employers' liability	14	Lease	24	Sale
5	Non Performance of contract	15	Apparent Agency	25	Loan for use
6	General Principles	16	Next kin's right for compensation	26	Division of Inherited Property
7	Joint tortfeasor	17	Scope of Damages	27	Action Paulienne
8	Pubic policy	18	Defamation	28	Acquisitive prescription
9	Transfer real estate and registration	19	Quasi-Mandate	29	Free of contract
10	Restriction of sublease	20	Judicial Divorce	30	Action oblique

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3		13		23	
4		14		24	
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6		16		26	
7		17		27	
8		18		28	
9		19		29	
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IV. Comparison of the Civil Code of Japan and the Uniform Contract Laws

CISG: United Nations Convention on
Contracts for International Sales of
Goods

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CISG and Civil Code of Japan

- Enactment of the Japanese Civil Code was a result of comparative study of law.
- The provisions of the Japanese Civil Code have more in common with CISG than with the German Civil Code.
- Clear definitions and an independent system of remedies are important characteristics of CISG which do not exist in the Japanese Civil Code. I think it is important to study Uniform Law in order to reform the Japanese Civil Code.

Art. 49 CISG

- (1) The buyer may declare the contract avoided:
 - (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
 - ← Common Law
 - (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.
 - ← Continental Law(German Civil Code)

Art. 541-543 J.C.C

(Rescission due to non-performance) ←additional period of time:
German Law

- Article 541. If one of the parties does not perform his obligation, the other party may fix a reasonable period and demand its performance, and may rescind the contract, if no performance is effected within such period.

(Rescission of time-bargain) ←fundamental breach of contract:
common law

- Article 542. If, according to the nature of the contract or by a declaration of intention by the parties, the object for which the contract was made cannot be attained unless it is performed at a fixed time or within a fixed period, one of the parties has allowed the time to elapse without performance on his part the other party may, without making a demand mentioned in the preceding Article, forthwith rescind the contract.

(Rescission due to impossibility)

- Article 543. If performance has become impossible in whole or in part by any cause for which the obligor is responsible, the obligee may rescind the contract.

Art. 566, 570

(Sale of object subject to usufruct)

← fundamental breach of contract

- Article 566. Where the object of a sale is subject to a superficies, emphyteusis, servitude, right of retention or pledge and the buyer was unaware thereof, he may rescind the contract only if the object of the contract cannot be attained thereby; in other cases the buyer may demand only compensation for damages.

(Warranty against defects)

- Article 570. If any latent defects exist in the object of a sale, the provisions of Article 566 shall apply mutatis mutandis. except in the case of a compulsory sale by official auction.

World trend to the Uniform contract law

- **1. CISG:** United Nations Convention on Contracts for the International Sale of Goods [1980]
- **2. UNIDROIT Principles:** UNIDROIT Principles of International Commercial Contracts [1994]
- **3. PECE:** THE PRINCIPLES OF EUROPEAN CONTRACT LAW [1994]
towards EUROPEAN CIVIL CODE

1. CISG

- The first successful convention of private law unified the principles of common-law and those of the continental law
 - This Convention establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract in 1980.
 - The Convention entered into force on 1 January 1988. Participants(member states) are now 57 countries.

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United Nations Commission on International Trade Law (UNCITRAL)

The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body within the United Nations system in the field of international trade law. UNCITRAL was tasked by the General Assembly to further the progressive harmonization and unification of the law of international trade by:

1. "Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
2. "Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;
3. "Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;
4. "Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;
5. "Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;

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Texts resulting from the work of UNCITRAL

Texts resulting from the work of the Commission include, in particular, conventions, model laws, guides to enactment, legislative guides, legislative recommendations, and model contract rules.

- [International Commercial Arbitration and Conciliation](#)
- [International Sale of Goods \(CISG\) and related transactions](#)
- [Cross-border Insolvency](#)
- [International Payments](#)
- [International Transport of Goods](#)
- [Electronic Commerce](#)
- [Public Procurement and Infrastructure Development](#)

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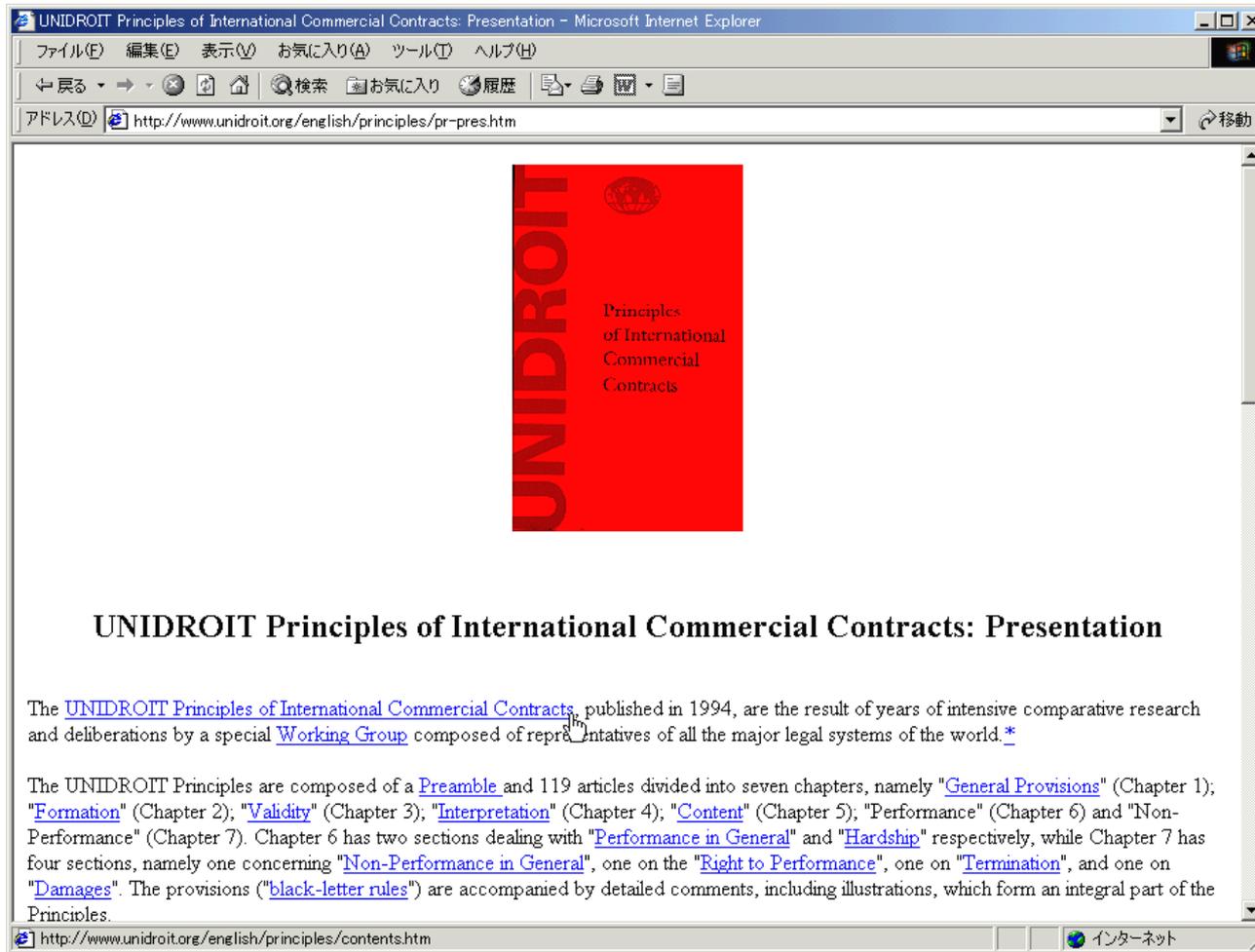
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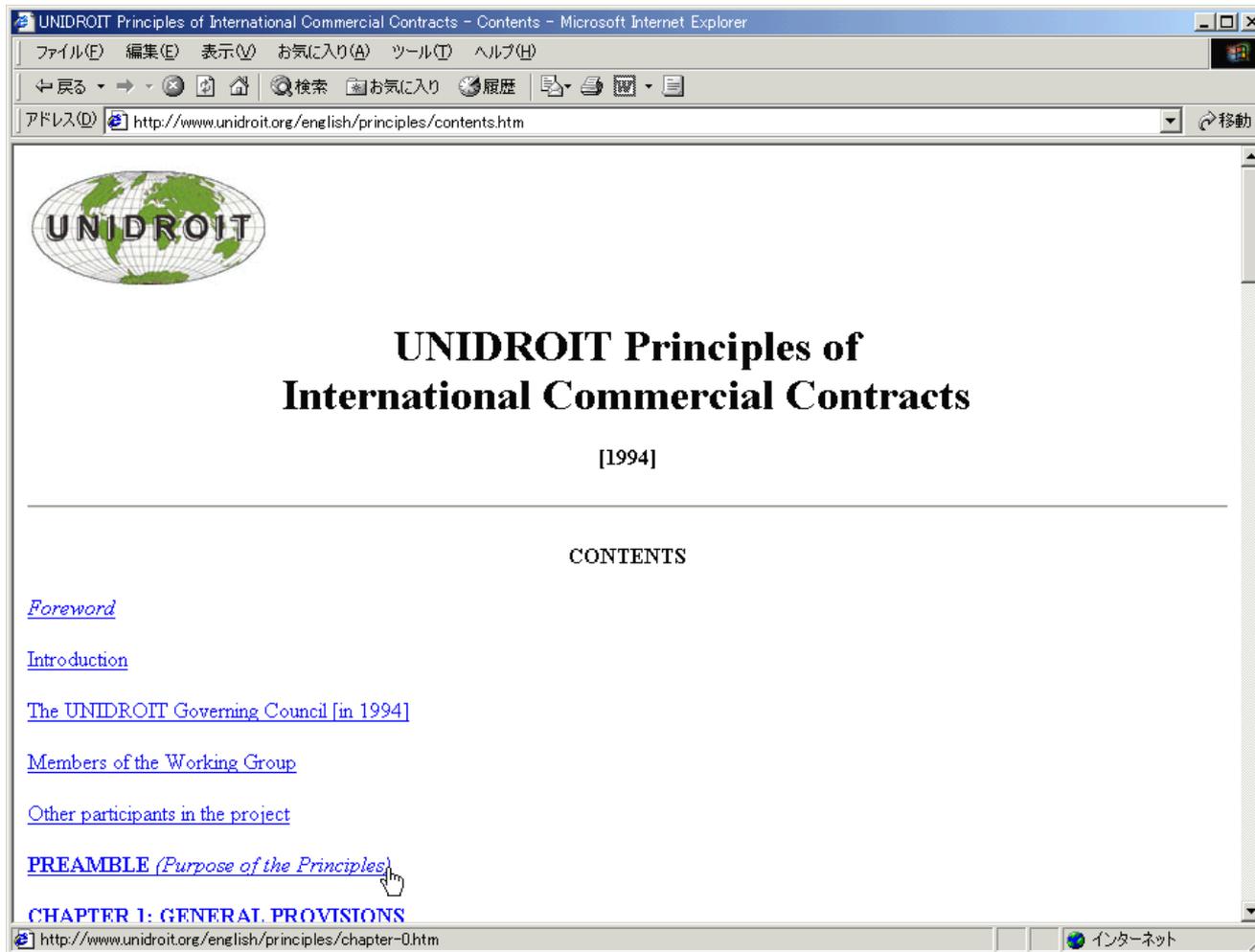
2. UNIDROIT Principles

- The UNIDROIT Principles set forth general rules for international commercial contracts in 1994.
 - They shall be applied when the parties have agreed that their contract be governed by them.
 - They may be applied when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like.
 - They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.
 - They may serve as a model for national and international legislators.

<http://www.unidroit.org/english/> (2/3)



<http://www.unidroit.org/english/> (3/3)

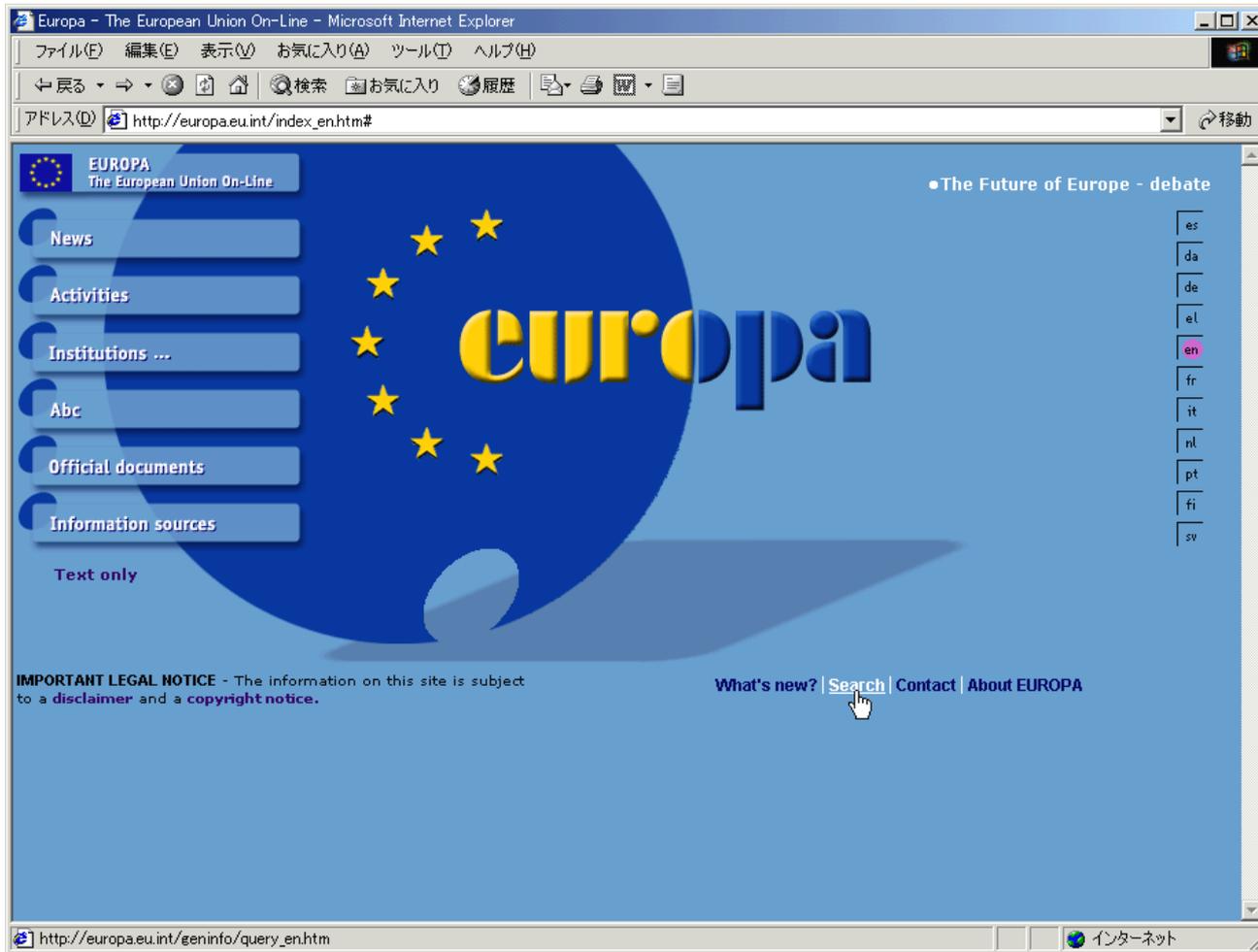


3. PECL and European Contract Code

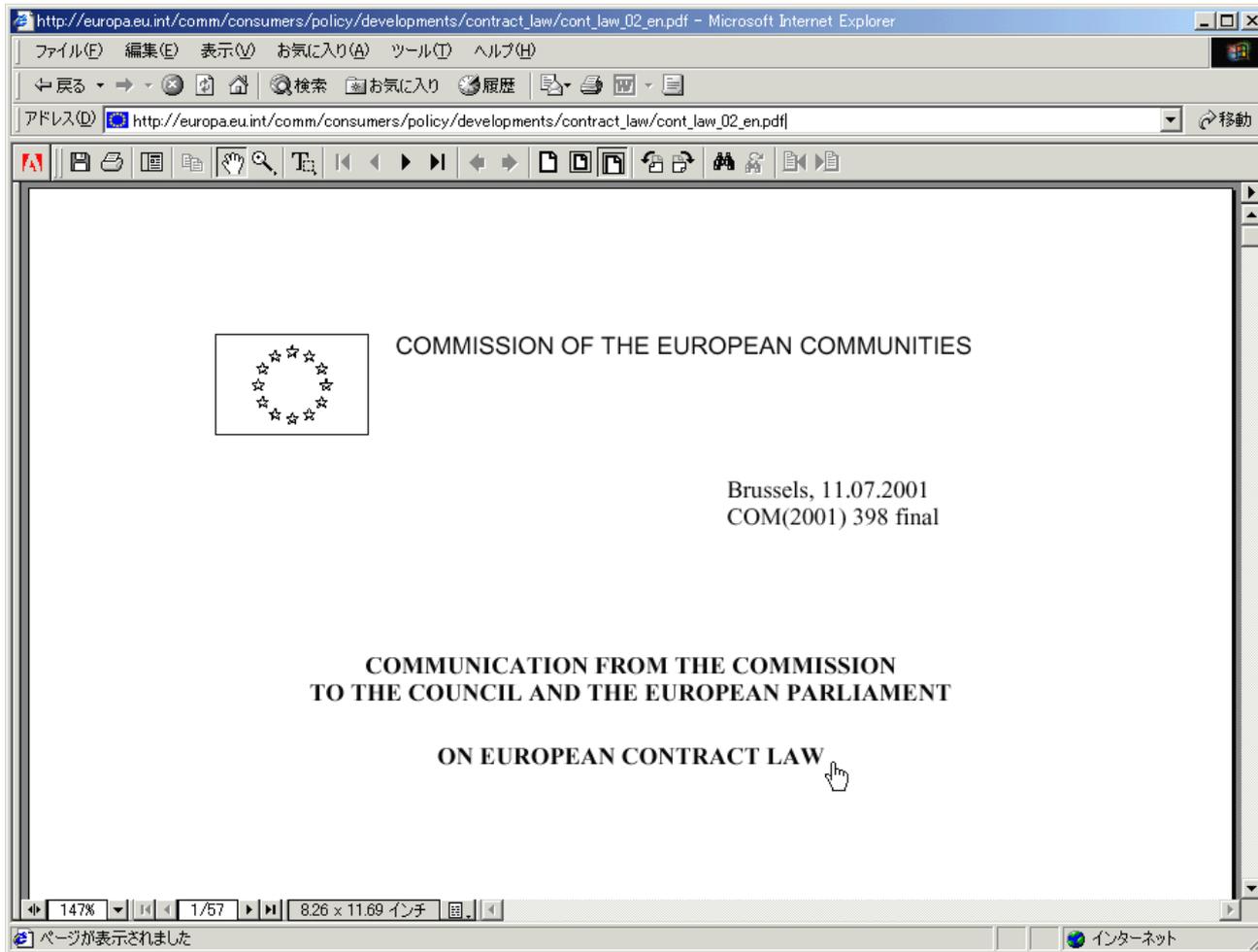
- Unifying the market, currency and then contract law
 - Ole Lando and Hugh Beals(eds.), "The Principles of European Contract Law, Part I and II: Performance, Non-Performance and Remedies, (Lluwer Law International, 1995, 2000).
 - Academy of European Private Lawyers, "European Contract Code - Preliminary draft", (Universita Di Pavia, 2001)



<http://europa.eu.int/> (1/2)



<http://europa.eu.int/> (1/2)



V. Formation of Contract

KAGAYAMA Shigeru

Professor of Meijigakuin University

- 1. freedom of contract

- 2. offer

 - Definition of offer and acceptance

 - Withdrawal and Revocation of offer

- 3. acceptance

 - Modified acceptance

 - Delayed acceptance



1. Freedom of contract

- A. Freedom of contents
 - Limited by mandatory rules containing:
 - Public order
 - Good faith and fair trading
 - Intention of parties is supplemented by
 - Usages and practices
 - Non-mandatory rules
- B. Freedom of form – No form required
- C. Freedom of negotiation

A. Freedom of contents

- Article 1.1 of UNIDROIT Principles
 - Freedom of Contract
 - The parties are free to enter into a contract and determine its content.
- Article 1.7 of UNIDROIT Principles
 - Good Faith and Fair Dealing
 - (1) Each party must act in accordance with good faith and fair dealing in international trade.
 - (2) The parties may not exclude or limit this duty.

B. Freedom of form

■ Article 11 of CISG

- Contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

■ Article 12 of CISG

- Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect to this article.

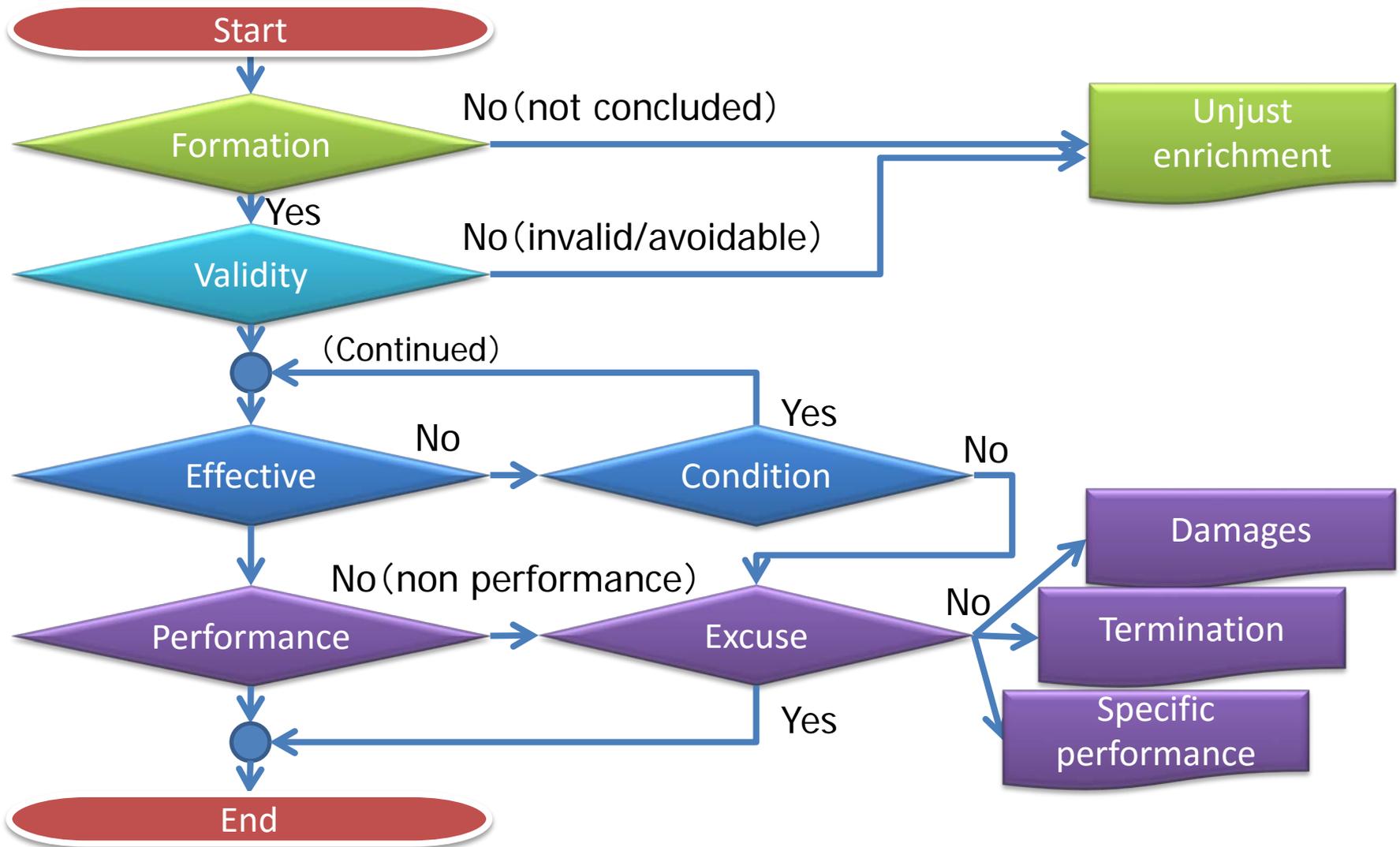
C. Freedom of negotiation

- Article 2.15 of UNIDROIT principles
 - Negotiations in Bad Faith
 - (1) A party is free to negotiate and is not liable for failure to reach an agreement.
 - (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
 - (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

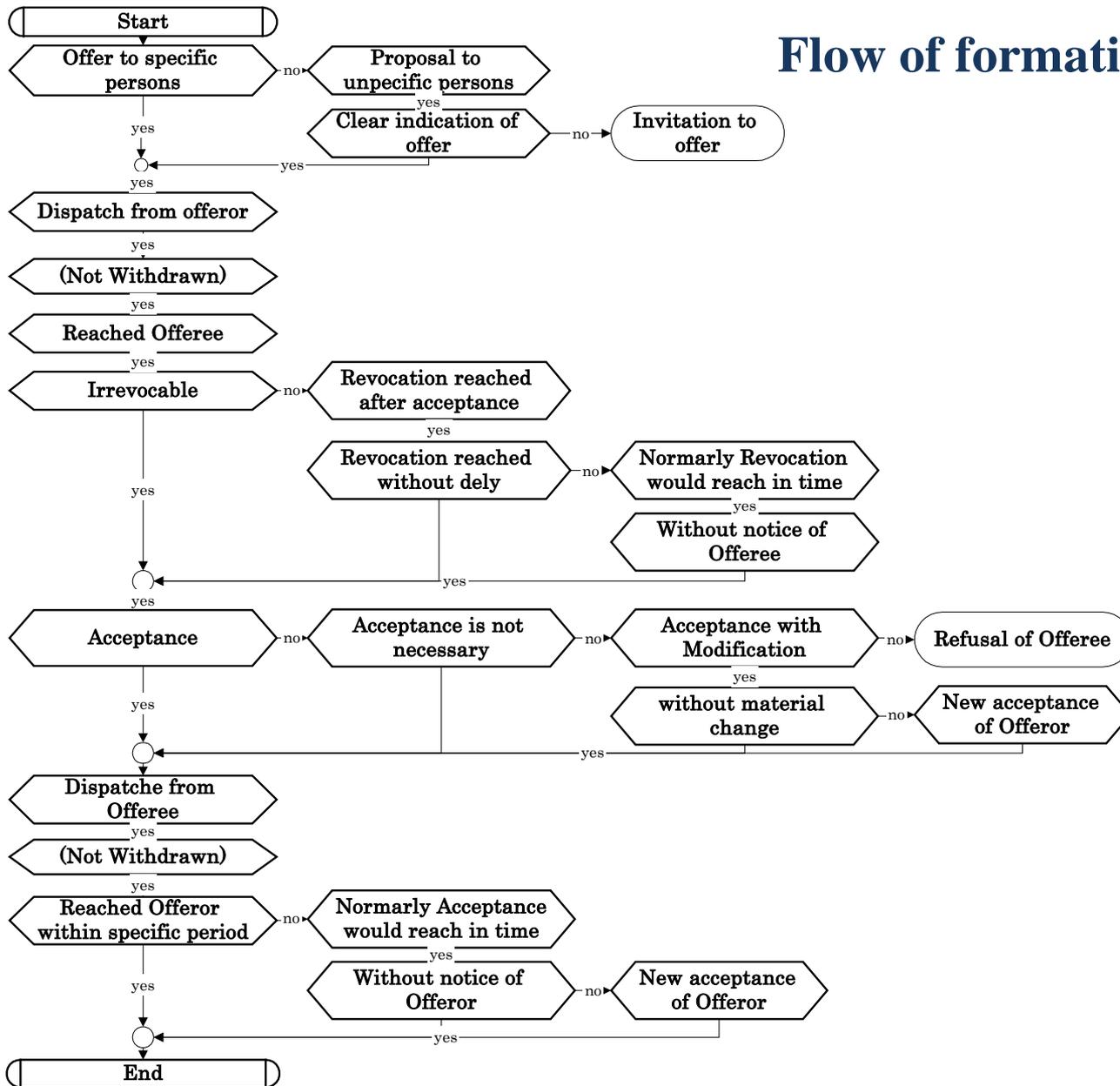
Binding character of contract

- Article 1.3 of UNIDROIT Principles
 - Binding Character of Contract
 - A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.
 - Exception: gross disparity, mistake, hardship, termination

Flow of Contract



Flow of formation of contract



Definition of Offer(1/2)

■ Article 14 of CISG

- (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is **sufficiently definite** and indicates **the intention of the offeror to be bound in case of acceptance**.

A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

- (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Definition of Offer (2/2)

■ Article 55 of CISG

- Where a contract has been validly concluded but **does not expressly or implicitly fix or make provision for determining the price**, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.



A circular argument?

Definition of offer and acceptance

■ Definition of offer

■ Article 14 of CISG

- (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror **to be bound in case of acceptance**.

■ Definition of acceptance

■ Article 18 of CISG

- (1) A statement made by or other conduct of the offeree indicating **assent to an offer** is an acceptance.
Silence or inactivity does not in itself amount to acceptance.



Another definition of offer and acceptance



■ Offer

- Awarding the power making contract concluded from offeror to the offeree.

■ Acceptance

- Exercising the offeree's power making contract concluded against the offeror.

■ Rejection of offer

- Negative exercising the offeree's power of making contract concluded against the offeror.

The time when an offer becomes effective

CISG	Code Civil of Japan
<p>Article 15</p> <p>(1) An offer becomes effective <u>when it reaches the offeree</u>.</p> <p>(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.</p>	<p>Article 97. (Manifestation of Intention to Person at a Distance)</p> <p>(1) Manifestation of intention to a person at a distance shall become effective at the time of the arrival of the notice to the other party.</p>

Withdrawal of offer

- Distinction between withdrawal and revocation
 - Before an offer becomes effective it can always be withdrawn whereas the question of whether or not it may be revoked.
 - After an offer become effective it can revoke under some conditions until the contract is concluded.



Revocation of offer (1/4)

- There is the indication of irrevocability of the offer, the offeror could not revoke it.
- Indication of irrevocability
 - Direct indication of irrevocability
 - “This is a firm offer.”
 - “We shall stand by our offer until we receive your answer.”
 - The indication of a fixed time for acceptance
 - “In case you intend to accept my offer, please do so no later than 31 August.”
 - “You have 10 days to accept this offer.”

Revocation of offer (2/4)

■ Contract is concluded or not?

date	activities	
	offeror	offeree
01 August	dispatches an offer	
02 August		receives the offer
...		
25 August	Dispatches a revocation of the offer	
27 August		Receives the revocation of the offer
28 August		dispatches the acceptance
30 August	Receives the acceptance	

Revocation of offer (3/4)

-Revocation after dispatch of acceptance

■ Contract is concluded or not? Difficult problem

date	activities	
	offeror	offeree
01 August	dispatches an offer	
02 August		receives the offer
...		
25 August	Dispatches a revocation of the offer	
26 August		dispatches the acceptance
27 August		Receives the revocation of the offer
28 September	Receives the acceptance	



Revocation of offer (4/4)

CISG	Civil Code of Japan
<p>Article 16 (1) Until a contract is concluded <u>an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.</u> (2) However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.</p>	<p>Article 521 (Offer specifying period of acceptance) (1) An offer specifying a period for acceptance cannot be revoked. (2) If the offeror does not receive notice of acceptance within the period specified, the offer shall cease to be effective.</p> <p>Article 524 (Offer without limiting time for acceptance) <u>An offer made to a person at a distance without specifying a period for acceptance may not be revoked until the lapse of a reasonable period for the offeror to receive a notice of acceptance.</u></p>

Rejection of offer

■ Article 17 of CISG

- An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

■ Article 528 of Civil Code of Japan (Modified acceptance)

- If the acceptor has accepted an offer subject to a condition or with any other modification, he shall be deemed to have **rejected the original offer** and made a new offer himself.

Acceptance

■ Article 18 of CISG

- (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
- (2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.



Modified acceptance (1/3)

■ Article 19 of CISG

- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a **counteroffer**.

Modified acceptance (2/3)

■ Article 19 of CISG

- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which **do not materially alter the terms of the offer** constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Modified acceptance (3/3)

- Article 528 of Civil Code of Japan (Modified acceptance)
 - If the offeree has accepted the offer by adding any condition or by making any other modification, it shall be deemed that the offeree has refused the offer and has made a new offer.

The time when a contract is concluded

CISG	Civil Code of Japan
<p>Article 23 A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.</p>	<p>Article 526 (Time for coming into existence of contract inter absentee) (1) A contract between persons at a distance shall be formed <u>upon dispatch of the notice of acceptance</u>. (2) In cases where no notice of acceptance is required due to the offeror's manifestation of intention or usage of trade, the contract shall be formed upon the occurrence of any fact which ought to be regarded as a manifestation of intention of acceptance.</p>

Exercise 4 (1/2)

Delayed acceptance

■ Facts

- 'A' indicates to 'B' 31 August as the deadline for acceptance of its offer.
- 'B' knows that the normal time for transmission of letters by mail to 'A' is 2 days and sends its letter of acceptance on 25 August.
- Owing to a strike of the postal service in 'A's' country the letter, which shows the date of its mailing on the envelope, only arrives on 1 September.
- On 2 September 'A' informs 'B' that it considers the offer as having lapsed.

Exercise 4 (2/2)

Delayed acceptance

- Question: Contract is concluded or not?

date	activities	
	offeror	offeree
01 August	dispatches an offer	
02 August		receives the offer
25 August		dispatches the acceptance
31 August	the period of time of acceptance	
01 September	receives the acceptance	
02 September	dispatches of the notice of delay of the acceptance	

Delayed acceptance (1/3)

■ Article 21 of CISG

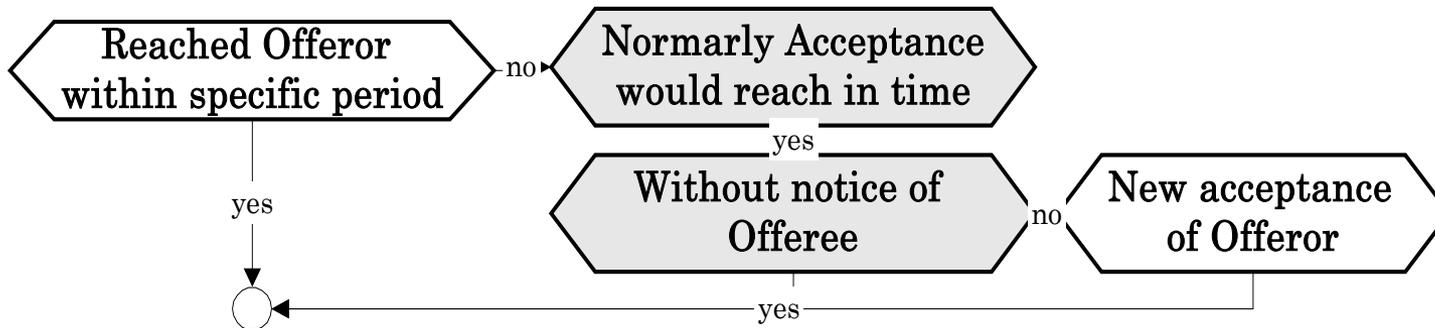
- (1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.
- (2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Delayed acceptance (2/3)

■ Article 522 of Code Civil of Japan (Delayed acceptance)

- (1) Even where a notice of acceptance has arrived after the expiration of the period mentioned in the preceding Article, if the offeror could have known that it was dispatched at such a time that it would have under normal circumstances arrived within such period, the offeror shall dispatch, without delay to the person to whom the offer has been made, a notice of the delayed arrival, unless a notice of the delay has already been dispatched by him before its arrival.
- (2) If the offeror has neglected to give the notice mentioned in the preceding paragraph, the notice of acceptance shall be deemed not to have been delayed.

Delayed acceptance (3/3)



Exercise 5

Delayed revocation of offer

■ Contract is concluded or not?

date	activities	
	offeror	offeree
01 August	dispatches an offer	
02 August		receives the offer
25 August	revokes the offer	
28 August		dispatches the acceptance
29 August		receives the revocation of the offer
31 August	receives the acceptance	
01 September		dispatches of the notice of delay of revocation

Delayed revocation of offer in Civil Code of Japan

Civil Code of Japan

Article 527 (Delayed notice of revocation arrived after notice of acceptance)

(1) Even in cases where notice of the revocation of an offer has arrived after notice of acceptance has been dispatched, if the acceptor could have known that it was dispatched at such a time that it would have under normal circumstances arrived before the dispatch of the notice of acceptance, the acceptor shall dispatch without delay notice of the delayed arrival to the offeror.

(2) If the acceptor has neglected to give the notice mentioned in the preceding paragraph the contract shall be deemed not to have come into existence.



Lack of provision in CISG about delayed revocation

- CISG has no article about delayed revocation.
- Article 16 of CISG
 - (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
 - (2) However, an offer cannot be revoked:
 - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
 - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.



Good faith and general principles

CISG	Civil Code of Japan
<p>Article 7</p> <p>(1) <u>In the interpretation of this Convention</u>, regard is to be had to its international character and to the need to promote uniformity in its application and <u>the observance of good faith</u> in international trade.</p> <p>(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with <u>the general principles on which it is based</u> or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.</p>	<p>Article 1 (Exercise of private rights)</p> <p>(1) All private rights shall conform to the public welfare.</p> <p>(2) The exercise of rights and performance of duties must be done <u>in good faith</u>.</p> <p>(3) No abusing of rights is permissible.</p>

Delayed acceptance and application of good faith

Act according to good faith		result
Offeree sent acceptance in due time	reliance on the means of transmission	If there is no notice of delay, he/she may act as if the acceptance should have reached in due time.
Offeror could recognize the delay	obligation of dispatching a notice of delay	If he/she has neglected to give the notice it shall be deemed not delayed

Delayed revocation and application of good faith

Act according to good faith		result
Offeror sent revocation on due time	reliance on the means of transmission	If there is no notice of delay, he/she may act as if the revocation should have reached in due time.
Offeree could recognize the delay	obligation of dispatching a notice of delay	If he/she has neglected to give the notice it shall be deemed not delayed

My draft amendment of Article 16 of CISG

- Article 16 of CISG (to be amended additionally)
 - (3) If a letter or other writing containing a late revocation of the offer shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeree in due time, the late revocation of the offer is effective as a revocation unless, without delay, the offeree orally informs the offeror that he considers his revocation as having lapsed or dispatches a notice to that effect.

Conclusion:

How to fill up a lack of rule

- In case of lack of rule (delayed revocation)
 - find the relevant rule (delayed acceptance)
 - extract a principle on which the relevant rule is based:
 - Protection of reliance on the means of transmission
 - Obligation of dispatching a notice of delay
 - No delay is deemed in case of negligence of the notice
 - apply the extracted principle to the case
 - add the rule by draft amendment

Examination (1/4)

- Read these sentences and Answer the questions as follows:
- Facts in Japan
 - A indicates to B 31 August as the deadline for acceptance of its offer.
 - B knows that the normal time for transmission of letters by mail to A is 2 days and sends its letter of acceptance on 25 August.
 - Owing to a strike of the postal service in A's country the letter, which shows the date of its mailing on the envelope, only arrives on 1 September.
 - On 2 September A informs B that it considers the offer as having lapsed.

Examination (2/4)

■ Questions

- (1) The contract between A and B is concluded?
 - (a) yes (b) no
- (2) If A doesn't inform 'B' till 30 September that it considers the offer as having lapsed, the contract between A and B is concluded?
 - (a) yes (b) no
- (3) If contract is concluded in case of question (1) or (2), which day is the contract concluded?
 - (a) 25 August, (b) 27 August, (c) 31 August, (d) 1 September, (e) 2 September

Examination (3/4)

- (4) If contract is concluded in case of question (1) or (2), which provision is applicable?
 - (a) Art. 7 of CISG, (b) Art. 21 of CISG, (c) Art. 522 of Civil Code of Japan, (d) Art. 527 of Civil Code of Japan
- (5) If contract is concluded in case of question (1) or (2), which principle does justify it?
 - (a) freedom of contract, (b) negligence, (c) good faith

VI. Content of contract

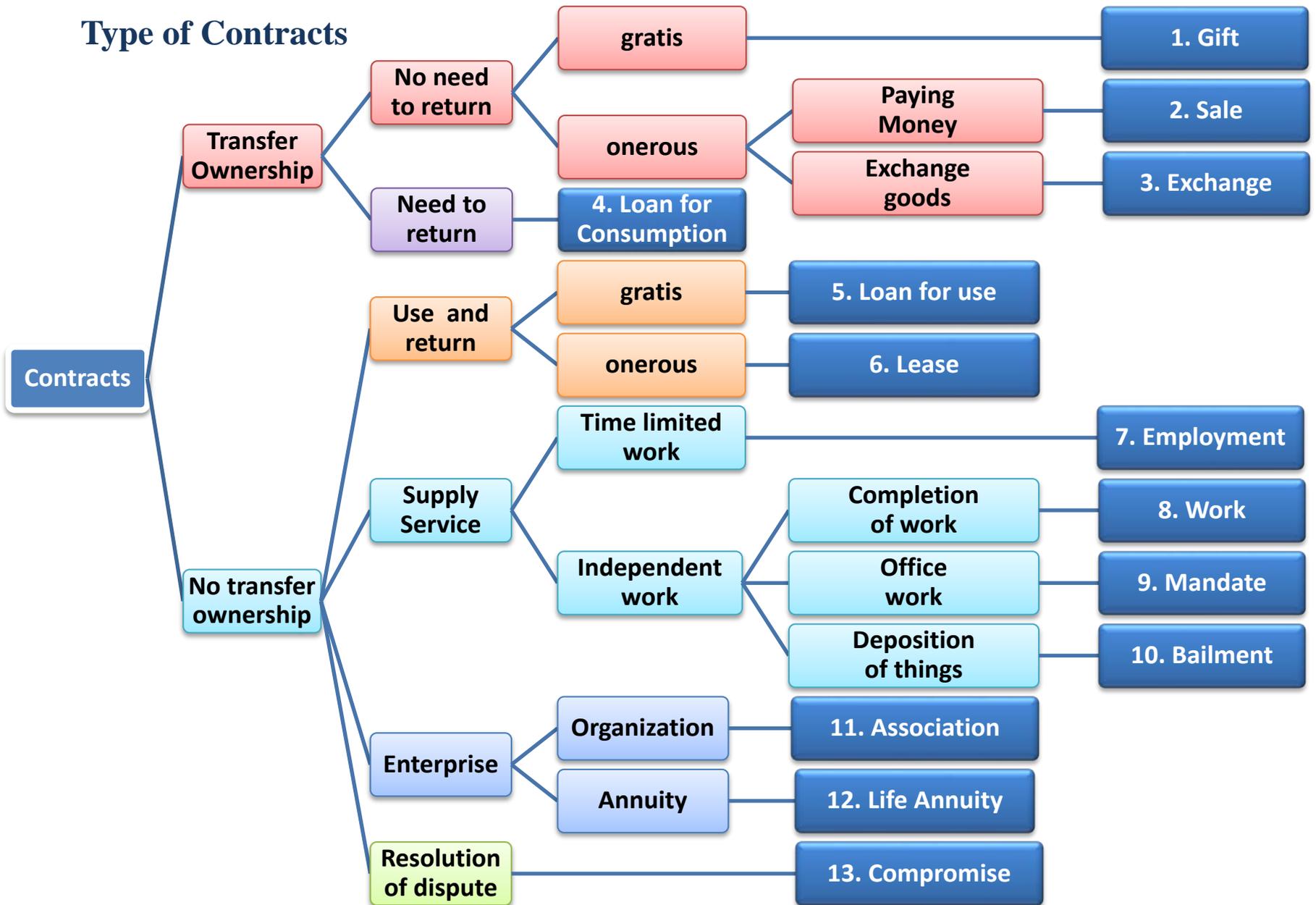
Professor KAGAYAMA Shigeru
Meijigakuin University

1. Type of contracts
2. Type of obligations
3. Determination of content

1. Type of contracts

Purpose		Nature		Name of contract
Transfer property right		gratis		Gift
		onerous	price	Sale
			things	Exchange
	Returning similar things	gratis, onerous		Loan for consumption
others	Using things	gratis		Loan for use
		onerous		Lease
	Using service	onerous		Employment
		onerous		Work
		gratis, onerous		Mandate
		gratis, onerous		Bailment
	Using things and service	onerous		Association
		onerous		Life Annuity
	Solution of disputes	onerous		Compromise

Type of Contracts



2. Type of obligations

Viewpoint	Type of obligations		comment
Origin	Express obligation		From stipulation of parties
	Implied obligation		From purpose and Nature of contract, practices and usages, good faith and fair trading, reasonableness
Execution	Obligation to give	Pay money	Easiest to execute
		Deliver things	Easy to execute
	Obligation to do or not to do		Difficult to execute: change to the damages in case of non-performance
Evidence	Obligation to achieve a specific result		Obligee should prove non-fault
	Obligation of best efforts		Obligore should prove obligor's fault

Duty of specific result and Duty of best efforts

- Article 5.4 of UNIDROIT Principles
 - Duty to Achieve a Specific Result. Duty of Best Efforts
 - (1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.
 - (2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

Determination of duty of result or duty of best efforts

- Article 5.5 - Determination of Kind of Duty Involved
 - In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or duty to achieve a specific result, regard shall be had, among other factors, to
 - (a) the way in which the obligation is expressed in the contract;
 - (b) the contractual price and other terms of the contract;
 - (c) the degree of risk normally involved in achieving the expected result;
 - (d) the ability of the other party to influence the performance of the obligation.



3. Determination of content

- A. Determination of Quality
- B. Determination of Price
- C. Indefinite period

A. Determination of quality

- Article 5.6 - Determination of Quality of Performance
 - Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.

B. Determination of price

■ Article 5.7 - Price Determination

- (1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.
- (2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.
- (3) Where the price is to be fixed by a third person, and that person cannot or will not do so, the price shall be a reasonable price.

C. Indefinite period

- Article 5.8 - Contract for an Indefinite Period
 - A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance.



Lecture on Contract

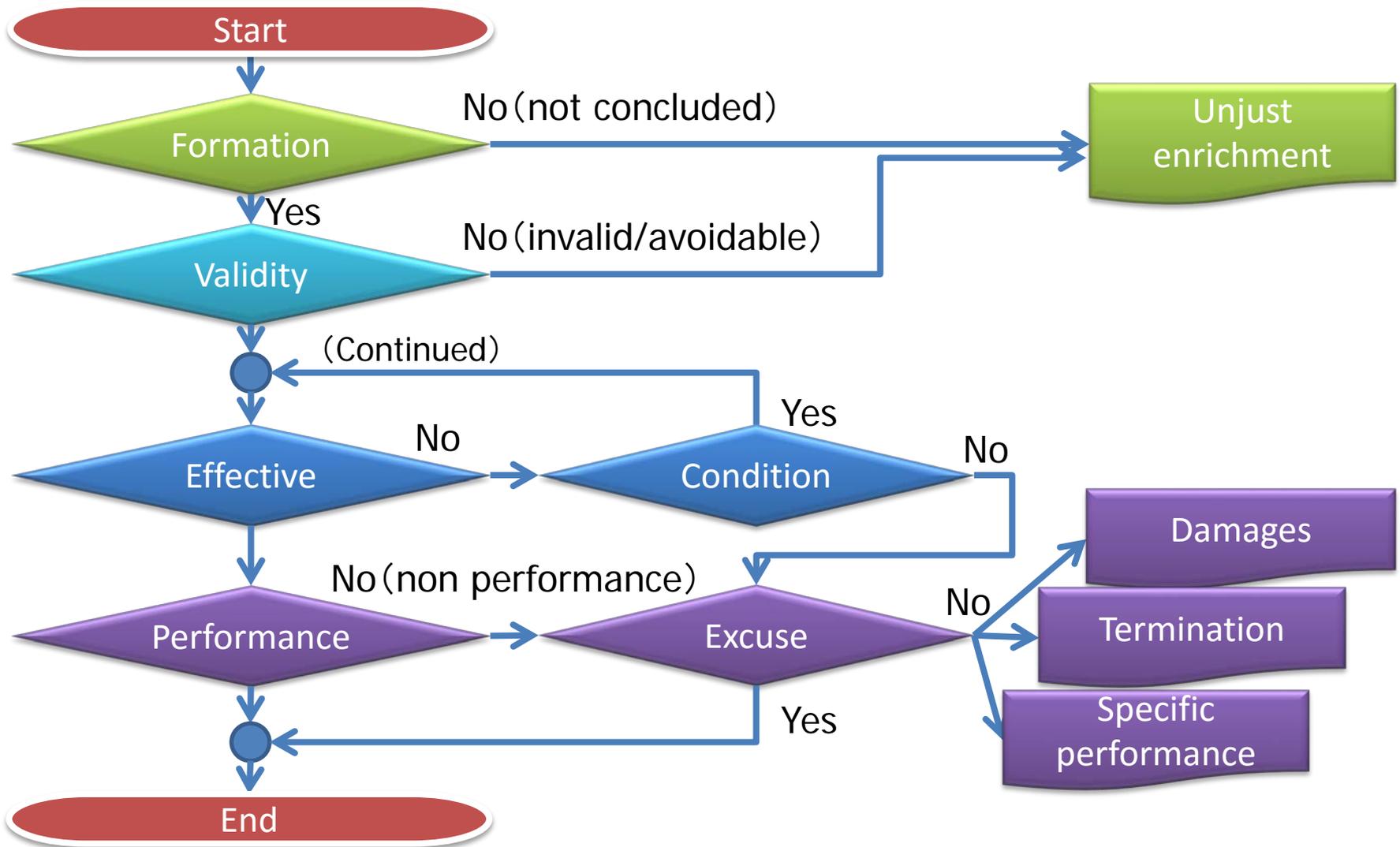


VII. Validity of contract

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Meijigakuin University

1. Causes of Invalidity of contract
2. Effects of invalidity of contract

Flow of Contract



Condition of the validity of Contract

- The contract is valid if
 - the parties of contract concluded it
 - a) with legal capacity or with sufficient authority and
 - b) the representation of will is consistent with its internal will,
 - c) without unfair intervention to their decision making process and
 - d) the contents conform to the public order.



Exclusion of the condition of validity

■ Article 3.3 of UNIDROIT Principles

- Initial Impossibility

- (1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.
- (2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

1. Causes of Invalidity of contract

- A. Lack of capacity of party
- B. Lack of authority of agency
- C. Lack of will (defective declaration of will)
- D. Unfair intervention to the decision making
- E. Violation of public order

A. Lack of capacity (Civil Code of Japan)

■ Article 4 (Age of Majority)

- The age of majority is reached when a person has reached the age of 20.

- Article 753 (Attaining majority by marriage)

- If a minor enters into marriage, he/she shall be deemed to have attained majority.

■ Article 5 (Juristic Act of Minors)

- (1) A minor must obtain the consent of his/her statutory agent to perform any juristic act; provided, however, that, this shall not apply to an act merely intended to acquire a right or to be relieved of a duty.
- (2) A juristic act in contravention of the provision of the preceding paragraph may be rescinded.

Form of consent of the legal representative (1/2)

- Article 5 (Property permitted to dispose)
 - (3) Notwithstanding the provision of paragraph 1, in cases the statutory agent permits the disposition of property by specifying the purpose thereof, a minor may freely dispose of the same to the extent of such purpose. The same shall apply in cases his/her statutory agent permits the disposition of the property without specifying any purpose.

Form of consent of the legal representative (2/2)

- Article 6 (Permission to carry on business)
 - (1) A minor who is permitted to carry on one or more kinds of business shall have the same capacity to act as a person of the age of majority as far as such business is concerned.
 - (2) In the case set forth in the preceding paragraph, if the minor may be unable to perform the relevant business for any reason, his/her statutory agent may revoke or limit permission in accordance with the provisions of Part IV (Relatives).

Valid contract in spite of lack of capacity

- Article 21 (Fraudulent Means Committed by Person with Limited Capacity)
 - If a person with limited capacity manipulates any fraudulent means to induce others to believe that he/she is a person with capacity, his/her act may not be rescinded.

B. Lack of authority of agency

(PECL:Principles of European Contract laws)

- Article 3:204 : Agent acting without or outside his authority
 - (1) Where a person acting as an agent acts without authority or outside the scope of its authority, its acts are not binding upon the principal and the third party.
 - (2) Failing ratification by the principal according to article 3:207, the agent is liable to pay the third party such damages as will place the third party in the same position as if the agent had acted with authority. This does not apply if the third party knew or could not have been unaware of the agent's lack of authority.

Liability of Principal (1/3)

- Article 3:201 : Express, implied and apparent authority
 - (3) A person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it.

Liability of Principal (2/3)

- **Article 3:207 : Ratification by Principal**
 - (1) Where a person acting as an agent acts without authority or outside its authority, the principal may ratify the agent's acts.
 - (2) Upon ratification, the agent's acts are considered as having been authorised, without prejudice to the rights of other persons.

Liability of Principal (2/3)

- Article 3:208 : Third Party's Right with Respect to Confirmation of Authority
 - Where the statements or conduct of the principal gave the third party reason to believe that an act performed by the agent was authorised, but the third party is in doubt about the authorisation, it may send a written confirmation to the principal or request ratification from it. If the principal does not object or answer the request without delay, the agent's act is treated as having been authorised.



Exercise 6

■ Facts

- The principal Y authorized an agent 'A' to register a piece of land which he owned.
- 'A' was given the title deed and Y's seal.
- Instead of registering the property, 'A' sold it to a third person X.

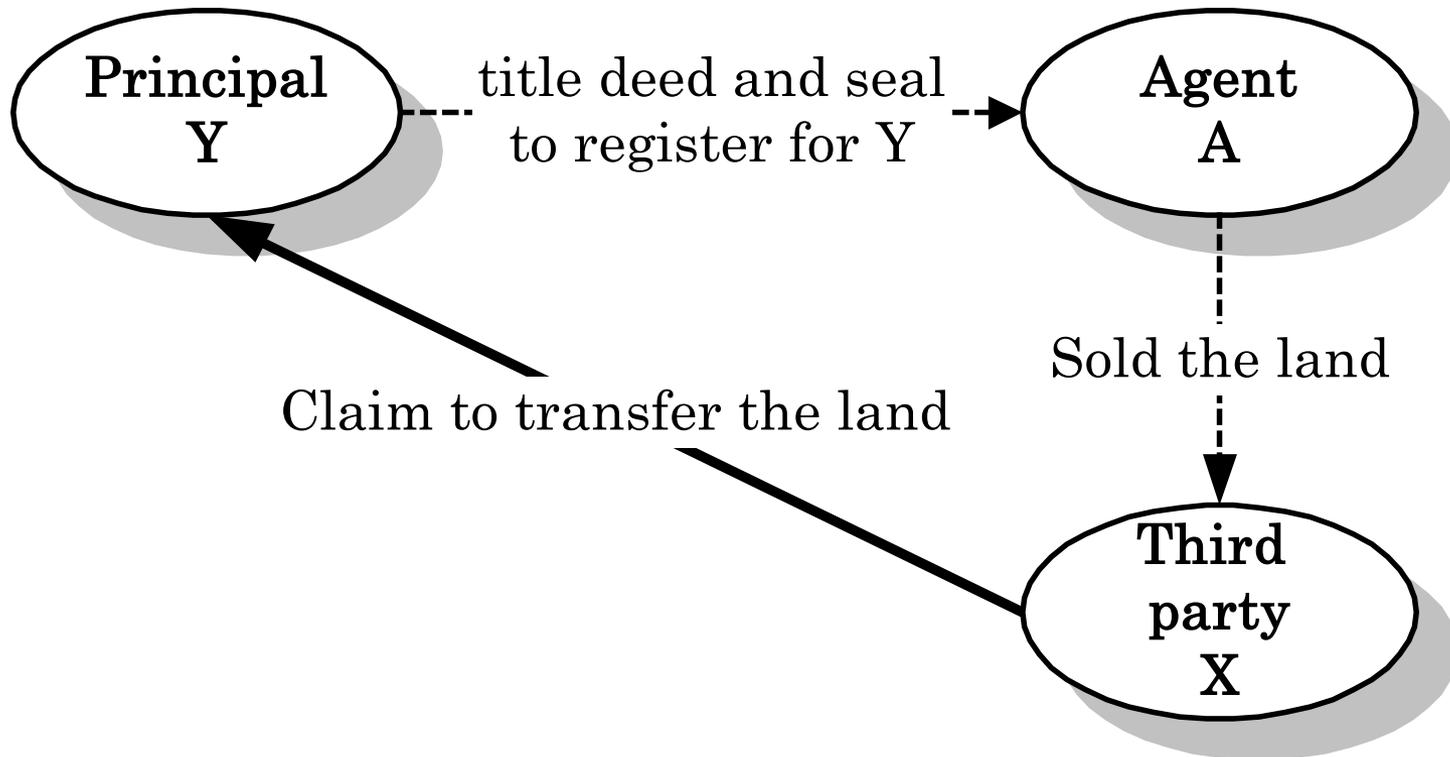
■ Question

- X can claim against Y to transfer the land and register it by name of X.



Illustration of exercise 6

Apparent agent case



Reference (1/6)

- Article 109 (Apparent Authority due to Manifestation of Grant of Authority of Agency)
 - A person who manifested to a third party that he/she granted certain authority of agency to other person(s) shall be liable for any act performed by such other person(s) with third parties within the scope of such authority, unless such third parties knew, or were negligent in not knowing, that such other person(s) were not granted the authority of agency.

Reference (2/6)

- Article 110 (Apparent Authority of Act Exceeding Authority)
 - The provision of the main clause of the preceding Article shall apply mutatis mutandis to the case where an agent performs any act exceeding its authority and a third party has reasonable grounds for believing that the agent has the authority.

Reference (3/6)

- Article 112 (Apparent Authority After Termination of Authority of Agency)
 - Termination of the authority of agency may not be asserted vis-a-vis a third party without knowledge; provided, however, that, this shall not apply to the cases where such third party was negligent in not knowing such fact.

Reference (4/6)

■ Article 555(Sale)

- A sale shall become effective when one of the parties promises to transfer a certain real rights to the other party and
- the other party promises to pay the purchase money for it.

■ Article 176(Creation and Transfer of Real Rights)

- The creation and transfer of real rights shall take effect solely by the manifestations of intention of the relevant parties.

Reference (4/6)

■ Article 555(Sale)

- A sale shall become effective when one of the parties promises to transfer a certain real rights to the other party and
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■ Article 176(Creation and Transfer of Real Rights)

- The creation and transfer of real rights shall take effect solely by the manifestations of intention of the relevant parties.

The effect of the double selling of a real estate (Art. 177 Code Civil of Japan)



Reference (6/6)

- Article 178 (Requirements of Perfection of Transfer of Real Rights concerning Movables)
 - The transfers of real rights concerning movables may not be asserted against third party, unless the movables are delivered.

Extract the principles on apparent agency

■ Premise

- 1. The principal creates the appearance of authorized agency against the pretended agent.
- 2. The apparent agent acts like a authorized agent.
- 3. The third party believes that the apparent agent has been granted authority in good faith and without negligence.

■ Result

- 1. The principal is responsible to the third party to the act of apparent agent.
- 2. The bona fide third party may deem the apparent agent to be a authorized agent.

C. Lack of will (defective declaration of will)

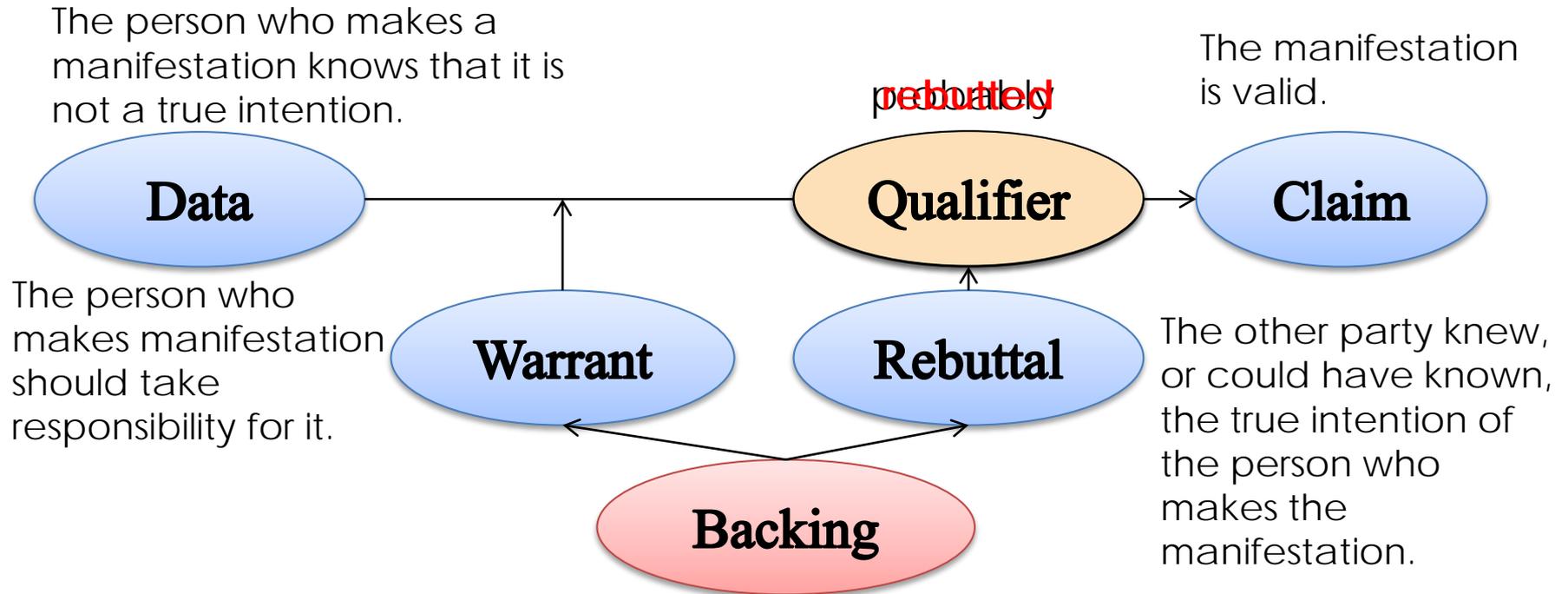
- Structure of Civil Code of Japan
- 1. Declarant is aware of lack of will
 - a) Mental reservation (ex. a joke)
 - b) Fictitious juristic act by collusion
- 2. Declarant is not aware of lack of will
 - c) Mistake

a) Mental reservation

■ Article 93 (Concealment of True Intention) Civ. C. Japan

- The validity of the manifestation of intention shall not be impaired even if the person who makes the manifestation knows that it does not reflect his/her true intention;
- provided, however, that, in cases the other party knew, or could have known, the true intention of the person who makes the manifestation, such manifestation of intention shall be void.
 - Example: A person who sold his property as a joke is nevertheless bound by his words. However, if the opposite party was aware that this was a joke, or should have been aware of this, the act is null and void.

Toulmin's diagram of mental reservation (Shifting the burden of proof)



- 1.Invalid:** The other party knew, or could have known, the true intention of the person who makes the manifestation. (**Rule:** If there is no will, then manifestation is invalid)
- 2.Valid:** The other party did not know and could have not known (without fault), the true intention of the person. (**Exception:** Application of theory of transaction safety)

Legal structure of mental reservation and its amendment

Current Art. 93

- Article 93 (Concealment of True Intention)
 - [Principle: valid] The validity of the manifestation of intention shall not be impaired even if the person who makes the manifestation knows that it does not reflect his/her true intention;
 - [Exception: void] provided, however, that, in cases the other party knew, or could have known, the true intention of the person who makes the manifestation, such manifestation of intention shall be void.

Amendment of Art. 93

- Article 93 (Concealment of True Intention)
 - (1) **Principle:** If a party's manifestation is different with true intention (i.e. lack of intention), then the manifestation is **null and void**.
 - (2) **Exception:** If the other party, however, did not know and could have not known, the true intention of the one party, then the manifestation is not null and void but **valid**.
 - (3) **Presumption:** In order to protect the safety of transaction, if a party who makes the manifestation knows that it does not reflect his/her true intention, then **it is presumed that the other party did not know and could have not known**, the true intention of the person who makes the manifestation.
 - (4) **Burden of proof:** If **the party** who makes different manifestation with true intention **proves** that the other party knew, or could have known, the true intention of the party who makes the manifestation, such manifestation of intention shall be void, as a principle, provided in first paragraph.

b) Fictitious juristic act by collusion

■ Article 94 (Fictitious declaration of intention)

- (1) Any fictitious manifestation of intention made in collusion with another party shall be void.
- (2) The nullity of the manifestation of intention pursuant to the provision of the preceding paragraph may not be asserted against a third party without knowledge.

Exercise 7

■ Facts

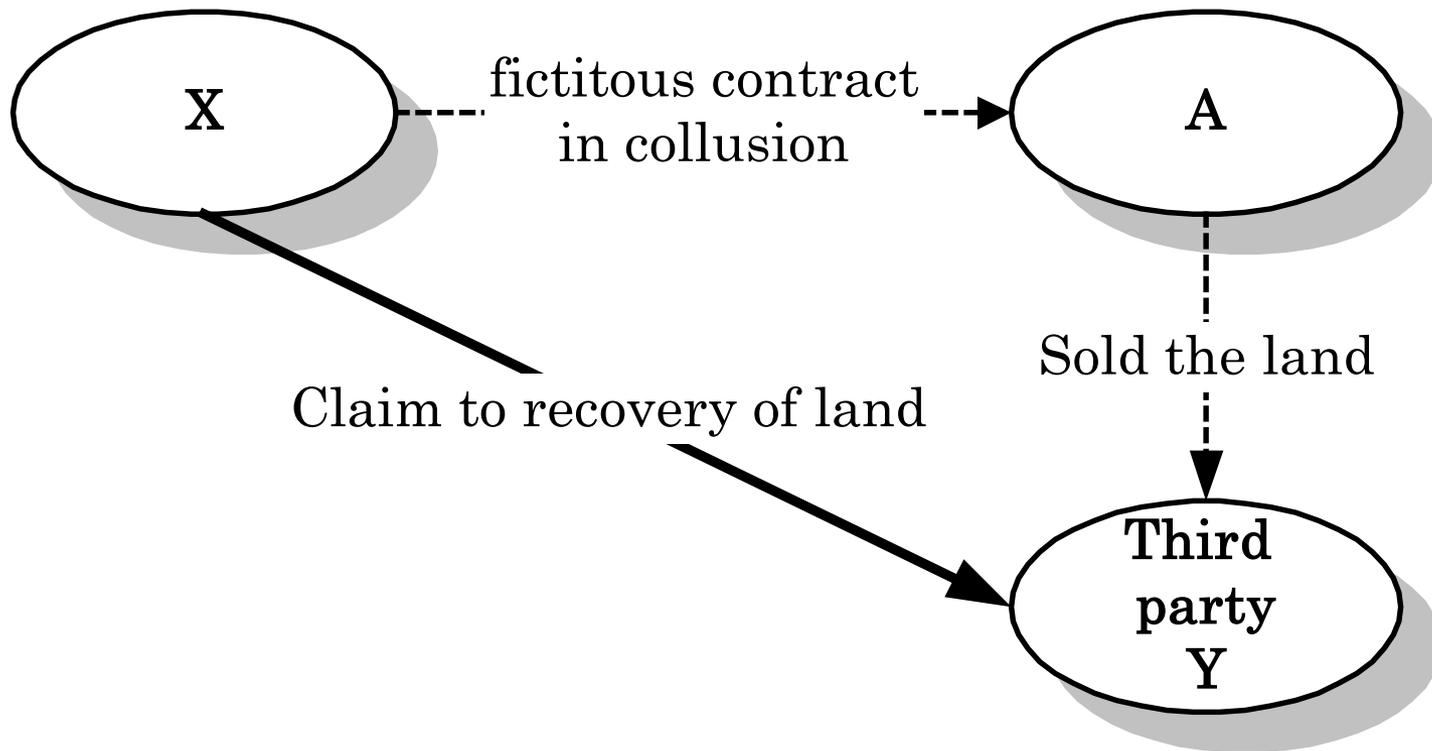
- X colludes with 'A' and fictitiously sells him a piece of land.
- 'A' abused X's trust and sold the land to a third party Y, who reasonably believed that 'A' was the genuine owner.

■ Questions

- The sale contract between 'A' and X is valid?
- X can claim to recover the land against Y?

Illustration of Exercise 7

Fictitious contract case



Supplementary Lecture on Contract in 2014



Prof. Shigeru KAGAYAMA
Meijigakuin University

Contents of Supplementary Lecture

Relation ship between a contract and a real right

- Effect of Sale contract
 - Sale Contract (Art. 555 Civil Code of Japan)
 - Effect of Sale contract (Art. 176 Civ. Code of Japan)
 - Restriction of the effect of sale contract without registration (Art. 177 Civ. Code of Japan)
- Application to the fictitious sale contract

External effect of contractual obligation

- Principle: Relativity of Contract
 - The effect of contractual obligation remains within parties of contract
- Exception: External effect of contractual obligation
 - "Action oblique (action indirecte)"
 - "Action directe"
 - Perfect "action directe"
 - Imperfect "action directe"
 - Action paulienne

Relationship between a contract and a real right

Relationship between sale contract and real right of land (1/2)

■ Article 555(Sale)

- A sale shall become effective when one of the parties promises to transfer a certain real rights to the other party and
- the other party promises to pay the purchase money for it.

■ Article 176(Creation and Transfer of Real Rights)

- The creation and transfer of real rights shall take effect solely by the manifestations of intention of the relevant parties.

The effect of sale contract (Art. 176 Code Civil of Japan)



- Article 176(Creation and Transfer of Real Rights)
 - The creation and transfer of real rights shall take effect
 - solely by the manifestations of intention of the relevant parties.

Relationship between sale contract and real right of land (2/2)

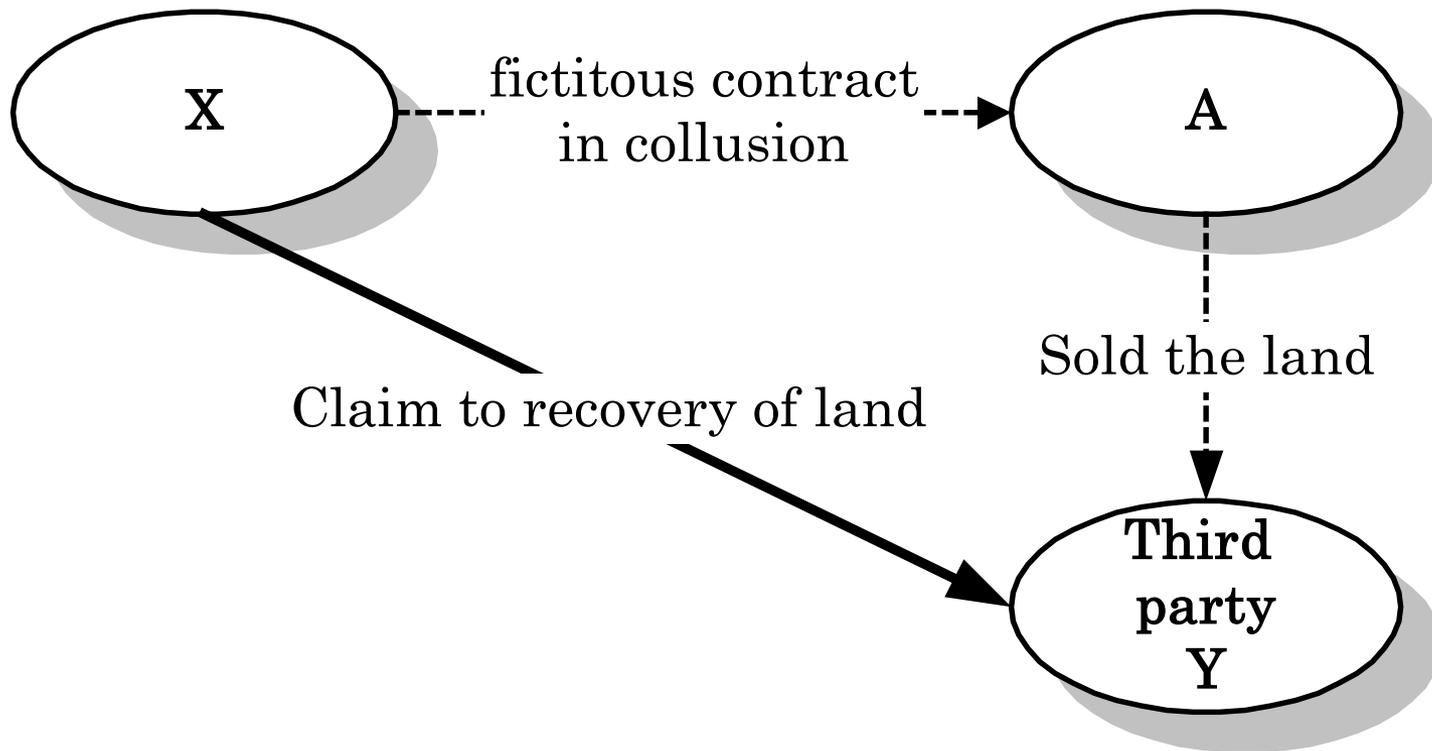
- Article 177 (Requirements of Perfection of Changes in Real Rights concerning Immovable properties)
 - Acquisitions of, losses of and changes in real rights concerning immovable properties may not be asserted against third parties,
 - unless the same are registered pursuant to the applicable provisions of the Real Estate Registration Act (Law No. 123 of 2004) and other laws regarding registration.

The effect of the double selling of a real estate (Art. 177 Code Civil of Japan)

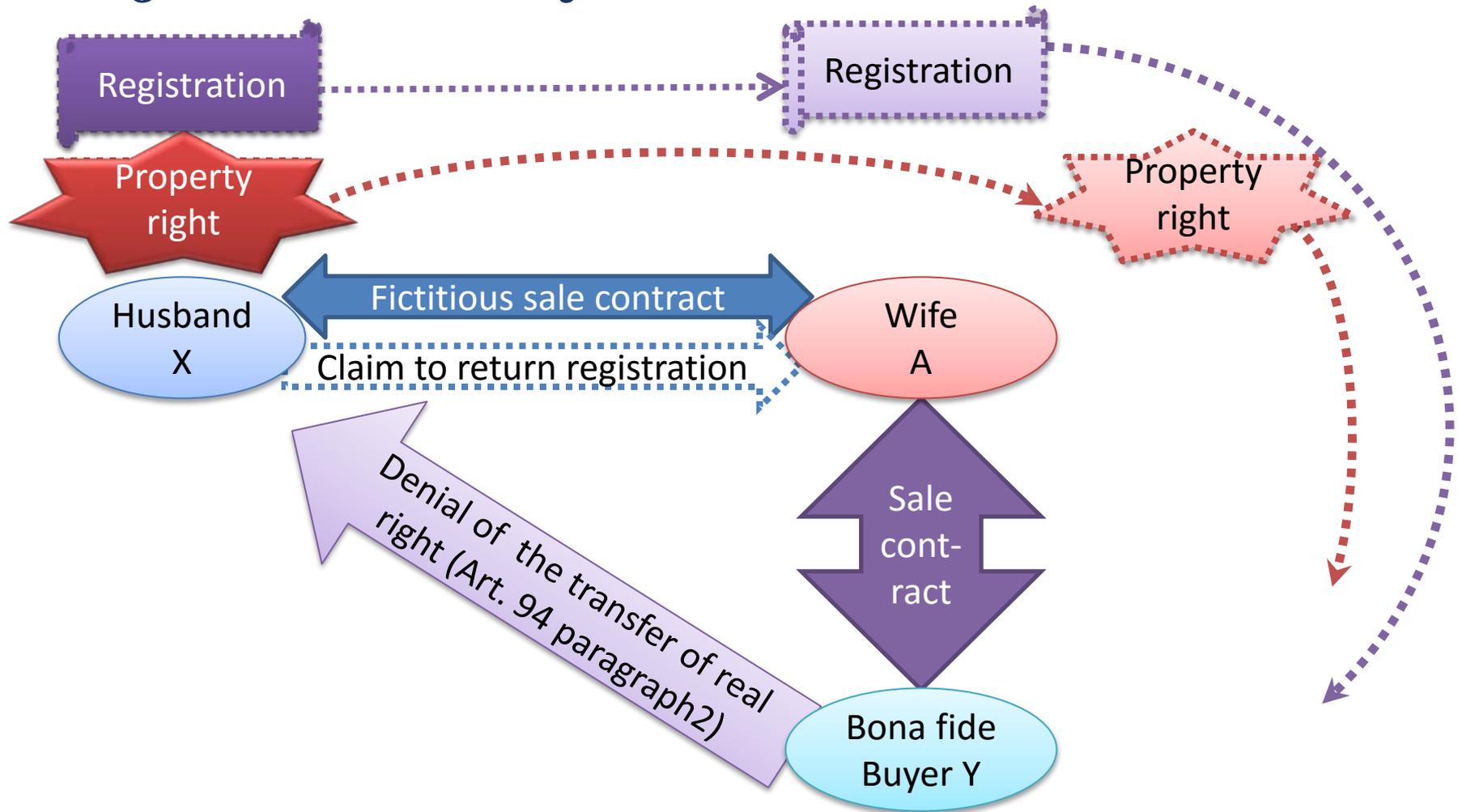


Illustration of Exercise 7

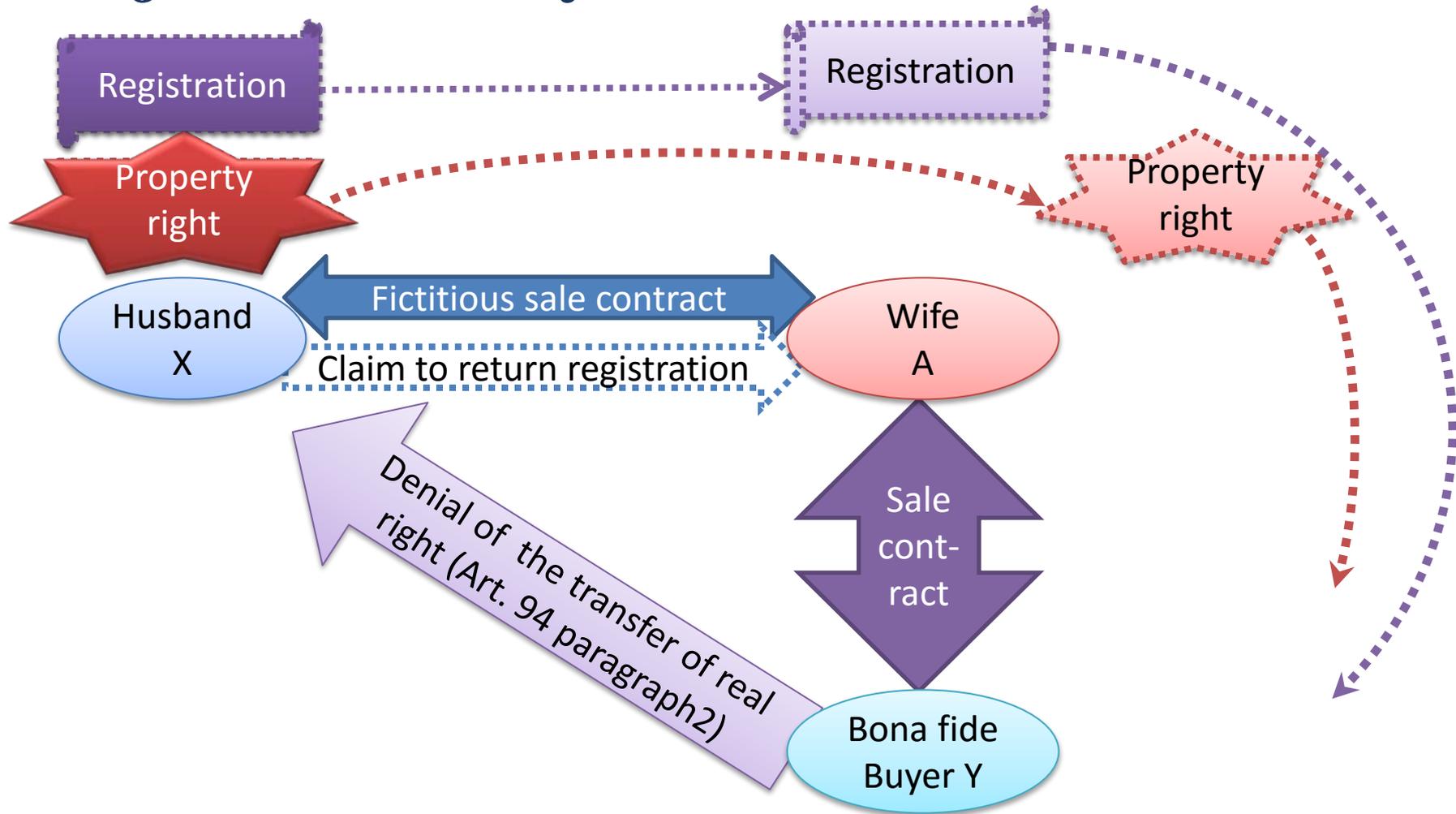
Fictitious contract case



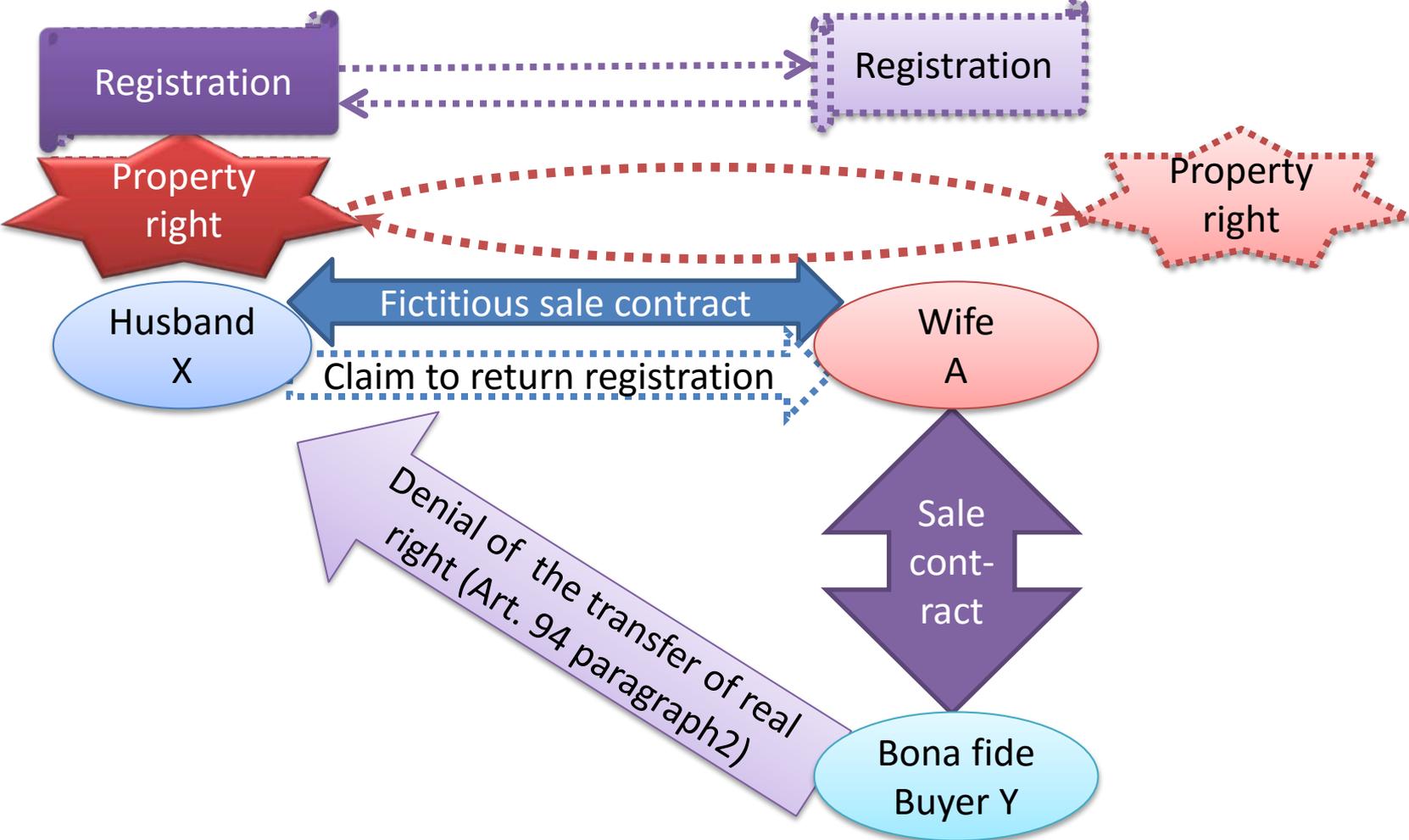
Application of Art. 177 to fictitious juristic act by Collusion Case (1/3)



Application of Art. 177 to fictitious juristic act by Collusion Case (2/3)



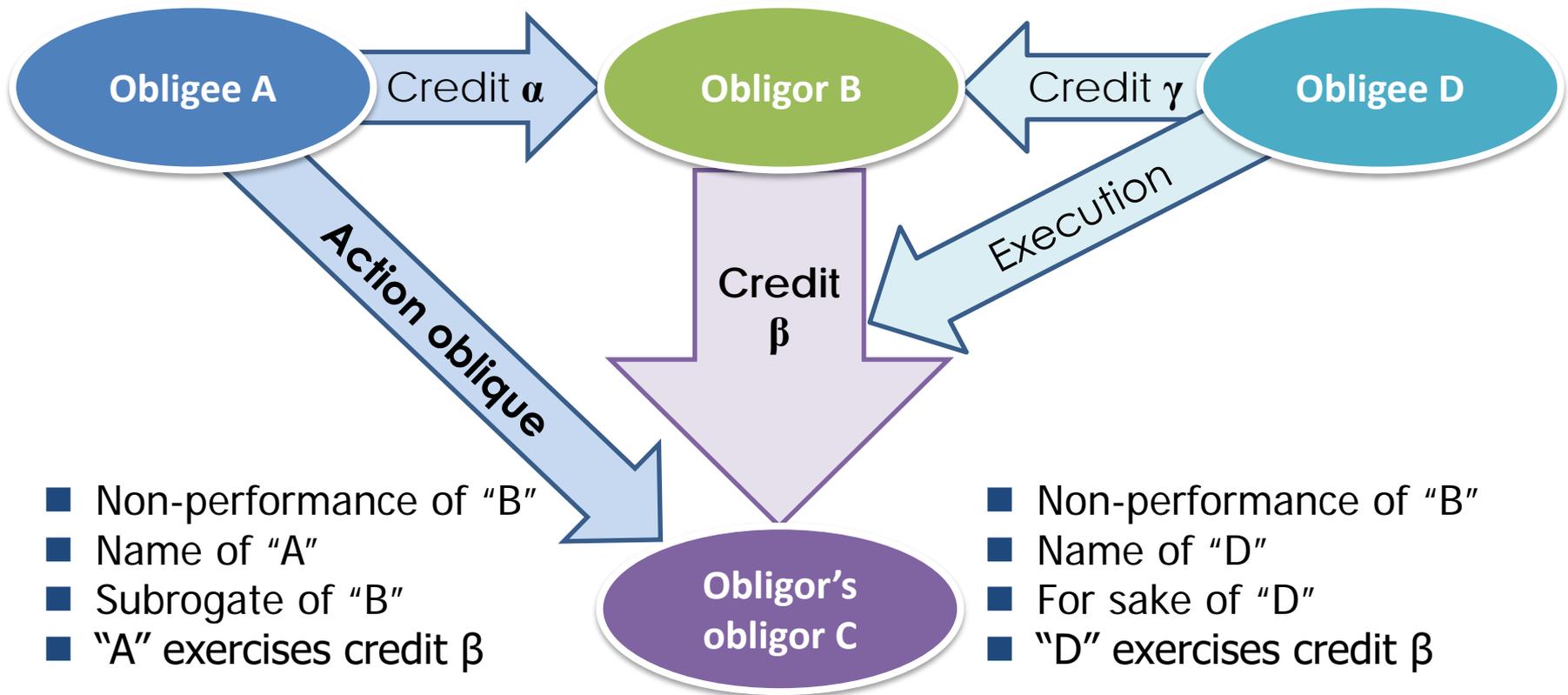
Application of Art. 177 to fictitious juristic act by Collusion Case (3/3)



External effect of contract

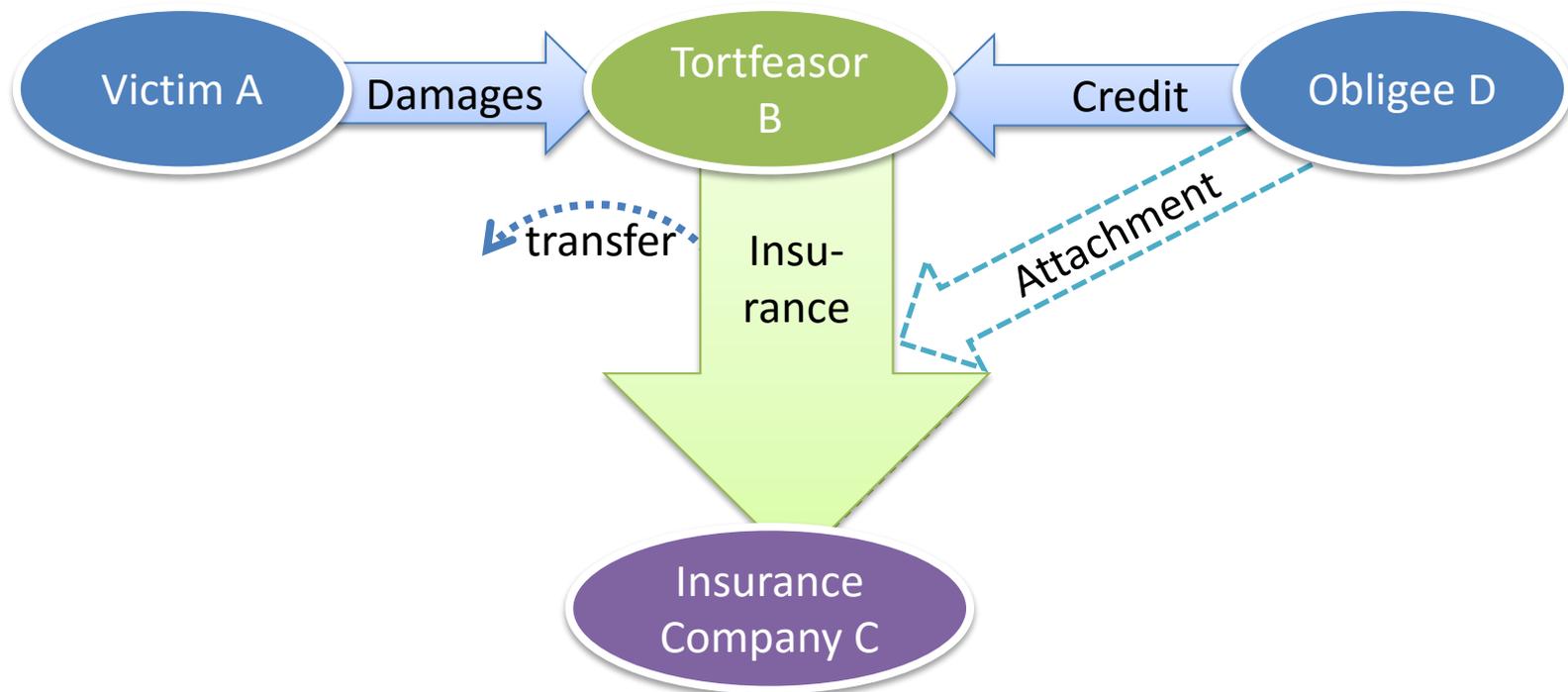
Action Oblique and Attachment

Dividend is equal among obligees



“Action directe” of a victim against assurance company

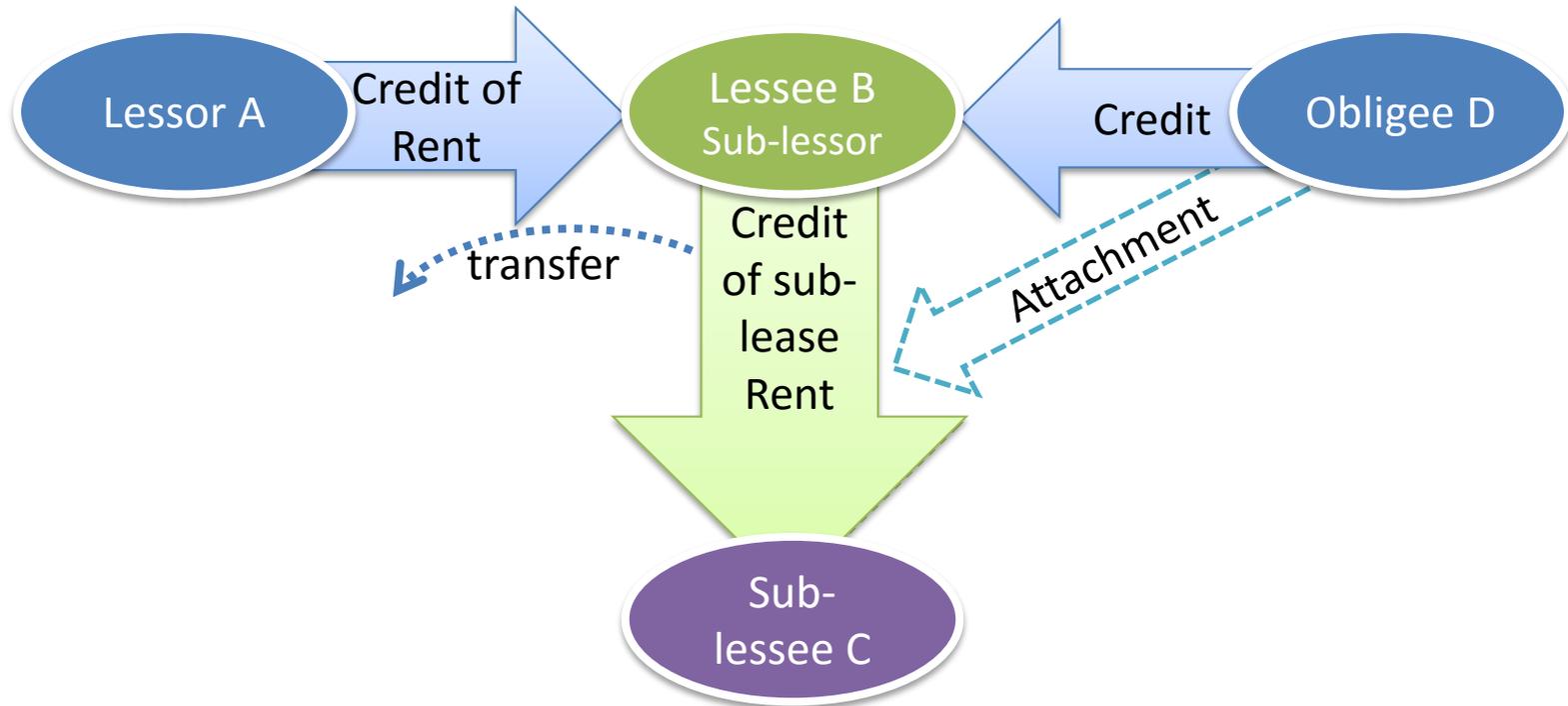
- Security Act of the Automobile Accident Liability Art. 16 (1)
 - A victim of automobile accident may claim for damages against insurance company of tortfeasor to the extent of the insurance amount.



“Action directe” of sub-lease contract

■ Article 613 (1)

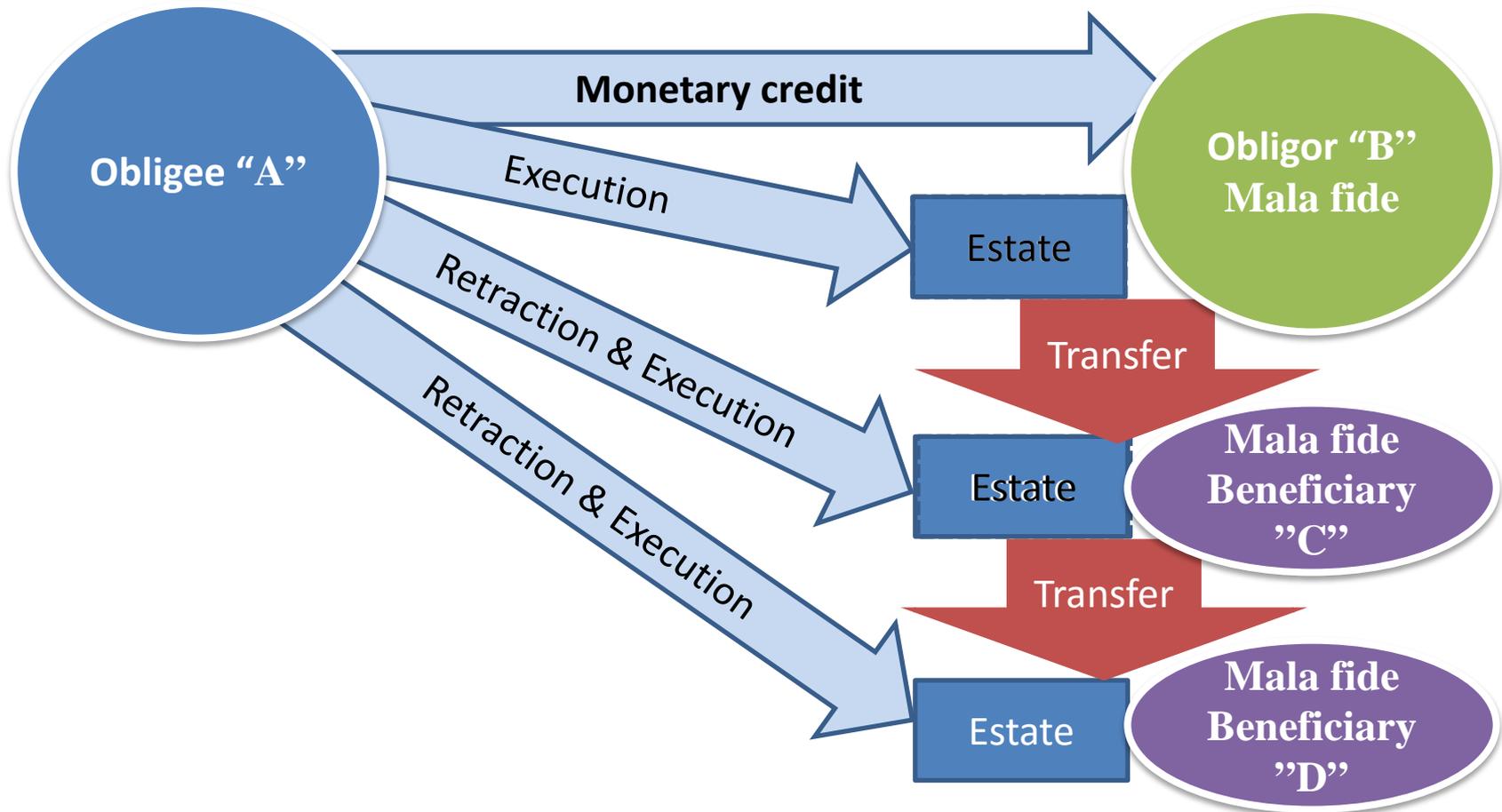
- (1) If a lessee lawfully sub-leases a leased Thing, the sub-lessee shall assume a direct obligation to the lessor. In such cases, advance payment of rent may not be asserted against the lessor.
- (2) The provisions of the preceding paragraph shall not preclude the lessor from exercising his/her rights against the lessee.



Action paulienne

- Article 424(Obligee's Right to Demand the Rescission of Fraudulent Act)
 - (1) An obligee may demand the court to rescind any juristic act which an obligor commits knowing that it will prejudice the obligee;
 - provided, however, that, this shall not apply to the cases where any person who benefits from such act, or any person who succeeds to such benefit, did not know, at the time of such act or succession, the fact that the obligee is to be prejudiced.
- Article 425(Effect of Rescission of Fraudulent Act)
 - The rescission pursuant to the provision of the preceding Article shall have an effect for the benefit of all obligees.
- Article 426(Limitation Period of Obligee's Right to Rescind Fraudulent Act)
 - The right to rescind pursuant to the provision of Article 424 shall be extinguished by operation of prescription if not exercised within two years from the time that the obligee acquired knowledge of the cause of the rescission. The same shall apply if twenty years pass from the time of the act.

Action paulienne (droit de suit: tracing right)





End of Supplementary Lecture

c) Mistake

- Article 95 (Mistake) Civ. C. Japan
 - Manifestation of intention has no effect when there is a mistake in any element of the juristic act in question;
 - provided, however, that the person who made the manifestation of intention may not assert such nullity by himself/herself if he/she was grossly negligent.

Relationship between gross negligence and mala fide

Bona fide (in good faith)			Mala fide (in bad faith)
Without negligence	negligence	Gross negligence	
Protected in almost all cases	Protected some cases	Evaluate as mala fide and not protected almost all but opponent is also mala fide cases	

An Example of gross mistake

On 8 December 2005, the brokerage of Mizuho Securities Co. Ltd. mistook a client's sell order for 1 J-Com share at 610,000 yen for one selling 610,000 shares at 1 yen each, placing the incorrect order with the Tokyo Stock Exchange's transaction system.

The company immediately realized the mistake after placing the order and submitted several cancel orders. However, the TSE failed to process the cancellation in accordance with the cancel orders due to a defect in the TSE's electronic trading system, and thus allowed the sales of the shares composing the order to be completed. As a result, the Company eventually accrued a loss of approximately 40.7 billion yen.

My proposal of amendment of Art. 95 of Civ. C. of Japan

■ Logical calculation

- Gross negligence \leq mala fide
- Mistake with gross negligence \leq
mala fide mistake = Mental reservation (Art. 93)

■ Art. 93

- Mental reservation shall be null and void, if the other party was aware, or should have been aware, of the real intention of the declarant.

■ Art. 95 (should be revised as follows)

- Manifestation of intention has no effect when there is a mistake in any element of the juristic act in question. Mistake with gross negligence shall also be void, only if the other party was aware, or should have been aware of gross mistake of declarant.

D. Unfair intervention to the decision making

■ Article 96 (Fraud or duress)

- (1) Manifestation of intention which is induced by any fraud or duress may be rescinded.
- (2) In cases any third party commits any fraud inducing any person to make a manifestation of intention to the other party, such manifestation of intention may be rescinded only if the other party knew such fact.
- (3) The rescission of the manifestation of intention induced by the fraud pursuant to the provision of the preceding two paragraphs may not be asserted against a third party without knowledge.

Distinction of “mistake of element of legal act” and “mistake of motive”

- Mistake of element of juristic act(Art.95)
 - Manifestation and juristic act are null and void.
 - There is no intention corresponding to the manifestation.
- Mistake of motive(Art.96 Paragraph2)
 - Manifestation is not null but avoidable.
 - There is a intention corresponding to the manifestation, there is, however, a defect in the process of making will.

E. Violation of public order

- Article 90 (Public policy)
Civil Code of Japan
 - A juristic act with any purpose which is against public policy or good morals is void.

Gross Disparity

■ Article 3.10, UNIDROIT Principles

- (1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to
 - (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and
 - (b) the nature and purpose of the contract.

2. Effect of invalidity of contract

■ Absolute invalidity

- Violation of public order

■ Relative invalidity

■ Nul and void / Avoidance

- Lack of capacity of party
- Lack of authority of agency
- Lack of will
- Unfair intervention to the decision making

Effect of avoidance (1/2)

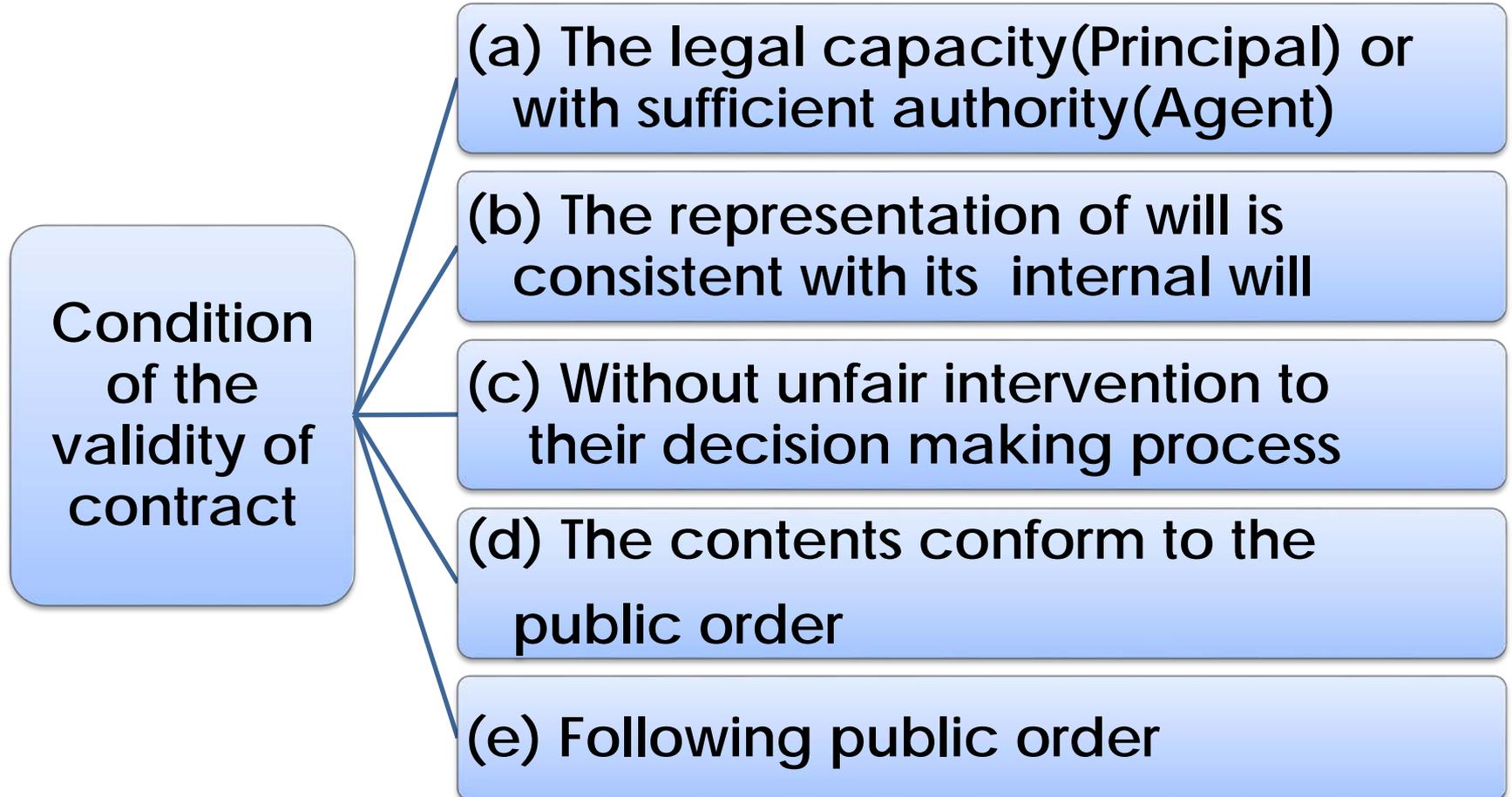
- Article 3.17, UNIDROIT Principles -
Retroactive Effect of Avoidance
 - (1) Avoidance takes effect retroactively.
 - (2) On avoidance either party may claim restitution of whatever is supplied under the contract or the part of it avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received.

Effect of avoidance (2/2)

■ Article 3.18 – Damages, UNIDROIT Principles

- Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

Condition of the validity of Contract (Review)

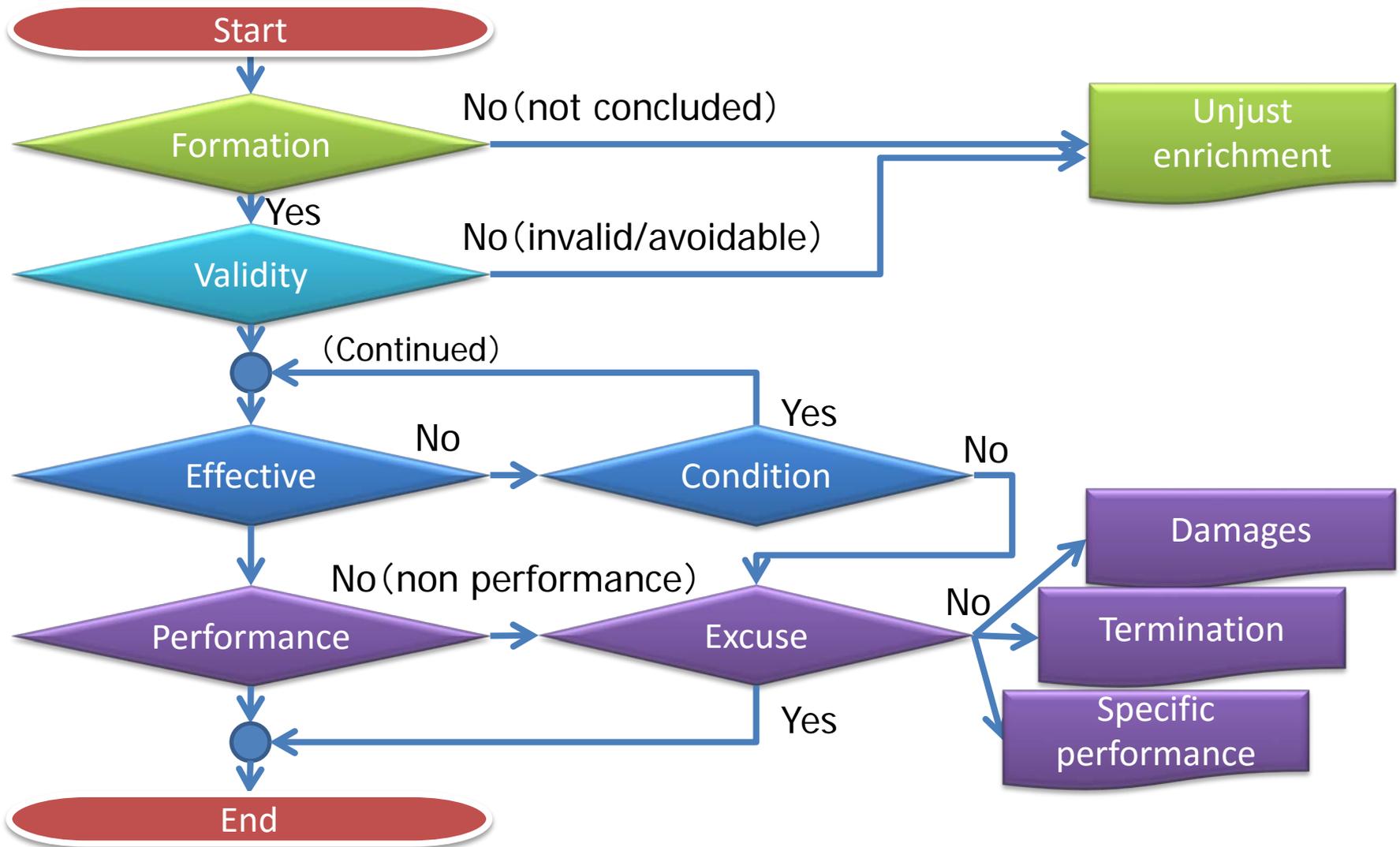


VIII. Performance of contract

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1. Time of performance
2. Order of performance
3. Place of performance
4. Costs of performance
5. Imputation of payments

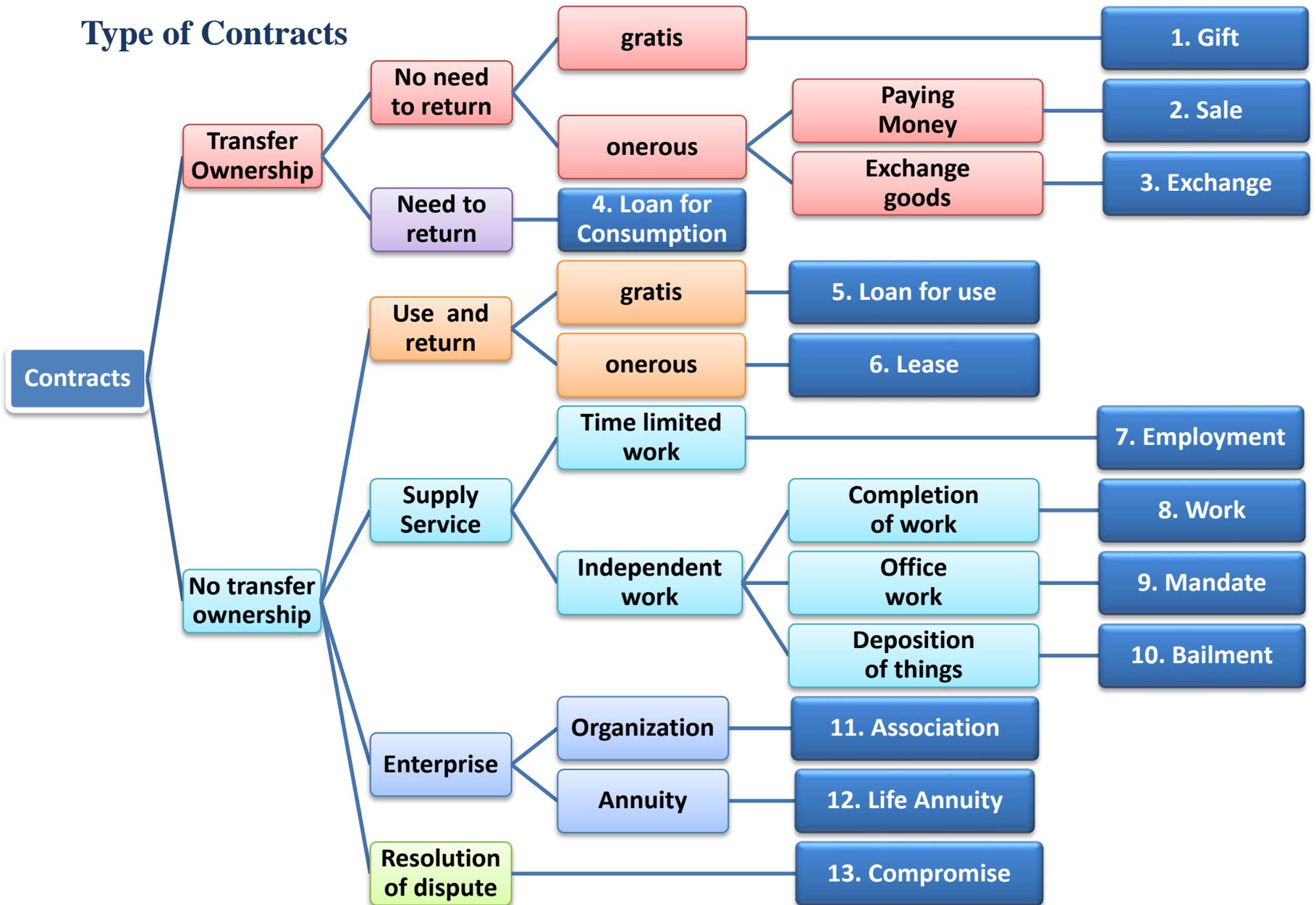
Flow of Contract



Type of contracts

Purpose		Nature		Name of contract
Transfer property right		gratis		Gift
		onerous	price	Sale
			things	Exchange
	Returning similar things	gratis, onerous		Loan for consumption
others	Using things	gratis		Loan for use
		onerous		Lease
	Using service	onerous		Employment
		onerous		Work
		gratis, onerous		Mandate
		gratis, onerous		Bailment
	Using things and service	onerous		Association
		onerous		Life Annuity
	Solution of disputes	onerous		Compromise

Type of Contracts



Example of Sale Contract Option Contract

■ Civil Code of Japan

■ Article 557 (Earnest Money)

- When the buyer delivers earnest money to the seller, the buyer may cancel the contract by forfeiting his/her earnest money or the seller may cancel the contract by reimbursing twice its amount, until either party commences performance of the contract.



1. Time of performance

■ Article 6.1.1 - Time of Performance

■ A party must perform its obligations:

- (a) if a time is fixed by or determinable from the contract, at that time;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time;
- (c) in any other case, within a reasonable time after the conclusion of the contract.



2. Order of performance

■ Article 6.1.4 - Order of Performance

- (1) To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.
- (2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

3. Place of performance

■ Article 6.1.6 - Place of Performance

- (1) If the place of performance is neither fixed by, nor determinable from the contract, a party is to perform:
 - (a) a monetary obligation, at the obligee's place of business;
 - (b) any other obligation, at its own place of business.
- (2) A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract.

4. Costs of performance

- Article 6.1.11 - Costs of Performance
 - Each party shall bear the costs of performance of its obligations.

5. Imputation of payments (3/1)

■ Article 6.1.12 - Imputation of Payments

- (1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied. However, the payment discharges first any expenses, then interest due and finally the principal.

5. Imputation of payments (3/2)

■ Article 6.1.12 - Imputation of Payments

- (2) If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.

5. Imputation of payments (3/3)

■ Article 6.1.12 - Imputation of Payments

- (3) In the absence of imputation under paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria and in the order indicated:
 - (a) an obligation which is due or which is the first to fall due;
 - (b) the obligation for which the obligee has least security;
 - (c) the obligation which is the most burdensome for the obligor;
 - (d) the obligation which has arisen first.
- If none of the preceding criteria applies, payment is imputed to all the obligations proportionally.



IX. Non-Performance of contract

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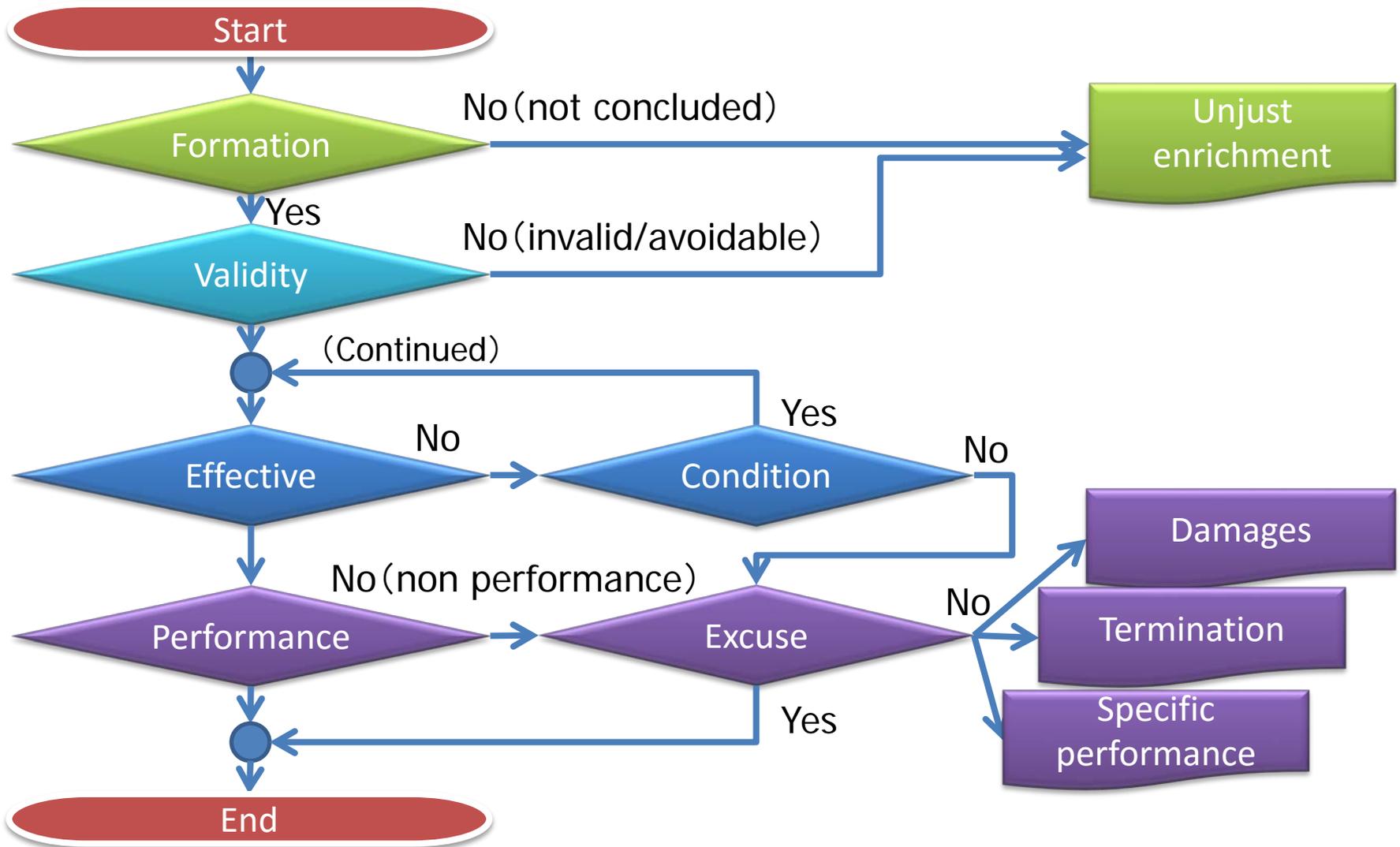
Remedies of non-performance

Right to performance

Termination

Right to damages

Flow of Contract



Definition of non-performance

■ Article 7.1.1 - Non-Performance Defined

- Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

Type of non-performance

- Delayed (late) performance
- Impossibility of performance
- Imperfect (defective) performance
 - Defect of object (lack of conformity)
 - Defect of right
 - Article 41 of CISG
 - The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Excuse of non-performance (1/3)

■ Article 7.1.2 - Interference by the Other Party

■ A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk.

■ A agrees to perform building work on B's land beginning on 1 February. If B locks the gate to the land and does not allow A entry, B cannot complain that A has failed to begin work.

Excuse of non-performance (2/3)

■ Article 7.1.6 - Exemption Clauses

- A clause which limits or excludes one party's liability for non-performance or which permits one party to tender performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.
 - A tour operator offers at a high price a tour providing for accommodation in specifically designated luxury hotels. A term of the contract provides that the operator may alter the accommodation if the circumstances so require. If the operator puts up its clients in second class hotels, it will be liable to them notwithstanding the contractual term since the clients expected to be accommodated in hotels of a category similar to that which had been promised.



Excuse of non-performance (3/3)

■ Article 7.1.7 - Force Majeur

- (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (4) **Nothing** in this article **prevents** a party from exercising a **right to terminate the contract** or to withhold performance or request interest on money due.

Exercise 8

■ Facts

- On 13 August, seller(X) and purchaser(Y) concluded a contract of sale of seller's house.
- The content of contract was as follows:
 - Time of performance: on 16 August
 - Price of house: 8,000,000 yen.
- On 15 August, X found that his house had been struck by lightning and burned out on 14 August.

■ Question

- May Y terminate the contract?
- May Y claim damages of the benefit for resale?

Right to performance (1/3)

- Article 7.2.1 - Performance of monetary Obligation
 - Where a party who is obliged to pay money does not do so, the other may require payment.

Right to performance (2/3)

- Article 7.2.2 - Performance of Non-Monetary Obligation
 - Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless
 - (a) performance is impossible in law or fact;
 - (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;
 - (c) the party entitled to performance may reasonably obtain performance from another source;
 - (d) performance is of an exclusively personal character; or
 - (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.



Right to performance (3/3)

- Article 7.2.3 - Repair and Replacement of Defective Performance
 - The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.

Condition of termination(1/3)

- Article 7.3.1 - Right to Terminate the Contract
 - (1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a **fundamental non-performance**.

Condition of termination (2/3)

- (2) In determining whether a failure to perform an obligation amounts to a **fundamental non-performance** regard shall be had, in particular, to whether
 - (a) the non-performance **substantially deprives the aggrieved party of what it was entitled to expect** under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
 - (b) strict compliance with the obligation which has not been performed is of essence under the contract;
 - (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
 - (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.



Condition of termination (3/3)

- (3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed under Article 7.1.5 has expired.
 - Article 7.1.5 - Additional Period for Performance
 - (3) Where in a case of delay in performance **which is not fundamental** the aggrieved party has given notice allowing an **additional period of time of reasonable length**, it may **terminate the contract at the end of that period**. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.

Termination due to expiring an additional period

- Article 541 of Civil Code of Japan (Termination due to delayed-performance)
 - If one of the parties does not perform his obligation, the other party may fix a reasonable period and demand its performance, and may terminate the contract, if no performance is effected within such period.

Effect of termination (1/2)

- Article 7.3.5 - Effects of Termination in General
 - (1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.
 - (2) Termination does not preclude a claim for damages for non-performance.
 - (3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

Effect of termination (2/2)

■ Article 7.3.6 - Restitution

- (1) On termination of contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.
- (2) However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.

Condition of damages

- Article 7.4.1 - Right to Damages
 - Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.



Effect of damages

■ Article 7.4.2 - Full Compensation

- (1) The aggrieved party is entitled to full compensation for harm sustained as a result of the nonperformance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.
- (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.



Exercise 9

■ Facts

- On 13 August, seller(X) and purchaser(Y) concluded a contract of sale of seller's house.
- The content of contract was as follows:
 - Time of performance: on 16 August
 - Price of house: 8,000,000 yen.
- On 14 August, X found that his house had been struck by lightning and burned out on 12 August.

■ Question

- May X claim the price of house against Y?
- May Y terminate the contract?
- May Y claim damages of the benefit for resale?

X. Unjust enrichment

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- 1. General unjust enrichment
- 2. Special unjust enrichment
 - A. benefiting unjust enrichment
 - B. violating unjust enrichment
 - C. redeeming unjust enrichment

1. General unjust enrichment

■ A. Bona fide unjust enrichment

- Article 703 (Liability to return benefit of bona fide person)
 - A person, who without any legal ground derives a benefit from the property or services of another and thereby causes loss to the latter, is bound to return such benefit to the extent that it still exists.

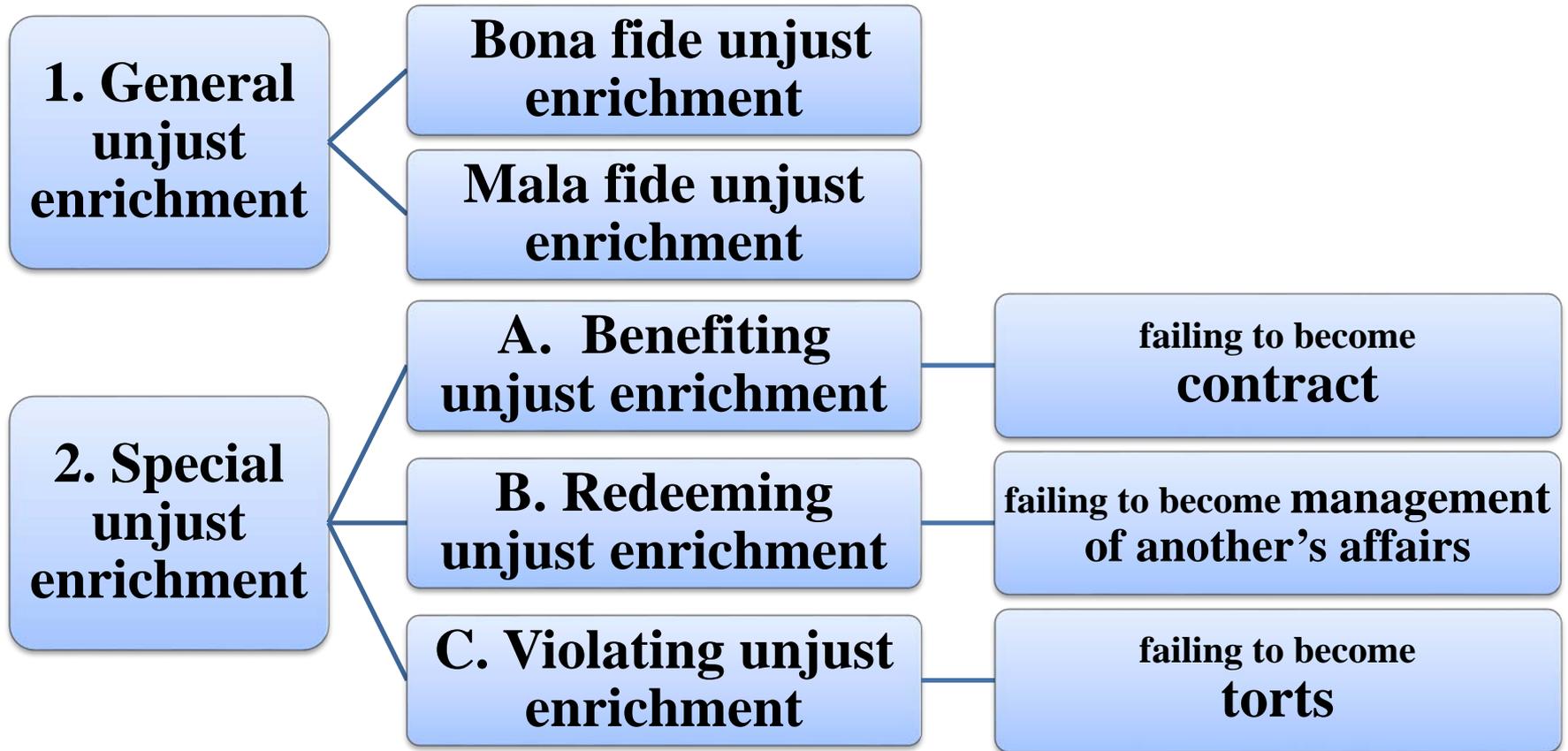
■ B. Mala fide unjust enrichment

- Article 704 (Liability to return benefit of mala fide person)
 - A person enriched mala fide shall return the benefit received by him with interest, and if there has been any damage, he is bound also to make compensation therefor.

2. Special unjust enrichment

- A. Benefiting unjust enrichment
 - Unjust enrichment failing to become contract
- B. Violating unjust enrichment
 - Unjust enrichment failing to become torts
- C. Redeeming unjust enrichment
 - Unjust enrichment failing to become management of another's affairs

Type of unjust enrichment



A. Benefiting unjust enrichment

- General unjust enrichment
- Exception of general unjust enrichment
 - Article 705 (Money paid aware of no-obligation)
 - If a person, who has effected an act of performance purporting thereby to discharge an obligation, was aware at the time that no such obligation existed, he cannot demand the return of the subject-matter of such act of performance.
 - Article 706 (Performance before due)
 - If a person, who has effected an act of performance purporting thereby to discharge an obligation which is not due, he cannot demand the return of the subject matter of such act of performance; however, if the obligor effects such act of performance by mistake, the obligee shall return the benefit which he received therefrom.

B. Violating unjust enrichment (1/2)

- Article 191 (Responsibility to person entitled to restoration)
 - In cases a thing possessed has been lost or damaged by any cause for which the possessor is responsible,
 - a mala fide possessor shall be liable to make compensation to the person entitled to restoration for the entire damage,
 - and a bona fide possessor shall be liable to the extent of the enrichment he still enjoys by reason of such loss or damage;
 - a possessor who has no intention of holding as owner shall, however, make compensation for the entire damage even though he may have been acting bona fide.



B. Violating unjust enrichment (2/2)

- Article 189 (Bona fide possessor and fruits)
 - 1. A bona fide possessor acquires the fruits of the thing in possession.
 - 2. If a bona fide possessor fails in an action on title, he is deemed to have been a mala fide possessor as from the time of the commencement of the action.
- Article 190 (Mala fide possessor and fruits)
 - 1. A mala fide possessor is liable to return the fruits and to make compensation for the value of fruits which have already been consumed by him, or have been damaged by his fault or have not been collected through his neglect.
 - 2. The provisions of the preceding paragraph shall apply mutatis mutandis to possessors by force or in secret.

C. Redeeming unjust enrichment (1/2)

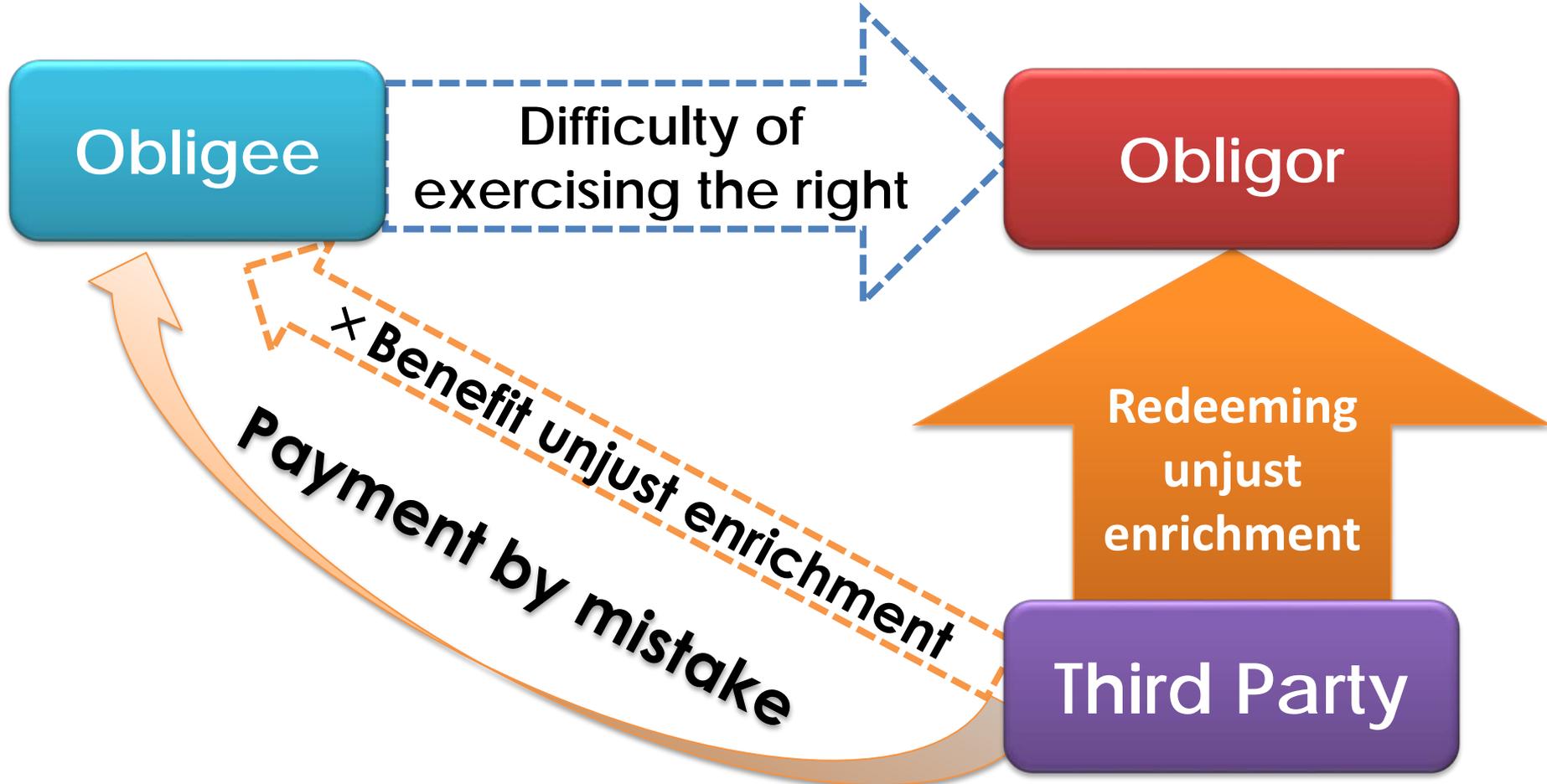
- Article 196 (Possessor's right to reimbursement of expenses)
 - 1. When a possessor restores the thing possessed, he is entitled to reimbursement from the person demanding restoration for the amount expended on its preservation and other necessary expenses; however, in cases the possessor has acquired the fruits, ordinary necessary expenses shall be borne by himself.
 - 2. In regard to the cost of improvement and other useful expenses paid on a thing in possession, the possessor is, to the extent that the increase in value remains subsisting, entitled to reimbursement either of the amount expended or of the amount by which the value of the thing has been increased, at the option of the person demanding its recovery. Against mala fide possessor, however, the Court may, upon the application of the person demanding recovery, allow a reasonable time.

Redeeming unjust enrichment (2/2)

- Article 707 (Performance by person other than obligor)
 - 1. If, in cases where a person other than the obligor has effected performance of an obligation by mistake, the obligee has bona fide destroyed documentary evidence or has relinquished any security or has lost his claim by prescription, the person who has effected the performance cannot demand the return.
 - 2. The provisions of the preceding paragraph shall not preclude the person who has effected performance from availing himself of the right to obtain reimbursement from the obligor.

Redeeming unjust enrichment (Art. 707)

Obligee has bona fide destroyed documentary evidence or has relinquished any security or has lost his claim by prescription



Exercise 10

■ Facts:

- X repaired a bulldozer for M, who had rented it from Y.
- M went bankrupt and the repaired bulldozer was returned to Y. (Y sold it to A and got ¥1,700,000).
- X sued Y in order to recover the fee (¥514,000) for the repair on the ground of Y's unjust enrichment.

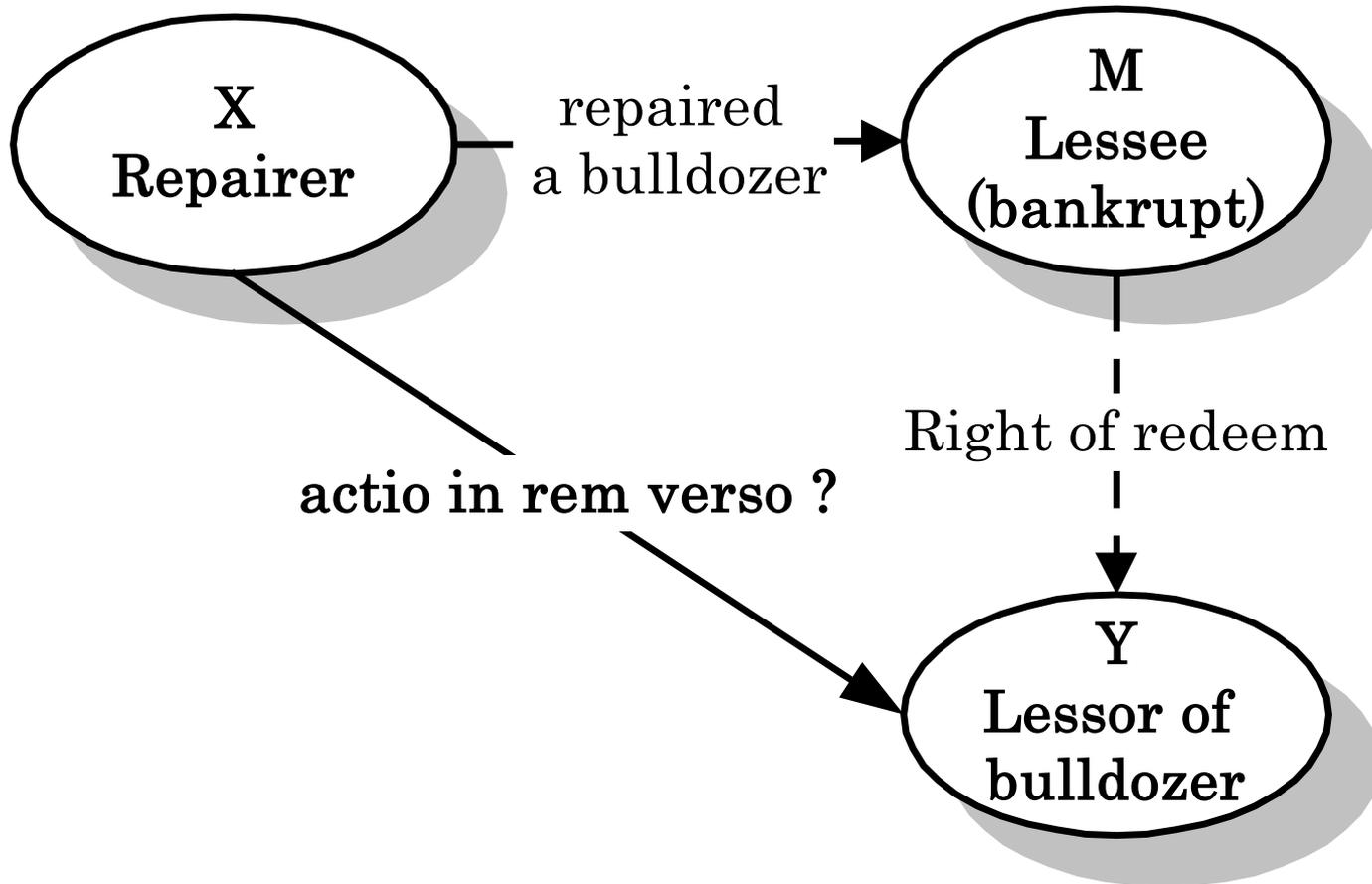
■ Question:

- X can recover the fee?

■ Reference:

- Judgment of the Supreme Court, July 16, 1970 (Minshu 24-7-909)

Illustration of Exercise 10



Materials

Best 50 of frequently applicable
articles of Civil Code of Japan
(1945-2013)

9. Best 30 Articles of Civil Code of Japan

Frequency of application(1945-2013) -> [Next31-50](#)

No.	Articles	No.	Articles	No.	Articles
1	General tort law	11	Unjust Enrichment	21	Liability of land
2	Compensation	12	Termination	22	Prescription of tort
3	Comparative Negligence	13	Mistake	23	Duty of Care of Mandatary
4	Employers' liability	14	Lease	24	Sale
5	Non Performance of contract	15	Apparent Agency	25	Loan for use
6	General Principles	16	Next kin's right for compensation	26	Division of Inherited Property
7	Joint tortfeasor	17	Scope of Damages	27	Action Paulienne
8	Pubic policy	18	Defamation	28	Acquisitive prescription
9	Transfer real estate and registration	19	Quasi-Mandate	29	Free of contract
10	Restriction of sublease	20	Judicial Divorce	30	Action oblique

Best 31-50 applied articles of Civil Code of Japan

	Articles		Articles
31	Responsibility of Guarantor	41	Reimbursement of Joint Guarantors
32	Distribution of Property	42	Assignability of Claims
33	Fictitious Manifestation	43	Extinctive Prescription
34	Apparent obligee	44	Set-off
35	Employment	45	Sharing of Living Expenses
36	Mortgages	46	Fraud or Duress
37	Usages and practices	47	Loans for Consumption
38	Parental Authority in the Case of Divorce	48	Performance for Illegal Causes
39	Assignment of Nominative Claim	49	Simultaneous Performance
40	Deposits for Consumption	50	Work

1. General provision of Torts

■ Article 709(Damages in)

- A person who has **intentionally** or **negligently** infringed any right of others, or legally protected interest of others, shall be liable to compensate any **damages** resulting in **consequence**.

2. Solatium

- Article 710 (Compensation for Damages Other than Property)
 - Persons liable for damages under the provisions of the preceding Article (Art. 709) must also compensate for **damages other than those to property**,
 - regardless of whether the body, liberty or reputation of others have been infringed, or property rights of others have been infringed.

3. Comparative Negligence

- Article 722(Method of Damages and Comparative Negligence)
 - (1) The provisions of Article 417 shall apply mutatis mutandis to compensation for damages in tort.
 - (2) If a **victim is negligent**, the court may determine the amount of compensation by taking that factor into consideration.

4. Employers' liability

■ Article 715(Liability of Employers)

- (1) A person who employs others for a certain business shall be liable for damages inflicted on a third party by his/her **employees** with respect to the execution of that business; provided, however, that this shall not apply
 - if the employer exercised reasonable care in appointing the employee or in supervising the business, or
 - if the damages could not have been avoided even if he/she had exercised reasonable care.
- (2) A person who supervises the business on behalf of the employer shall also assume the liability under the preceding paragraph.
- (3) The provisions of the preceding two paragraphs shall not preclude the employer or supervisor from exercising their right to obtain reimbursement against the employee.

5. Non-Performance of contract

- Article 415(Damages due to Default)
 - If an obligor **fails to perform consistent with the purpose of its obligation**, the obligee shall be entitled to demand damages arising from such failure.
 - The same shall apply in cases it has become impossible to perform due to reasons attributable to the obligor.

6. Principles of Civil Code of Japan

■ Article 1 (Fundamental Principles)

- (1) Private rights must conform to the **public welfare**.
- (2) The exercise of rights and performance of duties must be done in **good faith**.
- (3) No **abuse of rights** is permitted.

7. Joint Tortfeasors

- Article 719(Liability of Joint Tortfeasors)
 - (1) If more than one person has inflicted damages on others by their joint tortious acts, each of them shall be **jointly and severally liable** to compensate for those damages. The same shall apply if it cannot be ascertained which of the joint tortfeasors inflicted the damages.
 - (2) The provisions of the preceding paragraph shall apply to any person who incited or was an accessory to the perpetrator, by deeming him/her to be one of the joint tortfeasors.

8. Public Policy

- Article 90(Public Policy)
 - A juristic act
 - with any purpose which is **against public policy**
 - is void.

9. Transfer of real estate and registration

- Article 177 (Requirements of Perfection of Changes in Real Rights concerning Immovable properties)
 - Acquisitions of, losses of and changes in real rights concerning immovable properties **may not be asserted against third parties,**
 - **unless the same are registered** pursuant to the applicable provisions of the Real Estate Registration Act (Law No. 123 of 2004) and other laws regarding registration.

10. Restriction of subleasing

- Article 612 (Restrictions on Assignment and Subleasing of Leasehold)
 - (1) A lessee may not assign the lessee's rights or sublease a leased Thing without obtaining the approval of the lessor.
 - (2) If **the lessee allows any third party to make use of or take the profits of a leased Thing** in violation of the provisions of the preceding paragraph, **the lessor may cancel the contract.**

11. Unjust enrichment

- Article 703(Obligation to Return Unjust Enrichment)
 - A person who has benefited (hereinafter in this Chapter referred to as "beneficiary") from the property or labor of others without legal cause and has thereby caused loss to others
 - shall assume an **obligation to return that benefit**, to the extent the benefit exists.

12. Termination of contract

Delayed performance

- Article 541 (Right to Cancel for Delayed Performance)
 - In cases where **one of the parties does not perform his/her obligations,**
 - if the other party demands performance of the obligations, specifying a reasonable period and no performance is tendered during that period,
 - **the other party may cancel the contract.**

13. Mistake

■ Article 95(Mistake)

- Manifestation of intention has **no effect when there is a mistake in any element of the juristic act** in question;
- provided, however, that the person who made the manifestation of intention may not assert such nullity by himself/herself if he/she was **grossly negligent**.

14. Leases

■ Article 601 (Leases)

- A lease shall become effective when
- one of the parties promises to make a certain Thing available for the using and taking the profits by the other party and
- the other party promises to pay rent for the same.

15. Apparent agency

- Article 110(Apparent Authority of Act Exceeding Authority)
 - The provision of the main clause of the preceding Article shall apply mutatis mutandis to the case where
 - an agent performs any act exceeding its authority and
 - a third party has reasonable grounds for believing that the agent has the authority.

16. Next kin's right to compensation

■ Article 711 (Compensation for Damages to Next of Kin)

- A person who has taken the life of another must compensate for damages to
- the father, mother, spouse and children of the victim,
- even in cases where the property rights of the same have not been infringed.

17. Scope of Damages

Adequate causation

- Article 416(Scope of Damages)
 - (1) The purpose of the demand for the damages for failure to perform an obligation shall be to demand the compensation for damages which would ordinarily arise from such failure.
 - (2) The obligee may also demand the compensation for damages which arise from any special circumstances **if the party did foresee, or should have foreseen,** such circumstances.

18. Defamation

■ Article 723 (Recovery in Defamation)

- The court may, at the request of the victim, order a person who defamed others,
 - to effect appropriate measures to **restore the reputation of the victim** in lieu of, or in addition to, damages.

19. Quasi-Mandate

■ Article 656 (Quasi-Mandate)

- The provisions of this Section shall apply mutatis mutandis to mandates of business that do not constitute juristic acts.

20. Judicial Divorce

■ Article 770(Judicial Divorce)

- (1) Only in the cases stated in the following items may either husband or wife file a suit for divorce:
 - (i) if a spouse has committed an act of unchastity;
 - (ii) if abandoned by a spouse in bad faith;
 - (iii) if it is not clear whether a spouse is dead or alive for not less than three years;
 - (iv) if a spouse is suffering from severe mental illness and there is no prospect of recovery; or
 - (v) if there is any other **grave cause making it difficult to continue the marriage.**
- (2) A court may dismiss a suit for divorce if it finds continuing the marriage reasonable taking into account all circumstances, even in the case where there is a cause listed in items (i) to (iv) inclusive of the preceding paragraph.

21. Liability of land

- Article 717(Liability of Possessor and Owner of Structure on Land)
 - (1) If any defect in the installation or preservation of any structure on land causes damages to others, the possessor of such structure shall be liable to the victims to compensate for those damages; provided, however, that, **if the possessor has used necessary care to prevent the damages arising, the owner must compensate for the damages.**
 - (2) The provisions of the preceding paragraph shall apply mutatis mutandis to cases where there is any defect in the planting or support of bamboos and trees.
 - (3) In the cases of the preceding two paragraphs, **if there is another person who is liable for the cause of the damages, the possessor or owner may exercise their right to obtain reimbursement** against such person.



22. Limitation of time of liability of tort

- Article 724 (Restriction of Period of Right to Demand Compensation for Damages in Tort)
 - The right to demand compensation for damages in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative **within three years** from the time when he/she comes to know of the damages and the identity of the perpetrator.
 - The same shall apply when **twenty years have elapsed** from the time of the tortious act.

23. Duty of care of a good manager

■ Article 644 (Duty of Care of Mandatary)

- A mandatary shall assume a duty to administer the mandated business with the **care of a good manager** compliance with the main purport of the mandate.

24. Sale

■ Article 555(Sale)

- A sale shall become effective when
- one of the parties promises to transfer a certain real rights to the other party and
- the other party promises to pay the purchase money for it.

25. Loan for use

- Article 616 (Mutatis Mutandis Application of Loans for Use)
 - The provisions of Paragraph 1 of Article 594, Paragraph 1 of Article 597 and Article 598 shall apply mutatis mutandis to leases.
- Article 593 (Loans for Use)
 - A loan for use shall become effective when one of the parties receives a defined Thing from the other party
 - by promising that he/she will return the Thing after he/she has gratuitously made use of and taken the profits of the same.

26. Division of Inherited Property

- Article 907 (Agreement or Ruling for Division of Inherited Property etc.)
 - (1) Joint heirs may at any time divide inherited property by agreement except in the case where this is prohibited by the decedent's will pursuant to the provision of the following Article.
 - (2) If agreement is not, or cannot be, settled between joint heirs regarding division of inherited property, each of the joint heirs may make an application to the family court for a division of the inherited property.
 - (3) In the case referred to in the preceding paragraph, if there is a special reason, the family court may prohibit the division of the inherited property, in whole or part, for a specified period.

27. Action Paulienne

- Article 424(Obligee's Right to Demand the Rescission of Fraudulent Act)
 - (1) An obligee may demand the court to rescind any juristic act which an obligor commits knowing that it will prejudice the obligee; provided, however, that, this shall not apply to the cases where any person who benefits from such act, or any person who succeeds to such benefit, did not know, at the time of such act or succession, the fact that the obligee is to be prejudiced.
 - (2) The provision of the preceding paragraph shall not apply to a juristic act with a subject other than property rights.



28. Acquisitive Prescription

- Article 162(Acquisitive Prescription of Ownership)
 - (1) A person who possesses any property of another for 20 years peacefully and openly with an intention to own shall acquire the ownership thereof.
 - (2) A person who possesses any property of another for 10 years peacefully and openly with an intention to own shall acquire the ownership thereof if he/she was without knowledge and was not negligent when the possession started.

29. Free of contract

- Article 91 (Manifestation of Intention Inconsistent with Default Rules)
 - If any party to a juristic act manifests any intention which is inconsistent with a provision in any laws and regulations not related to public policy, such intention shall prevail.

30. Action oblique

■ Article 423(Obligee's Subrogation)

- (1) An obligee may exercise the right vested in the obligor in order to preserve his/her own claim; provided, however, that, this shall not apply to rights which are exclusive and personal to the obligor.
- (2) Until exercised by way of subrogation admitted in a judicial proceeding, the obligee may not exercise the right set forth in the preceding paragraph unless and until his/her claim has become due; provided, however, that, this shall not apply to any act of preservation.

31. Suretyship

- Article 446(Responsibility of Guarantor)
 - (1) A guarantor shall have the responsibility to perform the obligation of the principal obligor when the latter fails to perform such obligation.
 - (2) No contract of guarantee shall be effective unless it is made in writing.
 - (3) If a contract of guarantee is concluded by electromagnetic record (meaning a record produced by electronic means, magnetic means, or any other means unrecognizable by natural sensory functions that is for computer data-processing use) which records the contents thereof, the contract of guarantee is deemed to be made in writing, and the provision of the preceding paragraph shall apply.



32. Distribution of Property

- Article 768(Distribution of Property)
 - (1) One party to a divorce by agreement may claim a distribution of property from the other party.
 - (2) If the parties do not, or cannot, settle on agreement with regard to the distribution of property pursuant to the provision of the preceding paragraph, either party may make a claim to the family court for a disposition in lieu of agreement; provided that this claim for distribution of property shall be extinguished at the expiration of two years from the day of divorce.
 - (3) In the case referred to in the preceding paragraph, the family court shall determine whether to make a distribution, and the amount and method of that distribution, taking into account the amount of property obtained through the cooperation of both parties and all other circumstances.

33. Fictitious Manifestation

■ Article 94 (Fictitious Manifestation of Intention)

- (1) Any fictitious manifestation of intention made in collusion with another party(ies) shall be void.
- (2) The nullity of the manifestation of intention pursuant to the provision of the preceding paragraph may not be asserted against a third party without knowledge.

34. Apparent obligee

- Article 478(Performance to a Holder of Quasi-Possession of Claim)
 - Any performance made vis-a-vis a holder of quasi-possession of the claim
 - shall remain effective to the extent the person who performed such obligation
 - acted without knowledge, and was free from any negligence.

35. Employment

■ Article 623(Employment)

- An employment contract shall become effective when
- one of the parties promises to the other party that he/she will engage in work and
- the other party promises to pay remuneration for the same.

36. Mortgage

- Article 369(Content of Mortgages)
 - (1) A Mortgagee shall have the right to receive the performance of his/her claim prior to other obligees out of the immovable properties that the obligor or a third party provided to secure the obligation without transferring possession.
 - (2) Superficies and emphyteusis can be the subject matter of a mortgage. In such cases, the provisions of this Chapter shall apply mutatis mutandis.

37. Usages and Practices

- Article 92 (Custom Inconsistent with Default Rules)
 - In cases there is any custom which is inconsistent with a provision in any law or regulation not related to public policy, if it is found that any party to a juristic act has the intention to abide by such custom, such custom shall prevail.

38. Parental Authority in the Case of Divorce

- Article 819(Person Who Has Parental Authority in the Case of Divorce or Recognition)
 - (1) If parents divorce by agreement, they may agree upon which parent shall have parental authority in relation to a child.
 - (2) In the case of judicial divorce, the court shall determine which parent shall have parental authority.
 - (3) In the case where parents divorce before the birth of a child, the mother shall exercise parental rights and duties; provided that the parties may agree that the father shall have parental authority after the child is born.
 - (4) A father shall only exercise parental authority with regard to a child of his that he has affiliated if both parents agree that he shall have parental authority.
 - (5) When the parents do not, or cannot, make the agreements referred to in paragraph (1), paragraph (3), and the preceding paragraph, the family court may, on the application of the father or the mother, make a ruling in lieu of agreement.
 - (6) The family court may, on the application of any relative of the child, rule that the other parent shall have parental authority in relation to the child if it finds it necessary for the interests of the child.



39. Assignment of Nominative Claim

- Article 467 (Requirement for Assertion of Assignment of Nominative Claim against Third Parties)
 - (1) The assignment of a nominative claim may not be asserted against the applicable obligor or any other third party, unless the assignor gives a notice thereof to the obligor or the obligor has acknowledged the same.
 - (2) The notice or acknowledgement set forth in the preceding paragraph may not be asserted against a third party other than the obligor unless the notice or acknowledgement is made using an instrument bearing a fixed date.

40. Deposits for Consumption

- Article 666 (Deposits for Consumption)
 - (1) The provisions of Section 5 (Loans for Consumption) shall apply mutatis mutandis to cases where a depositary may, under the contract, consume the Thing deposited.
 - (2) Notwithstanding the provisions of Paragraph 1 of Article 591 which shall apply mutatis mutandis under the preceding paragraph, if the contract referred to in the preceding paragraph does not specify the timing of the return, the depositor may demand the return at any time.

41. Reimbursement of Joint Guarantors

- Article 465(Right of Joint Guarantors to Obtain Reimbursement for One Obligation)
 - (1) Where there are several guarantors, if one guarantor has paid the entire amount of the obligation or any amount exceeding the portion which is borne by such guarantor because the principal obligation is indivisible, or because there is a special provision that each guarantor should pay the entire amount, the provisions of Articles 442 to 444 inclusive shall apply mutatis mutandis.
 - (2) Except in cases provided in the preceding paragraph, if one of the guarantors who are not jointly and severally liable has paid the entire amount or any amount exceeding the portion to be borne by that guarantor, the provisions of Article 462 shall apply mutatis mutandis.

42. Assignability of Claims

■ Article 466(Assignability of Claims)

- (1) A claim may be assigned; provided, however, that, this shall not apply to the cases where its nature does not permit the assignment.
- (2) The provisions of the preceding paragraph shall not apply in cases where the parties have manifested their intention to the contrary; provided, however, that such manifestation of intention may not be asserted against a third party without knowledge.

43. Extinctive Prescription

- Article 166(Running of Extinctive Prescription)
 - (1) The extinctive prescription commences to run when it has become possible to exercise the right.
 - (2) The provision of the preceding paragraph shall not preclude the commencement of acquisitive prescription for the benefit of a third party who possesses any subject matter which is a right subject to the time of commencement or a right subject to a condition precedent, at the time of commencing such possession; provided, however, that the holder of the right may demand the possessor to give his/her acknowledgment at any time to interrupt the prescription.

44. Set-off

■ Article 505(Requirements for Set-offs)

- (1) In cases where two persons mutually owe to the other any obligation with the same kind of purpose, if both obligations are due, each obligor may be relieved from his/her own obligation by setting off each value thereof against the corresponding amount of the obligation of the other obligor; provided, however, that, this shall not apply to the cases where the nature of the obligation does not permit such set-off.
- (2) The provisions of the preceding paragraph shall not apply in cases where the relevant party manifests his/her intention to the contrary; provided, however, that such manifestation of intention may not be asserted against a third party without knowledge.

45. Sharing of Living Expenses

■ Article 760(Sharing of Living Expenses)

- A husband and wife shall share the expenses that arise from the marriage taking into account their property, income, and all other circumstances.

46. Fraud or Duress

- Article 96(Fraud or Duress)
 - (1) Manifestation of intention which is induced by any fraud or duress may be rescinded.
 - (2) In cases any third party commits any fraud inducing any person to make a manifestation of intention to the other party, such manifestation of intention may be rescinded only if the other party knew such fact.
 - (3) The rescission of the manifestation of intention induced by the fraud pursuant to the provision of the preceding two paragraphs may not be asserted against a third party without knowledge.

47. Loans for Consumption

- Article 587 (Loans for Consumption)
 - A loan for consumption shall become effective when one of the parties receives money or other things from the other party by promising that he/she will return by means of things that are the same in kind, quality and quantity.

48. Performance for Illegal Causes

■ Article 708 (Performance for Illegal Causes)

- A person who has tendered performance of an obligation for an illegal cause may not demand the return of the thing tendered; provided, however, that this shall not apply if the illegal cause existed solely in relation to the Beneficiary.

49. Simultaneous Performance

- Article 533(Defense for Simultaneous Performance)
 - A party to a bilateral contract may refuse to perform his/her own obligation until the other party tenders the performance of his/her obligation;
 - provided, however, that this shall not apply if the obligation of the other party is not yet due.

50. Work

- **Article 632(Contracts for Work)**
 - **A contract for work shall become effective when one of the parties promises to complete work and the other party promises to pay remuneration for the outcome of the work.**