

# Restitution as the Consequence of Frustration under English Law and Korean Law in a Comparative Perspective

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## Abstract

**Purpose** – This paper examines the admissibility of restitution as the legal consequence where a contract is frustrated under the Law of Reform (Frustrated Contracts) Act 1943 in comparison with Korean Civil Code (KCC). In order to provide practical guidelines and advice regarding choice of and application of law for contracting parties in international trade, the paper comparatively evaluates requirements and the scope of restitution under the Act 1943 and KCC.

**Design/methodology** – This paper executes a comparative study to analyze whether the parties may claim restitution of money paid or non-money benefit obtained before or after the time of discharge under English law and KCC. To achieve the purpose, it focuses on the identifying characteristics of each statute, thereby providing guidelines to overcome difficulties in legal application and interpretation as to restitution as the consequence of frustration.

**Findings** – Under English law, the benefit may be restituted according to Art 1943 or the common law rule, mistake of fact or law. Under the KCC, restitution is considered based on the principle of the obligation to recover the original obtained regardless of the time when the benefit is conferred. Whilst Act 1943 does not require careful analysis of the grounds of restitution, requirements to justify restitution according to the principle of unjust enrichment, mistake of fact or law, and the KCC should be met. Meanwhile, the KCC may provide more opportunities to award restitution because it does not require the burden of proof related to the defendant's good faith, unlike the principle of unjust enrichment.

**Originality/value** – Where the contract is frustrated by the effect of COVID-19, one legal issue is a consequence of frustration. Therefore, this paper analyzes requirements and the scope of restitution under English law as compared with the KCC in a timely manner. It provides contracting parties with practical guidelines and advice to reduce unpredictability when they choose the governing law in a contract.

**Keywords:** Frustration, Rescission of Contract, Restitution, Unjust Enrichment

**JEL Classifications:** K12, K15

## 1. Introduction

Over 2 years, COVID-19 has affected crucially contractual performance, thereby increasing the unpredictability on the consequences of COVID-19. It has led to the revival of the

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doctrine of frustration, which has been developed in English law. A contract may be frustrated when an event radically changes the nature of obligations which were undertaken by the contract after the formation of the contract (Davis Contractors Ltd v Fareham UDC [1956] 2 All ER 145; Glaisdale in National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] 1 All ER 161). However, as the frustration brings a contract to an end automatically and releases contracting parties from further obligations, it applies narrowly (Beal, 2021; Bridge, 2021; Peel, 2007). Once a contract is frustrated, contracting parties will have questions regarding what claims may be sought. First, contracting parties may consider statutory claims under the Law of Reform (Frustrated Contracts) Act 1943<sup>1</sup> (hereinafter called the Act 1943). Since Act 1943 provides for legal consequences of frustration, money or non-money benefit received before the time of discharge may be restituted. The restitution of payment or non-money transferred after the time of discharge may be examined on the ground of the common law rule, unjust enrichment, because Act 1943 does not have statutory provisions in relation to this issue (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011; Virgo, 1999).

Meanwhile, when an event such as COVID-19 arises, under Korean Civil Code (hereinafter called the KCC), the principle of change of circumstances may be considered even though it is not legislated. This is because it is recognized as a derivation of the principle of good faith (Kim Dae-Kyung, 2011; Song Deok-Soo, 2019). The change of circumstances may lead a contract to be rescinded according to requirements which are a ① radical change of circumstances, ② unforeseeability, and ③ where the maintenance of contract results in significant unfairness (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; Song Deok-Soo, 2019; 2004DA31302 Korea Supreme Court 2007.3.29). As consequences of the rescission of contract due to a change of circumstances, restitution can be awarded as part of unjust enrichment under the KCC (Ji Won-Rim, 2021; Kim Joon-Ho, 2021). In particular, under KCC Art. 548(1), the restitution of benefit conferred under the contract is dealt with based on the obligation to restate the original received as a special rule of unjust enrichment (Ji Won-Rim, 2021; Kim Joon-Ho, 2021). Unlike English law, the KCC has a single statutory scheme to consider the recoverability of restitution irrespective of the time when the benefit is conferred.

When contract is frustrated, contracting parties may claim restitution under English law as common law or the KCC as civil law. Since the nature and scheme of common law and civil law are different, requirements and scope to justify restitution under English law differ from those under the KCC. It gives rise that the recoverability benefit conferred will be different according to the governing law of the contract. Therefore, this study examines the admissibility of restitution as a consequence of rescission which contracting parties may seek where a contract is rescinded due to a frustrating event. By evaluating requirements and the scope of restitution under English law in comparison with the KCC, practical guidelines and advice regarding choice of and application of law are provided for contracting parties in international trade to reduce unpredictability.

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<sup>1</sup> Although Act 1943 was enacted to complement unsatisfactory nature in common law, its application is restricted to a charter party for the carriage of goods by sea, a contract of insurance, and a contract for the sale of specific goods under Section 2(5).

## 2. Restitution under Act 1943

### 2.1. Defects in the Common Law

In *Chandler v. Webster* [1904] 1 KB 493, the Court of Appeal held that the consequences of frustration were to release parties from their obligations to perform in the future, but did not affect obligations which had accrued before frustration (Beal, 2021). Moreover, it was recognized that money paid before the frustrating event was recoverable on the ground of ‘a total failure of consideration’ which could only arise when the contract was set aside *ab initio* (Beal, 2021; Peel, 2007). However, the proposition of *Chandler v. Webster* was overruled by *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32. In the *Fibrosa* case, a contract was made in July 1939, to deliver certain machinery to the appellants, the delivery to be CIF Gdynia. On September 23<sup>rd</sup>, 1939, Gdynia became enemy-occupied territory. The contract was frustrated by that fact and the plaintiff sued to recover the advance payment of £1,000. The House of Lords held that the plaintiff could recover money paid in advance as money paid upon a consideration which had wholly failed. It was recognized that ‘a total failure of consideration’ could not arise only where the contract was void *ab initio*. Therefore, although a contract was subsequently frustrated, money paid in advance for a consideration which has wholly failed could be recovered.

Whilst the result in the *Fibrosa* case represented a development upon the rule supported in *Chandler v. Webster*, it did not leave the common law in an entirely satisfactory state (Beal, 2021; Burrows, McKendrick and Edelman, 2005).

### 2.2. Law Reform (Frustrated Contracts) Act 1943

#### 2.2.1. General

Remaining defects in the common law led to the enactment of the Law of Reform (Frustrated Contracts) Act 1943. Act 1943 does not deal with the frustration of contracts itself, but with the consequences of the frustration of the contracts, enabling the court to award restitution of benefits transferred under contracts thereafter frustrated (*BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 1 All E.R. 925).<sup>2</sup> The main purpose of the Act was to remove the perceived injustice of the common law, particularly the denial of restitution where the consideration had only partially failed (Bridge, 2014; Virgo, 1999). This was because money paid in advance was not recovered if the consideration had partially failed according to the common law. In addition, the Act is not considered part of unjust enrichment under common law rules, but deals with a situation where unjust enrichment would otherwise apply (Beal, 2021; *BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 1 All E.R. 925; Mitchell, Mitchell and Watterson, 2011).

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<sup>2</sup> Under Section 1(1) of the Act, it applies only to a contract which has become impossible or been frustrated, and the parties have been discharged from further performance of the contract. The Act has no application to situations where the contract has been frustrated, nor does it apply to contracts which are initially impossible or to the discharge of a contract under an express provision of the contract, which provides for the automatic cancellation of a contract on the occurrence of a specified event (Beal, 2021; McKendrick, 1995).

### 2.2.2. Restitution of Advanced Payments

#### a) No Requirement of Total Failure of Consideration

Section 1 (2) declares that “all sums paid or payable to any party in pursuance of the contract before the time when the parties were discharged shall be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable”. The payer is entitled to recover money paid to the payee before the contract is frustrated. Where money payable prior to the frustrating event has not been paid, the payer is relieved from his obligation to pay money.

Moreover, the effect of Section 1(2) is to go beyond the common law rule that the payer obtains restitution from the payee only on the ground of ‘a total failure of consideration’ (Beal, 2021; Virgo, 1999). This appears from the wording of “the money paid being recovered back from the payee as money received to the payer’s use, not as money paid on a consideration that has failed” (Peel, 2007; Williams, 1944). Therefore, money paid prior to the frustrating event is recoverable even though there is only a partial failure of consideration, which means that rules relating to a failure of consideration are not relevant. In the *Fibrosa* case, the plaintiff recovered money paid in advance based on ‘a total failure of consideration’. In that case, for example, if the consideration had only partially failed, restitution would not be allowed under common law because it was not fair to permit recovery back of the whole, and apportionment of loss had not been regarded available (Williams, 1944). However, under Section 1(2), the plaintiff may have the right of restitution based on a partial failure of consideration.

#### b) Time of Discharge

Money paid before the time of discharge will only be recovered under Section 1(2), thereby making important to identify the time of discharge. In *National Carriers Ltd. v. Panalpina (Northern) Ltd.* [1981] 1 All E.R. 161, Lord Simon stated that “the frustration of a contract takes place when there supervenes an event which significantly changes the nature of the outstanding contractual rights or obligations from what the parties could reasonably have contemplated at the time of its execution”. The contract may be discharged at the time of the occurrence of events which radically change the nature of obligations arising under the contract. Therefore, where the contract is frustrated, payment made in advance would be to be returned. Meanwhile, where money is paid after the contract is frustrated because the payer was not aware of the frustrating event, then the payment would not be recovered under Section 1(2) (Beal, 2021; Virgo, 1999). This recoverability of the payment will be governed by common law rules of unjust enrichment (Beal, 2021; Mitchell, Mitchell and Watterson, 2011).

#### c) Proviso to Section 1(2)

Section 1 (2) states that “where the payee incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may allow him to retain or recover the whole or any part of the sums so paid or payable”. Expenses must have been incurred in or for the purpose of, the performance of the contract. The expenses do not have to have been incurred by reason of the payment (*BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 1 All E.R. 925). The payee may recover expenses to the extent that the payer actually

paid or is payable money before the time of discharge (*BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 1 All E.R. 925; Williams, 1944). For example, in the case of pre-payment, this proviso allows the reduction of the amount to be repaid to the payer. Therefore, this proviso limits the payer's right of restitution. If the payer is able to recover the payment made in advance, it is only fair that the payee is allowed to recover expenses incurred for the purpose of the performance of the contract (Virgo, 1999).

### 2.2.3. Restitution of Non-Money Benefit

#### a) Identification and Valuation of the Benefit

Section 1(3) deals with the restitution of valuable benefits other than payment. According to Section 1(3), "where one of parties has obtained valuable benefit in, or for the purpose of the performance of the contract, before the time of discharge, such sum not exceeding the valuable benefit shall be awarded to the other party".

The non-money benefit could consist the end product of the performance, not the cost of the performance (Beal, 2021; *BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 1 All E.R. 925). The benefit should be identified as the end product of the performance before the time of discharge (Beal, 2021; Bridge, 2021). For example, where part of goods contracted for has been delivered to the buyer, the benefit consists of goods delivered which may be worth more or less than expenditure arising from manufacture and delivery, and so on. (Bridge, 2021). In some cases, performance will have no end product, for example, where services may consist of doing such work as the survey or transportation of goods (*BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 1 All E.R. 925). In these cases, the benefit can be identified by reference to the value of the service performed under the contract (Beal, 2021; Treitel, 2014).

Once the benefit is identified, it should be valued. As Section 1(3) refers to valuable benefit before the time of discharge, it is not appropriate to consider the effect of the frustrating event on the assessment of a benefit (Mitchell, Mitchell, and Watterson, 2011; Peel, 2007; Virgo, 1999).<sup>3</sup> Furthermore, Section 1(3)(b) specifies that the court is to regard the effect of the circumstances giving rise to the frustration to determine the just sum. For example, where the contract goods are delivered, but some are destroyed by the frustrating event, in valuing the benefit, the effect of the frustrating event may not be a factor to assess the value of the benefit. If there is a valuable benefit received before the time of discharge by excluding situations in which a frustrating event destroyed the benefit, the court has the discretion of an award (Mitchell, Mitchell, and Watterson, 2011; Peel, 2007).

#### b) Award of the Just Sum

Once the court determines that the valuable benefit is received, then it should assess the just sum with regard to all circumstances of the case. According to Section 1(3), the value of the benefit will be the ceiling on the just sum which should be awarded so that the just sum cannot be the greater than the valuable benefit obtained. However, Section 1(3) does not give

<sup>3</sup> However, in *BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 1 All E.R. 925, Robert Goff J. held that where a contract for the construction of a building is frustrated by a fire which destroys the building and which also destroys substantially an amount of work already done by the plaintiff, then the value of benefit would be nil because of the effect of the frustrating event.

any guidance to determine what is the just sum or any factors to take into account for the assessment of the just sum. This results in enforcing the court to assess the sum awarded in whatever way he thought appropriate, as long as the decision was not unjust (Mitchell, Mitchell, and Watterson, 2011).

As particular factors to take into account, firstly, Section 1(3)(a) instructs that the court should consider the amount of any expenses incurred before the time of discharge in, or for the purpose of the performance of the contract. The payee's expenditure incurred according to Section 1(2) will be a consideration when determining the award of the just sum, and so would be deducted from the just sum (Beal, 2021; Virgo, 1999). In the case that expenses exceed the benefit, the payee cannot recover all of the expenditure (Virgo, 1999).<sup>4</sup>

Moreover, under Section 1(3)(b), the effect of the frustrating event on the benefit should be considered to assess the just sum. This is because the function of Section 1(3)(b) is to enable the court to apportion the losses between parties (Bridge, 2021; Haycroft and Waksman, 1984; Treitel, 2014; Virgo, 1999). Therefore, where the valuable benefit was destroyed by the frustrating event thereby being nothing, the justice may require the court to reduce the amount with regard to the loss suffered (Virgo, 1999).<sup>5</sup>

#### 2.2.4. Interest

Under section 35A of the Senior Courts Act 1981, the court may award interest on any sum adjusted to be payable (Bridge, 2021; Mitchell, Mitchell and Watterson, 2011). The interest should fall due from the date of notification of the claim to the defendant to the date of the court order (Mitchell, Mitchell and Watterson, 2011; BP Exploration Co (Libya) Ltd v. Hunt (No 2) [1982] 1 All E.R. 925).

### 3. Mistake as a Ground of Restitution

#### 3.1. General

Under Section 1 of Act 1943, where the payment was made and the non-money benefit was obtained before the time of discharge, the payment may be recoverable and the benefit may be awarded. However, Act 1943 does not deal with the restitution of the money paid or the benefit obtained after the time of discharge. The restitution of payment made or benefit received after the time of discharge may be sought on the ground of the common law rule on unjust enrichment. Among grounds of restitution to determine whether enrichment is considered to be unjust, benefit conferred as a result of mistake may be restituted (Beal, 2021;

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<sup>4</sup> In BP Exploration Co (Libya) Ltd v. Hunt (No 2) [1982] 1 All E.R. 925, Robert Goff J. took the view that the expenses incurred should be relevant to valuing the benefit, and so it would be deducted from the value of benefit. However, Section 1(3) states clearly that the court should take into account the expenses to assess the just sum. Therefore, the expenditure incurred in connection with the performance under the contract will be relevant to determine the award of the just sum, not the valuable benefit.

<sup>5</sup> In BP Exploration Co (Libya) Ltd v. Hunt (No 2) [1982] 1 All E.R. 925, Robert Goff J. held that since the effect of the frustrating event on the benefit is to be measured as at the date of frustrating, once the benefit was destroyed at the date of frustrating, the just sum would not be awarded.

Mitchell, Mitchell and Watterson, 2011; Virgo, 1999).

English law has long developed a set of rules to determine what counted as a mistake for justifying restitution. A mistake contains an incorrect belief or an incorrect tacit assumption about a past or present matter of fact or law (Beal, 2021; Mitchell, Mitchell and Watterson, 2011). A mistake does not encompass misprediction, which is concerned with the future (Beal, 2021; Virgo, 1999). A misprediction will not be the basis to justify restitution because “it does not show that the plaintiff’s judgement was vitiated, only that as things turned out it was incorrectly exercised” stated in *Dextra Bank & Trust Co Ltd v. Bank of Jamaica* [2002] U.K.P.C. 50. Therefore, as the plaintiff has not been mistaken as to the present state of affairs but has made a misprediction as to future events, he as a risk-taker will not recover the payment or the benefit (Birks, 1985; Mitchell, Mitchell and Watterson, 2011; Virgo, 1999).

Where the payment was made or the benefit was obtained after the time of discharge either because the payer was unaware of the frustrating event, or although the payer has the mistaken belief that the contract remained in spite of the frustrating event, the recoverability of a payment or the benefit transferred may be decided by a mistake of fact (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011; Virgo, 1999). Where the payment was made after the time of discharge because the payer was aware of the happening of the event, but was not aware that it gave rise to the frustrating event under the law, then the restitution of the payment or the benefit conferred may be sought on the ground of the common law rule, a mistake of law (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011).

## 3.2. Mistake of Fact

### 3.2.1. *Liability Mistake*

Whether payment or benefit transferred under mistake is recoverable is put to question tests. Firstly, the restitution would be justified where the payment or benefit was made because of a liability mistake of fact that the plaintiff had the existing legal liability (Mitchell, Mitchell, and Watterson, 2011; Virgo, 1999). This was recognized in *Aiken v. Short* (1856) 1 H & N 210<sup>6</sup> (Mitchell, Mitchell and Watterson, 2011; Virgo, 1999). In *Aiken v. Short*, Bramwell B. expressed that “the mistake must be as to a fact which, if true, would make the person paying liable to pay money; not where, if true, it would merely make it desirable that he should pay the money”. If the plaintiff can show that a liability mistake leads him to believe to pay money under the contract, but, in fact, there is no liability, then restitution will be awarded (Birks, 1985; Virgo, 1999).

Therefore, if the plaintiff is unaware of the happening of frustrating event, it should be recognized that if the plaintiff had not been mistaken as to the liability, he would not have paid money after the time of discharge (Beal, 2021; Mitchell, Mitchell, and

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<sup>6</sup> The plaintiff was convinced that the defendant’s land was encumbered under mortgage with the plaintiff and the defendant had interest in the property. To discharge the defendants’ lien in the plaintiff’s supposed property, the plaintiff had paid money to the defendant. As in fact the defendant did not have such an interest, the plaintiff sought to recover the payment. However, the restitutionary claim was denied because the plaintiff did not have the liability to make payment and so did not make a liability mistake.

Watterson, 2011; Virgo, 1999). In other words, the money paid or the benefit obtained after the time of discharge would be recovered on the ground of a mistake relating to the present liability.

### 3.2.2. Causative Mistake

Secondly, a causative mistake can ground the restitutionary claim. In *Barclays Bank Ltd. v. WJ Simms, Son & Cook (Southern) Ltd.* [1980] Q.B. 677, Robert Goff J. held that “if a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it”. Based on a causal relationship between the plaintiff’s mistake and his action, it requires that a mistake causes the plaintiff to pay money (Birks, 1985; Mitchell, Mitchell and Watterson, 2011; Virgo, 1999).

The causative test was further considered in *Banque Financière de la Cité v. Parc (Battersea) Ltd.* [1998] 2 W.L.R. 475. The debtor borrowed money from the plaintiff, who received a letter of postponement which stated that the plaintiff’s debt had priority over any other debt. The defendant also lent money to the debtor, but his debt was secured. When the debtor went into liquidation, the plaintiff alleged the restitution of payment. The court held that even if the defendant was not bound by the letter of postponement, the plaintiff obtained priority over the defendant because the former had the subrogation toward the latter having the right against the debtor. Furthermore, this is because the plaintiff believed mistakenly that the letter of postponement gave him priority over the defendant. Therefore, restitution was awarded since the mistaken assumption caused the plaintiff to lend money to the debtor.

According to the restitution on the ground of a liability mistake, restitution would be denied in *Banque Financière de la Cité v. Parc (Battersea) Ltd.*. This is because the plaintiff’s mistake was not a mistake for the liability to make payment, but a causative mistake. On the other hand, in *Aiken v. Short* on the basis of a liability mistake, restitution was not granted because the plaintiff’s mistake was not a liability mistake. Under restitution on the grounds of a causative mistake, *Aiken v. Short* decided that the payment was recovered. Therefore, where the plaintiff shows that he would not have made the payment had he known of his mistake, he will have restitution (Beal, 2021; Virgo, 1999; *Kleinwort Benson Ltd. v. Lincoln CC* [1999] 2 A.C. 349).

In the case that the plaintiff paid money to the defendant, or the benefit had been awarded after the time of discharge, even though his payment is not a liability, if he proves that he would not have paid money but for his mistake relating to the frustration, then it is more likely that his mistake constitutes the grounds of restitution (Beal, 2021; Mitchell, Mitchell and Watterson, 2011; Virgo, 1999).

### 3.3. Mistake of Law

Whilst, for a long time, benefit transferred as a result of a mistake of law was irrecoverable, *Kleinwort Benson Ltd. v. Lincoln CC* [1999] 2 A.C. 349<sup>7</sup> abolished the so-called

<sup>7</sup> When the swap contracts were concluded between the bank and local authorities, it was widely accepted as a valid contract. It turned out that such contracts were ultra vires local authorities under the regulations. Then, the plaintiff bank sought the restitution of payment according to the swap contract with the defendants, the local authorities. The plaintiff asserted that the payment was made as on the

mistake of law “bar” (Beal, 2021; Birks, 1985; Mitchell, Mitchell and Watterson, 2011; Virgo, 1999). It was held that a claim for the restitution of payment made as a ground of a mistake of fact was considered the same as one for the restitution of payment made under a mistake of law, although distinguishing between a mistake of fact and a mistake of law causes difficulties in identifying the grounds of restitution (Beal, 2021; Kleinwort Benson Ltd. v. Lincoln CC [1999] 2 A.C. 349). According to Lord Hope, since “there is no essential difference in principle with regard to the payer’s state of mind or with regard to the state of facts or the law, the recovery is not barred by a mistake of law” (Kleinwort Benson Ltd. v. Lincoln CC [1999] 2 A.C. 349).

In the case of the judicial development of law, the majority in *Kleinwort Benson Ltd. v. Lincoln CC* held that the plaintiff that acted under a settled understanding of law which was subsequently declared to be incorrect by judicial decision could be considered to make a mistake of law (*Kleinwort Benson Ltd. v. Lincoln CC* [1999] 2 A.C. 349; Mitchell, Mitchell, and Watterson, 2011). For example, where the plaintiff paid money according to his belief that the law was to be X, but a decision subsequently declares an applicable law to be otherwise, payment would be recoverable under the restitution-grounding mistake of law (*Kleinwort Benson Ltd. v. Lincoln CC* [1999] 2 A.C. 349; Mitchell, Mitchell, and Watterson, 2011). Moreover, even though the plaintiff unreasonably formed a belief that the law is X and acted based on that belief, if it is overruled by a later judicial decision, then his act is made under a mistake of law, and so restitution would be awarded (Mitchell, Mitchell and Watterson, 2011).

In the case of legislative changes, where the law is changed by legislation, a plaintiff that acted on the basis of the previous law is not entitled to have restitution (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011). This is different from law changed by judicial decision. This is because most legislative changes operate subsequently and do not affect the previous law which applied to the contract (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011). Therefore, the plaintiff did not make a mistake of law when he conferred benefit with the belief that the law was correct (Mitchell, Mitchell, and Watterson, 2011). Meanwhile, can it cause a mistake of law where legislative changes operate retrospectively? Exceptionally, it may be possible that there is a mistake of law where the law is retroactive in force and has the provision for the admissibility of restitution as a result of legislative changes (Virgo, 1999). English authority is not concluded.

In the case that the plaintiff paid the defendant or the benefit had been awarded to the defendant after the time of discharge, if the frustrating event is caused by a subsequent judicial decision which overrules the previous law applying to the contract, then the plaintiff’s restitutionary claim would be justified under a mistake of law (Beal, 2021; Mitchell, Mitchell and Watterson, 2011). Meanwhile, there is little possibility that restitution is awarded as on the grounds of a mistake of law where legislative changes give rise to the frustrating event. This is because most legislative changes do not operate retroactively and English authority is not established yet (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011).

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grounds of a mistake of law. It was held that restitution under a mistake of law should no longer be barred.

## 4. Restitution under Korean Civil Code

### 4.1. General

In Korean law, a contract may be rescinded by the radical change of circumstances (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; Song Deok-Soo, 2019; 2004DA31302 Korea Supreme Court 2007.3.29). The majority opinion and precedents support that the rescission of a contract leads the contract to be rescinded retroactively, thereby releasing the contracting parties from their obligations (Ji Won-Rim, 2021; Kim Joon-Ho, 2021). Therefore, obligations already fulfilled should be restituted under an obligation for restitution. In the case of the rescission of a contract due to the radical change of circumstances, restitution is awarded as part of unjust enrichment, but, as to the scope of restitution, KCC Art. 548 is regarded as a special rule of unjust enrichment under KCC Art. 748<sup>8</sup> (Ji Won-Rim, 2021; Kim Joon-Ho, 2021).

### 4.2. Restitution of Benefit

#### 4.2.1. Basis of Restitution

Where circumstances are radically changed, contracting parties may have the choice such as the modification or rescission of a contract (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; Song Deok-Soo, 2019; 2004DA31302 Korea Supreme Court 2007.3.29). Where the contract is rescinded because of the radical change of circumstances, it refers to an obligation for restitution based on the rescission of a contract under the KCC. This is because there are no specific provisions relating to restitution as a consequence of rescission of contract resulting from the radical change of circumstances under the KCC. Benefits conferred under the contract are considered part of unjust enrichment (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; Kim Sang-Yong, 2016). KCC Art. 548(1) stipulates that “if the contract has been rescinded, each party shall be liable to restore the other party to his original position”. Therefore, under KCC, in the case of the radical change of circumstances, the restitution of benefits conferred under the contract is dealt with based on the obligation to restate the original transferred.

As compared with English law, the frustrated contract is not rescinded *ab initio*, but frustration leads the contract to an end forthwith, which results in releasing contracting parties from further obligations (Beal, 2021). As a consequence of frustration, restitution is governed by Act 1943. In particular, Act 1943 overcomes the denial of restitution on the ground of ‘a partial failure of consideration’ (Beal, 2021; Virgo, 1999). Thus, under English law, restitution as a consequence of frustration enables contracting parties to secure legal stability and predictability.

However, according to the KCC, where the contract is rescinded due to the radical change of circumstances, the rescission of a contract has a retroactive effect, unlike English law. It

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<sup>8</sup> KCC Art. 748 states that “(1) The person enriched in good faith shall be liable to act as set forth in Article 747 to the amount that he still possesses of such benefits. (2) A person enriched in bad faith shall return the benefits received by him together with interest, and if there has been any damage, he shall be bound also to make compensation”.

reveals the difference of the basis causing restitution between English law and KCC. Whilst frustration releasing the contracting parties from further obligations brings restitution under English law, the rescission having a retroactive effect due to the radical change of circumstances results in considering the principle of obligation to restate the original received under the principle of the rescission of a contract (Ji Won-Rim, 2021; Kim Joon-Ho, 2021). Therefore, irrespective of the effect of the rescission of a contract, benefit conferred under the contract may be restituted according to English law and the KCC.

Meanwhile, restitution is awarded as part of unjust enrichment according to the KCC (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; Kim Sang-Yong, 2016). Under English law, while benefit mistakenly received after the time of discharge may be restituted under unjust enrichment, benefit conferred before the time of discharge may be restituted under Act 1943, which is not considered part of unjust enrichment (Beal, 2021; BP Exploration Co (Libya) Ltd v. Hunt (No 2) [1982] 1 All E.R. 925; Mitchell, Mitchell, and Watterson, 2011; Virgo, 1999). Although ACT 1943 is applied restrictively, it does not require careful analysis of the grounds of restitution (Mitchell, Mitchell and Watterson, 2011). Under Act 1943, once the contract is frustrated, restitution should be awarded. In this respect, in comparison with the KCC which analyzes restitution as part of unjust enrichment, English law seems to be stable and predictable legally.

#### *4.2.2. Elements of Restitution*

##### *a) Scope of Restitution*

Where the contract has been rescinded due to the radical change of circumstances, each party shall be liable to restore the other party to his original position under KCC Art. 548(1). The benefit enriched in good or bad faith should be recovered regardless of whether it exists (Kim Joon-Ho, 2021; Song Deok-Soo, 2019). The basic principle of restitution under the KCC is that the plaintiff has the right to claim the restitution of whatever it has supplied or paid under the contract (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; Kim Sang-Yong, 2016; Song Deok-Soo, 2019). For example, goods received should be recovered in original condition. If goods cannot be returned in the condition in which the defendant received them, then an amount corresponding to the value of goods at the time of rescission should be returned (Ji Won-Rim, 2021; Kim Sang-Yong, 2016; Song Deok-Soo, 2019). On the other hand, according to the majority opinion, where property cannot be recovered by causes without the defendant's fault, the defendant may not have the duty to restate the amount equivalent to the value of the original (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; Kim Sang-Yong, 2016).

In the case of the recovery of advanced payments, interest shall be paid upon any money to be repaid as from the day on which such money has been received under KCC Art. 548(2). In addition, where one party incurred expenditure to retain or improve goods, he may claim restitution to recover such costs (Kim Joon-Ho, 2021; Kim Sang-Yong, 2016). Under KCC Art. 203(2), in regard to the cost of improvement, "the possessor is, to the extent that the increase in value remains, entitled to reimbursement either of the amount expended or of the amount by which the value of the article has been increased, at the option of the person claiming its recovery".

In comparison with English law, under Act 1943, the plaintiff may claim restitution of money paid or non-money benefit obtained. In the case of the restitution of pre-payment, according to proviso to Section 1(2), the restitution of payment is decided taking into account expenses incurred for the purpose of the performance of the contract (Virgo, 1999). Under the KCC, requirements to recover advanced payment are similar to those of English law. However, in terms of the time from which interest is charged, whilst, under English law, the interest should fall due from the date of notification of the claim to the defendant, KCC Art. 548(2) instructs that interest should be charged from the day on which money has been paid (Mitchell, Mitchell and Watterson, 2011; BP Exploration Co (Libya) Ltd v. Hunt (No 2) [1982] 1 All E.R. 925). Therefore, the interest awarded under the KCC may be greater than that under English law.

Secondly, in the case of the restitution of a non-money benefit, under Section 1(3) of Act 1943, the just sum not exceeding the valuable benefit shall be awarded. If the ceiling of the just sum is nothing because of the frustrating event, the defendant cannot be regarded to have received the benefit (Virgo, 1999). Therefore, the effect of the frustrating event is considered to assess the just sum awarded, and so the court will apportion the losses between parties with wide discretion (Bridge, 2021; Haycroft and Waksman, 1984; Treitel, 2014; Virgo, 1999).

Under the KCC, where non-money benefit cannot be recovered in the original conferred, an amount corresponding to the value of non-money benefit at the time of rescission should be returned (Ji Won-Rim, 2021; Kim Sang-Yong, 2016; Song Deok-Soo, 2019). However, if the non-money benefit cannot be returned by causes without the defendant's fault, it may not bring the duty to retribute the amount equivalent to the value of the original transferred (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; Kim Sang-Yong, 2016). In general, a frustrating event arises without fault of either party, thereby leading to the rescission of a contract. If the defendant cannot retribute a non-money benefit because of a frustrating event, then he may not have the obligation to retribute the amount corresponding to the value of non-money under the KCC. Therefore, the plaintiff cannot recover anything if the benefit is destroyed by a frustrating event, thereby being nothing. On the other hand, the minority opinion suggests that losses between parties should be apportioned based on the perspective of the equation of loss regardless of faults. In the end, under the KCC, it may leave too much to the discretion of the court to determine the recoverability of restitution while considering the allocation of loss between parties, such as English law.

#### *b) Restitution of Benefits Arising from the Use of Property*

Where one party obtains valuable benefits resulting from the use of property, the benefit should be recovered (Ji Won-Rim, 2021; Kim Joon-Ho, 2021). In particular, the operating profit for the property should be restituted within the range that is deemed to have been naturally acquired (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; 2006DA26328 Korea Supreme Court 2006.9.8.). However, the benefit obtained through the party's effort such as business ability will not be recovered (Ji Won-Rim, 2021; 2006DA26328 Korea Supreme Court 2006.9.8.).

As compared to English law, under Act 1943, the additional benefit flowing from use of benefits conferred may not be returned (Mitchell, Mitchell, and Watterson, 2011; BP

*Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 1 All E.R. 925). This is because by terms of Section 1(2), only ‘sum paid’ was recoverable, and there is no allowance for the use value of money received (Mitchell, Mitchell, and Watterson, 2011; *BP Exploration Co (Libya) Ltd v. Hunt (No 2)* [1982] 1 All E.R. 925). In addition, under Section 1(3), in terms of the assessment of the just sum, the court considers only expenses incurred in, or for the purpose of the performance of the contract, thereby being impossible to justify the award of restitution to additional benefit due to use of benefit transferred. Therefore, under the KCC, it is likely that the plaintiff may have the restitution of additional benefit flowing from use of property conferred, except benefits arising from the defendant’s effort. Meanwhile, under English law, the court may not award the restitution of additional benefits arising from use of benefits received because Act 1943 is not concerned with the reversal of the defendant’s unjust enrichment (Virgo, 1999). In terms of the restitution of additional benefit flowing from use of property conferred, the plaintiff under the KCC may be in a more advantageous position rather than under English law.

*c) Restitution of Benefits Received after the Time of Discharge*

Under the KCC, there are no provisions which govern the restitution of benefits obtained after the time of rescission due to the radical change of circumstances. Whether the benefit is received before or after the time of discharge is not dealt with under the KCC. In this case, the admissibility of restitution is governed by the principle of the obligation to restate the original transferred (Ji Won-Rim, 2021; Kim Joon-Ho, 2021). In particular, the plaintiff may claim restitution regardless of whether the benefit is received in good or bad faith under KCC Art. 548 (Kim Joon-Ho, 2021; Song Deok-Soo, 2019).<sup>9</sup> Thus, even if the plaintiff knew that the contract was discharged without mistaken belief, but performs his duty under the contract, the benefit conferred in bad faith may be recovered. Therefore, under the KCC, the scope and criteria of restitution may be taken into account irrespective of when the benefit is accrued.

In comparison with English law, while the recoverability of benefits obtained before the time of discharge is governed by Act 1943, the restitution of benefits received after the time of discharge may be sought on the ground of the unjust enrichment, mistake of fact or law (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011; Virgo, 1999). Therefore, under English law, the time when the benefit is obtained is the important issue. If the benefit is received before the time of discharge, careful analysis of the grounds of restitution is not required under Act 1943 (Mitchell, Mitchell, and Watterson, 2011). In this situation, the admissibility of restitution under English law may be more predictable than under the KCC.

However, under English law, where the benefit is received after the time of discharge, the restitution is awarded only by mistaken belief, thereby requiring profound analysis of the restitution-grounding mistake of fact or law (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011). According to the KCC, mistaken belief is not a requirement to consider

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<sup>9</sup> By the theory of unjust enrichment of the KCC, “if a person has performed an obligation with the knowledge that no such obligation has ever existed, he may not demand the return of the subject matter according to Art. 742”.

the recoverability of benefits conferred after the time of discharge. This is because the restitutionary claim may be justified, although the benefit is received in bad faith after the time of discharge (Kim Joon-Ho, 2021; Song Deok-Soo, 2019). In this case, it is highly likely that the restitution claim will be justified without the burden of proof regarding good faith under the KCC.

## 5. Conclusion

Due to radical the change of circumstances from events such as COVID-19, where a contract is frustrated, contracting parties may claim the restitution of benefits conferred according to governing law. This study examines the recoverability of restitution as a consequence of rescission by evaluating requirements and scope of restitution under English law as common law in comparison with the KCC as civil law.

In terms of statutory scheme related to restitution, under English law, restitution is dealt with differently depending on whether the benefit is transferred before or after the time of discharge. The KCC does not distinguish between benefits received before the time of discharge and benefits received after the time of discharge. Since Act 1943 does not require careful analysis of the grounds of restitution in the case of a benefit received before the time of discharge, the admissibility of restitution under English law may be more predictable than under the KCC. (Mitchell, Mitchell, and Watterson, 2011). On the other hand, as to the restitution of benefits conferred after the time of discharge, whilst restitution requires profound analysis of the restitution-grounding mistake of fact or law under English law, the KCC provides more opportunities to justify restitution because the benefit may be recovered without the burden of proof related to the defendant's good faith (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011). Therefore, under English law, the plaintiff has a heavy burden of proof to show the restitution-grounding mistake of fact or law in case of the restitutionary claim of benefit received after the time of discharge. Under the KCC, even though the plaintiff does not need to prove the benefit was received in good or bad faith irrespective of when the benefit was conferred, he should meet other requirements to justify the restitution claim.

In addition, Act 1943 releases only obligations to pay money. If other obligations remain unperformed before the time of discharge, damages as a result of breach of contract may fall to the promisor (Beal, 2021; Mitchell, Mitchell, and Watterson, 2011; Stewart and Carter, 1992). However, the KCC releases contracting parties from all obligations because the contract is rescinded retroactively (Ji Won-Rim, 2021; Kim Joon-Ho, 2021). Since the frustration affects not only some but also all aspects of a contract, the plaintiff under English law seems to be in an unfortunate position unlike the KCC (Mitchell, Mitchell, and Watterson, 2011; Stewart and Carter, 1992).

Secondly, in regard to the recovery of advanced payments, English law and the KCC have similar requirements taking into account expenses incurred for the purpose of the performance of the contract. However, the interest awarded under the KCC may be greater than under English law because the interest should be charged from the day on which money has been paid, but under English law, the date of notification of claim is the critical time.

Under the KCC, the plaintiff may be in an advantageous position rather than under English law.

Thirdly, in terms of the restitution of non-money benefits conferred, under English law, the just sum not exceeding the valuable benefit shall be awarded in consideration of expenditure and the effect of the frustrating event, although there is no any guidance to determine what is the just sum or any factors. It results in the court apportioning losses between parties with wide discretion (Bridge, 2021; Haycroft and Waksman, 1984; Treitel, 2014; Virgo, 1999). Under the KCC, if non-money benefits cannot be recovered because of causes without the defendant's fault, the defendant does not have the obligation to restate the amount corresponding to the value of the original transferred (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; Kim Sang-Yong, 2016). If the benefit may be destroyed by frustrating event without the benefit's fault, thereby being nothing, the plaintiff may not recover anything. Therefore, under English law, the plaintiff is in a better position compared with the KCC. Under the KCC, the court may consider the allocation of loss between the parties, such as English law.

In particular, by Section 2(3) of Act 1943, the terms of contract which regulate consequences of frustration can exclude an award under the provisions of Act 1943. Act 1943 may prevent contracting parties from subversion of contractual bargain or from reallocation of risks (Mitchell, Mitchell, and Watterson, 2011). Since the court is enforced to take a limited approach, in ordinary occasions, contracting parties relying on Section 2(3) may not succeed except, for example, where money may be paid out-and-out, with the intention in which it will be irrevocable in any event (Bridge, 2021; Mitchell, Mitchell, and Watterson, 2011; Treitel, 2014). However, contracting parties under English law may still have the opportunity to exclude the application of Act 1943 if they make express provision related to the effect of frustration in their contract (Beal, 2021).

Lastly, as to additional benefits flowing from use of benefits conferred, under the KCC, the operating profit for the property is restituted within the range that is deemed to have been naturally acquired, except benefits arising from the defendant's efforts (Ji Won-Rim, 2021; Kim Joon-Ho, 2021; 2006DA26328 Korea Supreme Court 2006.9.8.). However, under English law, the plaintiff may not be entitled to recover benefits resulting from use of property transferred because of statutory words (Mitchell, Mitchell and Watterson, 2011; BP Exploration Co (Libya) Ltd v. Hunt (No 2) [1982] 1 All E.R. 925). In the end, it seems that the KCC allows a wide range of restitution.

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