PROPOSAL ON THE UNFAIR TERMS IN LEASE AGREEMENT

A DISSERTATION

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TO THE SCHOOL OF LAW

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS

OF THE SCHOOL OF LAW

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OF

DOCTOR OF JURIDICAL SCIENCE

BY

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ABSTRACT

Korea and the U.S. have different types of lease systems, but both have some unfair terms in their lease agreements. A tenant cannot renew or make a successive a residential lease agreement once the agreement is terminated. In Korea, security of tenure for a tenant is important due to the high population density. In the U.S, security of tenure is important because the society undergoes expenses and effort if the evicted tenant becomes a social problem.

Under the commercial lease agreement, a tenant of the U.S cannot collect their investment to demise if the landlord terminates the agreement at any time. It is unfair that the landlord enjoys the increase in value due to a tenant. In Korea, a tenant loses the opportunity to collect their investment by making a premium agreement after the term of agreement is terminated even the Commercial Building Lease Protection Act guarantees a tenant the right to collect the investment to demise through a premium agreement.

This dissertation is aimed at proposing solutions for these unfair situations related to lease agreements. To this end, each aspect of the lease system as well as the rights and duties of a tenant and landlord are introduced. Based on this information, the existing standards to maintain a balance between the landlord and tenant in both the countries are discussed. However, these aspects alone are not enough to solve the problems, so a comparative study is undertaken for this dissertation. To improve the

Korean residential lease agreement, a rent-control act is introduced. For the Korean commercial lease agreement, the case law that allows tenants to sublease in the U.S. and restricts the termination of a franchise agreement by the implied covenant of good faith and fair dealing is referred to. For the U.S. residential lease agreement, a mandatory minimum lease period and the limited reasons for which a landlord can terminate the agreement are discussed. For the U.S. commercial lease agreement, the special Korean concept of a “premium” is discussed, with a proposal to refine the premium agreement and the right to request for the renewal of a contract.

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CHAPTER 1. INTRODUCTION

A tenant's right to remain is one of the most important elements of their housing rights.[1] The reason for the security of tenure being fundamentally important is that it is the basis of people's lives. People can make financial, psychological, and emotional investments in their homes and neighborhoods when their security of tenure is guaranteed. Security of tenure also enables the tenant's children to attend school without any interruptions and the tenants to maintain stable employment.[2] Therefore, the tenant's security of tenure is related not only to the individual's personal life but also their social life. The importance of the security of tenure is further supported by the fact that involuntary displacement can disrupt the tenant's educational, religious, social, and professional connections. [3] Involuntary displacement can also bring about intense psychological harm. In his classic study of people's displacement from the West End of Boston, Marc Fried mentioned that "relocation was a crisis with potential danger to mental health for many people."[4] Forced displacement causes problems not only for the individuals affected but also for society as a whole, since the society would pay a high price for family disruption,

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[1] Where it Matters Most: Making International Housing Rights Meaningful at the National Level, in NATIONAL PERSPECTIVES ON HOUSING RIGHTS 3, 35 (Scott Leckie ed., 2003).

[2] Florence W. Roisman, *The Right to Remain: Common Law Protections for Security of Tenure - An Essay in Honor of John Otis Calmore*, 86 N. C. L. REV. 817, 820 (2008).

[3] Shana Pribesh & Douglas B. Downey, *Why are Residential and School Moves Associated with Poor School Performance?*, 36 DEMOGRAPHY 521 (1999).

[4] Marc Fried, Grieving for a Lost Home: Psychological Costs of Relocation, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359, 361.

homelessness, and foster care placement.[5] Based on their respective situations, the government of each county has recognized the importance of security of tenure and has tried to protect it by enacting statutes and uniform acts or applying doctrines in the holding of the courts. In Korea, establishing the security of tenure has been recognized as an important issue for a long time. The Korean civil law consists of two different rules that regulate the lease agreement: the *Chonse*[6] agreement and the typical lease agreement.[7] Under the typical lease agreement, a tenant pays a monthly rental fee to a landlord and uses the demised premises specified in the agreement. On the other hand, the *Chonse* agreement is a form of lease that's unique to Korea, under which a tenant pays a large sum of money as a deposit money called as a *Chonsegum* at a beginning of the lease and does not pay a monthly rental fee over the course of the agreement period. The *Chonse* agreement is the most prevalent lease agreement in Korea. The Civil Act protects tenants who satisfy two requirements which making a *Chonse* agreement and register the right of *Chose* which called as "*Chonsegwon*" stronger as Chonsegwon-holder than a tenant of typical lease agreement.[8] A tenant who is registered as a *Chonsegwon* can stake a claim against a third party who wants to take over the property even though the parties involved in the original lease contract did not agree to the same. However, there is a low number of registered *Chonse* agreements, for reasons that will be analyzed in Chapter 2. Therefore, the

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[5] Florence W. Roisman, *supra* note 2, at 828.
[6] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 303–319(S.Kor.).
[7] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 618–654 (S.Kor.).
[8] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 303-319 (S.Kor.).

Korean statute has special acts, namely, the Korean Housing Lease Protection Act and Korean Commercial Building Lease Protection Act, to protect the tenants who aren't registered under the *Chonsegwon*. However, a tenant with an unregistered *Chonse* agreement or a general lease agreement would still require protection. The landlord can refuse to renew the housing lease agreement at the end of the specified duration even if the tenant doesn't breach any rules or obligations. This means that the tenant can't be guaranteed the security of tenure. In addition, the tenant of a commercial building wouldn't be able to collect the premium amount from a new tenant, if a landlord disturbs a tenant to get a premium from a new tenant after the original lease agreement terminates by landlord's notice to terminate it.

In the U.S., a landlord can evict a tenant from the rental unit for "any reason or no reason" by terminating or refusing to renew the rental agreement without any limitations under the rule of the common law. Therefore, the security of tenure has been recognized as an important issue in the U.S. as well. Some of the courts have introduced an implied warranty of habitability in residential leases and also decided to prohibit landlords from certain conducts that are unfavorable to tenants, such as retaliatory conduct, retaking the possession by self-help, or imposing unfavorable provisions in the lease agreement. In addition, the Uniform Residential Landlord and Tenant Act and Revised Uniform Residential Landlord and Tenant Act have been promulgated. However, specific rules and guidelines to protect the tenant's right to remain are still required since the landlord has the right to decide whether to renew the lease agreement once the term of tenancy or periodic tenancy ends. Some jurisdictions in the United States have legislative acts that require a good cause for the

eviction of a tenant, but in most of the states, the tenants and owners of manufactured homes on rental sites must rely on the common law for any such protection.[9] Therefore, a new approach to protect the tenant's security of tenure is required.

For In the case of tenants with commercial lease agreements in the U.S., it is necessary to discuss how to protect the tenant's right to collect the amount invested into the demised premises. Usually, a tenant tries to increase the value of the demised property by various methods such as redecorating. However, the tenant is not guaranteed a return of this investment when the landlord decides to terminate the commercial lease agreement, resulting in the landlord benefiting from the tenant's investment. Some scholars have theoretically attempted to limit the landlord's termination of the tenancy at will to solve the abovementioned problem. However, the tenant's right to collect the investment amount is not still guaranteed.

Considering these circumstances, this paper is aimed at pointing out and clarifying the unfair terms present in the lease agreements and statutes of the U.S. and Korean legal systems, followed by potential solutions for establishing the security of tenure in each legal system as well as guaranteeing the tenant's collection of the amount invested in the demised premises. To this end, the U.S. Rent Control Act is presented in relation to the Korean residential lease agreement as a tool for establishing the security of tenure. Further, this thesis focuses on the doctrines of the common law that forbid the landlord from obstructing the collection of the premium amount from a new tenant for the case of a Korean commercial lease agreement. In addition, a comparative study of the legal articles that protect a tenant's right to

[9] Florence W. Roisman, *supra* note 2, at 818.

security is presented, and a solution to the issues in the U.S. residential lease system is proposed. The concept of the "premium" in the Korean commercial lease agreement is also introduced as an approach to protect the tenant's right to collect the amount invested into the demised premises for U.S. commercial lease agreement.

Chapter 1 introduces the issues discussed in this thesis and the structure of this paper.

Chapter 2 includes a general overview of the lease agreement systems in Korea and the U.S. In this chapter, the unique *Chose* and *Imdaecha* systems in Korea are separately explained. Following this, the tenant's rights and obligations in each system and the problems they encounter with the security of tenure despite the establishment of these protection acts are discussed. An overview of the U.S. lease agreement is provided along with an introduction of several court doctrines and model laws such the Uniform Residential Landlord and Tenant Act and Revised Uniform Residential Landlord and Tenant Act. Furthermore, the tenant's rights and obligations, as given by the model laws, are explained, and the problems related to the security of tenure encountered by the tenants despite the legal attempts to protect them are discussed.

In Chapter 3, the existing standards for the protection of tenants in the Korean and U.S. lease systems are discussed. For the U.S. context, several doctrines to control the imbalance of power between the landlord and tenant are provided, such as the doctrines of unconscionability and good faith. This begins with a debate on the efficiency of social controls in contract-based relationships. Afterwards, the scope and standards of the doctrines applied by the court are presented, including a discussion of

the two-prong test. In addition, the requirement for other standards to create a balance in the lease agreements is discussed. Comparative legal study is proposed for introducing new standards. The discussion of the Korean standards begins with the history of the law and the standards used to protect the tenants. Following this, several standards such as forced contracts and general provisions in the civil act as well as cases in which the standards were applied are introduced. In addition, the mandatory provisions and effectiveness of the agreement against the mandatory provisions are discussed. Last, the necessity to research common law doctrines to mitigate the unfairness in the lease agreements is presented.

Chapter 4 begins with a clarification of the defaults or gaps that threaten the tenant's security of tenure through the acts and court decisions of the Korean and U.S. legal systems. Then, solutions to the unfair terms in the lease agreements are proposed. The proposal for the commercial lease agreement in the U.S. presents the Korean "premium" system and tenant's right to request for a renewal as methods to guarantee the collection of the amount invested into the demised premises. To address the unfair terms in the Korean commercial lease agreement, doctrines of common law such as the implied covenant of good faith and fair dealing and implied covenant of good cause for termination used by the courts in cases of subleasing without the landlord's consent are discussed. Solutions are provided to mitigate the unfair terms in the residential lease agreements of both the legal systems on the basis of a comparative study. In the context of the U.S, the comparative study is focused on foreign laws and guidelines, such as the ones in France, South Korea, and England, that include articles to protect the tenants. A minimum mandatory period for the lease agreement is

proposed based on the rules in France and South Korea. Particularly, the Korean minimum mandatory period is suggested as it is mandatory only for the landlord, and the tenant can claim a lease period that's lesser than the mandated length. For improving the residential lease agreement in Korea, this thesis draws upon the rent control acts enforced in some of the U.S. states. Provisions to control the rental amount and eviction process are proposed for the system in Korea.

In Chapter 5, the author's proposals for the security of tenure in both the Korean and U.S. lease systems are summarized. In addition, it organizes the meaning of this thesis to the legal system of Korea and U.S.

CHAPTER 2. A GENERAL REVIEW OF THE LEASE AGREEMENT SYSTEMS IN KOREA AND THE U.S.

I. LEASE AGREEMENT SYSTEM IN KOREA

A. General Review

The Korean civil law includes two different rules for the regulation of the lease agreement. The first is the *Chonse* agreement and the other is the typical lease agreement. Under the typical lease agreement, a tenant pays a monthly rental fee to a landlord and uses the demised premises during the term of the lease. In addition to this typical lease agreement, a unique lease system called *Chonse* is also present in Korea, and it is the most prevalent form of lease agreements. There are two types of *Chonse* agreements: *Chonse* with registration and *Chonse* without registration. To be precise, the *Chonse* agreement without registration is the most prevalent form of lease agreement in Korea. The differences between the two will be discussed in the last part of this general review.

Under the *Chonse* system, a tenant pays a large sum of deposit money called the *Chonsegum* at the beginning of the agreement and does not pay any monthly rental fee during the lease period. The *Chonsegum* is refunded to the tenant upon the termination of the agreement. The landlord can retain any interest amount obtained from the *Chonsegum* or invest it, and, thus, the *Chonsegum* also plays a role as a financial device between the two individuals.

Two different chapters in the Korean Civil Act help regulate the *Chonse* and typical lease agreements. Articles 303 to 319 in Chapter 6 regulate the *Chonse* agreement but are only applied to those with registration. The unregistered *Chonse* agreement and typical lease agreement, which is called *Imdaecha* in Korean legal terminology, are regulated by articles 618 to 654 in Chapter 7 of the Korean Civil Act. Apart from these, two other acts strongly protect tenants with a typical lease agreement or unregistered *Chonse*: the Korean Housing Lease Protection Act and Korean Commercial Building Lease Protection Act. These acts are preferentially applied to the contracts between tenants and landlords in typical lease agreements or unregistered *Chonse* agreements and civil act is applied only those special acts are not applied.

When a tenant enters into a *Chonse* agreement with a landlord, the legal protection offered by the regulated articles depends on the situation and whether the tenant registers for a *Chonsegwon*. *Chonsegwon* refers to a registered *Chonse* agreement. In addition, articles 303–319 of the Civil Act are applied only to a tenant with a *Chonsegwon,* i.e., a tenant with a registered *Chonse*.

There have been several arguments about which act should be applied to a tenant with an unregistered *Chonse* agreement (a tenant without a *Chonsegwon*). However, the legislation of the acts solved this problem. The Korean Housing Lease Protection Act states that “this Act shall apply to a contract for lease of an unregistered house on a deposit basis.” For the case of commercial buildings, Article 17 of the Korean Commercial Building Lease Protection Act states, “This Act tenant who makes a *Chonse* agreement, the article 12 of The Housing Lease shall apply

mutatis mutandis to contracts of lease on a deposit basis of buildings unregistered." That means that a tenant with a *Chonse* agreement will be governed by the articles related to the typical lease agreement if the tenant did not register the *Chonse*.

In summary, tenants who enter into lease agreements can be of three types based on the applied articles of law: (i) tenants with registered *Chonse* agreements; (ii) tenants with unregistered *Chonse* agreements; (iii) tenants with typical lease agreements or *Imdaecha*.

In the next section, the registered *Chonse* agreement, which is ruled by articles 303–319 of the Civil Act, is first discussed. This is followed by an overview of the unregistered *Chonse* and typical lease agreements, which are regulated by articles 618–654 in Chapter 7 of the Korean Civil Act, Korean Housing Lease Protecting Act, and Korean Commercial Building Lease Protection Act. The tenant's rights as well as the regulations that protect the tenant in each type of lease agreement are focused on.

B. *Chonse* Agreement with Registration (*Chonsegwon*)

1. The Nature of the Registered *Chonse* Agreement

The *Chonse* agreement is protected by a property right called the *Chonsegwon.* When a tenant and landlord enter into a *Chonse* agreement, they can register the *Chonsegwon*. In other words, a *Chonsegwon* refers to a registered *Chonse* agreement. According to the Korean property law, the acquisition or transfer of property rights in real estate occurs upon the completion of valid registration.

Therefore, such a registration is required to create a *Chonsegwon* in addition to the contract itself.[10]

The registered *Chonse* agreement has several unique features. First, it is a property right in the real estate sector. It creates a leasehold interest in property (a right in rem) for the *Chonse* lessee.[11] Right in rem is a concept in the civil law system[12], and it refers to a legal right directly exercised on a physical object.[13] It is effective for all the people and not only a counterpart of the contract, and a person with a *Chonsegwon* can claim the right to all people.[14] For example, a tenant with a *Chonsegwon* can claim their right as the new owner of the real estate property even if the new owner does not succeed the original owner's right of contract.[15] In addition, a person who has a *Chonsegwon* can resist anybody who interferes with their rights. Even if the owner of the property interferes with the person with a *Chonsegwon,* aiming to use and obtain interest from the property, the *Chonsegwon* holder can repel

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[10] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 186 (S.Kor.); Youngjoon Kwon & Yong-Shik Lee, *Legal Analysis of Traditional Leasehold in Korea (Chonsegwon) from a Comparative Legal Perspective,* 29 ARIZ. J. INT'L & COMP. L. 263, 271 (2012).

[11] Youngjoon Kwon & Yong-Shik Lee, *supra* note 10, at 264.

[12] There are two systems in the legal sphere: the civil law system and the common law system. The civil law system was developed in the continental European countries, such as Germany and France, based on comprehensive statutory systems, including the civil code. The civil law system has been adopted by East Asian countries, such as Korea and Japan. On the other hand, the common law system was developed in England and adopted by North America, Australia, and the other former British colonies. It is based on non-statutory bodies of law, such as contract law and tort law, based on judicial precedents. (Youngjoon Kwon & Yong-Shik Lee, *Legal Analysis of Traditional Leasehold in Korea (Chonsegwon) from a Comparative Legal Perspective*, 29 ARIZ. J. INT'L & COMP. L. 263, 269 (2012)).

[13] *Id.*

[14] Kim Jun Ho, *Lecture on Civil Law* 582 (2005).

[15] Youngjoon Kwon & Yong-Shik Lee, *supra* note 10, at 270.

the owner. This strong and stable nature of the *Chonsegwon* has been established because it is a right in rem. Thus, it differs from a right in personam, through which one can only claim to a debtor of a contract.[16]

The second feature of the registered *Chonse* agreement is that it has two different functions as a right in rem. The first is the right to use the property and profit from it. This is the natural function of a *Chonse* agreement regardless of whether its registered, since the contract would be made to use the demised premises. The first sentence of Article 303 of the Korean Civil Act states, "Any person having *Chonsegwon* is paying the deposit money and possessing the real property owned by another person."

The other function is that it provides the right to use the property as a security interest. One of the most important features of the *Chonse* agreement, irrespective of the registration status, is that the deposit money is unusually large. In other countries, the deposit amount is two or three times the monthly rent. However, in Korea, the deposit amount is 10–50% of the total price of the building.[17] The deposit money amount tends to be higher, ranging from 30 to 70 percent, in Seoul, the capital city of South Korea. The reason for such a large sum of deposit money being justified in Korea can be understood by reviewing the functions of the deposit (*Chonseguem*).

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[16] Sjef Van Erp, *Comparative Property Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1043, 1051–52 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[17] KIM JE-WAN, BUSINESS LAW IN KOREA, A GUIDE TO BUSINESS LAW IN ASIA 234 (Pitman B. Potter & Ljiljana Biukovic eds., LexisNexis Canada Inc.) (2008).

Chonsegeum, which is the object of the security right, has the following three functions.[18] First, the deposit money is a means of collecting the monthly rental fee; the monthly rental fee is replaced by the profit the lessor earns using the deposit amount.[19] Second, the deposit money acts as insurance in case the tenant fails to compensate for any damages to the building.[20] Last, the *Chonsegeum* functions as a personal financing tool as well. Since the deposit money paid by the tenant to the owner is a large portion of the price of the entire house or building and the owner can dispose of the *Chonseguem* or obtain profits from its use during the *Chonse* agreement period, the *Chonseguem* can be considered as a private loan for the duration of the agreement.

This tradition of a tenant paying a large sum of deposit money to a landlord and its function as a form of personal financing can be traced back to the custom of *Kasajeondang* (house pledge) during the Joseon dynasty.[21] The *Kasajeondang* was a form of personal financing that required the landlord to offer their demised property as the collateral for a loan of the deposit money.[22] Through this process, the creditor (a tenant) obtained the right to occupy the property for the duration of the loan as a

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[18] Youngjoon Kwon & Yong-Shik Lee, *supra* note 10, at 275–276.
[19] *Id*.
[20] Seo Gi Kim, *Contract Regulation in Korea to Protect a Housing Tenant*, 3 ASIAN BUS. LAW. 56, 60–61 (2009).
[21] The Joseon dynasty was a Korean dynastic kingdom that lasted for approximately five centuries. It was founded by Yi Seong-Gye in July 1392 and lasted until 1910 (*Joseon*, ENCYCLOPEDIA OF KOREAN CULTURE (Oct. 27, 2017), http://encykorea.aks.ac.kr/Contents/SearchNavi?keyword=조선&ridx=2&tot=6548).
[22] Jaeseon So & Chonsegwoneui Byeoncheongwa Gineung, *The Evolvement and the Function of Chonsegwon*, in I HANGOOKMINBEONBEUI ILONGWA BALJEON [THE DEVELOPMENT OF THE THEORY OF KOREAN CIVIL LAW] 396–97 (1999); Youngjoon Kwon & Yong-Shik Lee, *supra* note 10, at 265.

guarantee against the loan payment. In case the debtor (a landlord) failed to pay back the loan, the demised premises would ultimately belong to the creditor.[23] Under the *Kasajeondang*, the loan is similar to a *Chonsegeum*, which is the deposit money obtained through the *Chonse* agreement, and the creditor's right to occupy is similar to the current *Chonse* agreement and acts as a security device to guarantee loan repayment.[24]

In summary, the *Chonse* agreement has dual significances, as seen above. The first significance is the tenant's right to use the demised property and profit from it. The second significance is that it functions as a personal financing device with the house as collateral.

2. The Rights and Obligations of a Tenant with a Registered *Chonse* Agreement

a. The right to use and benefit from the demised premises.

A tenant who makes a *Chonse* agreement with the registration of *Chonsegwon* can use and benefit from a landlord's demised premises. This means that the tenant has the right to possess the demised premises and can refuse to handover the property while the agreement is valid, as given in Article 213 of the Korean Civil Act.

The tenant should use the demised premises in accordance with the property's purpose and characteristics.[25] If a person holding a *Chonsegwon* does not use or

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[23] Jaeseon So, *Id.* at 397; Youngjoon Kwon & Yong-Shik Lee, *Id*.
[24] *Id.*
[25] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 311(1) (S.Kor.).

profit from the subject matter of the *Chonsegwon* in accordance with the terms applied to the use thereof or the character of the subject matter, the settlor of the *Chonsegwon* may claim the extinguishment of the *Chonsegwon*.[26] In this case, the settlor may request the *Chonsegwon* holder to restore the subject matter to its original condition or demand compensation for loss in lieu thereof.[27]

For example, a tenant with a *Chonsegwon* cannot use the demised premises as a commercial store when the agreement specifies the reasonable expectation that it should be used as a residential place.[28]

b. The obligation to maintain the original condition of the demised premises.

Under Article 309 of the Korean Civil Act, a person with a *Chonsegwon* should maintain the status-quo condition of the subject matter of the *Chonsegwon* and perform any necessary repairs in the ordinary course of the management thereof.[29] If the person having the *Chonsegwon* has defrayed expenses for improving the subject matter of the *Chonsegwon* or other useful purposes, he/she may, so long as the increase in value remains, require reimbursement from the owner either of the amount defrayed or the amount by which its value has increased, at the option of said owner.[30]

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[26] *Id*.
[27] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 311(2) (S.Kor.).
[28] Youngjoon Kwon & Yong-Shik Lee, *supra* note 10, at 274.
[29] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 309 (S.Kor.).
[30] *Id.* art. 310(1).

c. The tenant's right as a creditor who has a security interest.

As reviewed earlier, a *Chonse* agreement with the *Chonsegwon* registration also functions as a security right in rem.[31] When the landlord fails to return the deposit money at the end of the agreement, the tenant may request an auction of the registered demised premises under the Korean Civil Execution Act.[32]

During the auction process, the *Chonsegwon* holder has preference over the unsecured creditors regarding the registered demised premises.[33] Among the secured creditors, the priority order of rights registered for the same real estate property shall be decided by the order of registration in principle.[34] To be specific, the tenant with the *Chonsegwon* is prioritized over a mortgagee who has registered the mortgage after the *Chonsegwon*. This principle is maintained even when a creditor other than the tenant who has a *Chonsegwon* initiates the auction process.[35] Through this judicial disposition of the property, the tenant with the *Chonsegwon* can receive a refund that satisfies the *Chonsegwon* agreement at the end of the auction procedure.[36]

d. The right to transfer the tenant's rights or create a sub-*Chonse* agreement with a registration for a third party.

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[31] YOONJIK KWAK, MOOLKWONBEOB [LAW OF PROPERTY] at 257 (7th ed. 2002); Youngjoon Kwon & Yong-Shik Lee, *supra* note 10, at 275.
[32] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 318 (S.Kor.).
[33] *Id.* Second phrase of art. 303, 1.
[34] Budongsan Deonggi boeb[Registration of Real Estate Act], Act No 536, Jan.1, 1960.1.1. amended by Act No. 14901, Oct. 13, 2017,art. 4(1)(S.Kor.).
[35] Youngjoon Kwon & Yong-Shik Lee, *supra* note 10, at 276
[36] Minsa Jibhaeng Beob[Civil Execution Act], Act No. 6627, Jan. 26, 2002, amended by Act. No. 13952, Feb. 3, 2016, art. 88(1), 91(3), 148(S. Kor.).

A *Chonsegwon* holder is free to transfer their rights to a third party.[37] The *Chonsegwon* holder also may offer the *Chonsegwon* as collateral for their own debt, and the court can order the *Chonsegwon* to be attached and transferred to the creditor in an enforcement procedure.[38] Frequently, *Chonsegwon* becomes the object of a mortgage.[39] The *Chonsegwon* holder also may create a sub-*Chonsegwon* with a third party.[40] A claim for a *Chonsegeum* transfer cannot, in principle, be separated from the original *Chonsegwon*.[41] However, when the *Chonsegeum* is not refunded, either after the *Chonsegwon* period expires or upon the mutual agreement to rescind the contract, the claim can be transferred to a third party without a *Chonsegwon.*

Chonsegwon can be extinguished on several grounds. First, upon the expiration of the *Chonsegwon* period agreed upon by the parties. If the duration is not fixed, either party may notify the other party of the termination of the *Chonsegwon*, which would take effect after a period of six months has elapsed.[42] *Chonsegwon* can also be extinguished with the destruction of the underlying real estate property.[43] If a part of the property is destroyed, the *Chonsegwon* that corresponds to the destroyed portion is extinguished.[44] If the purpose of *Chonsegwon* cannot be achieved with the remaining part of the property, the *Chonsegwon* holder can notify the property owner

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[37] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 306 (S.Kor.).
[38] *Id.*
[39] *Id.* art. 371(1).
[40] *Id.* art. 306.
[41] S. Ct., 66da850, July 5, 1966 (S. Kor.).
[42] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 313 (S.Kor.).
[43] *Id.* art. 314(1).
[44] *Id.*

of his/her intention to terminate the entire *Chonsegwon* and demand a refund of the *Chonsegeum*.[45] In either case, the party responsible for the destruction of the real estate is required to compensate for the loss,[46] and the property owner reserves the right to deduct the due amount for the damage from the *Chonsegeum*.[47] Additional grounds for the dissolvement of *Chonsegwon* include the use of the real estate property not being in accordance with the terms of the lease or purpose and characteristic of the real estate,[48] voluntary relinquishment of the *Chonsegwon* by the *Chonsegwon* holder, and fulfillment of the terms of extinction as set out in the contract.[49] *Chonsegeum* is to be refunded to the *Chonsegwon* holder upon the extinction of the *Chonsegwon.*

C. The Unregistered *Chonse* and Lease Agreements

1. The General Nature of the Unregistered *Chonse* Agreement and the Lease Agreement

As previously mentioned, the *Chonse* agreement is the most common form of the lease agreements used in Korea. Since a tenant who makes a registered or unregistered *Chonse* agreement pays a deposit amount which can be refunded upon moving into the premises and doesn't pay a monthly rental fee, but a tenant who enters into a typical lease agreement (*Imdaecha*) has to pay the monthly fee.

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[45] *Id.* art. 314(2).
[46] *Id.* art. 315(1).
[47] *Id*. art. 315(2).
[48] *Id.* art. 311.
[49] KWAK, *supra* note 31, at 267.

Even though tenants prefer the *Chonse* agreement over the typical lease agreement, there is a low percentage of *Chonse* agreementsare registered. Only 8% of the commercial *Chonse* agreements and 1.45% of the house lease agreements are registered under the *Chonsegwon*.[50]

Why don't the tenants of commercial and residential properties register their lease agreements under the *Chonsegwon* if it provides stronger protection? The Small and Medium Business Administration surveyed the commercial building lease agreements in 2015 to answer this question.[51] According to the survey, 25% of the reason was attributed to the fact that the tenants would be protected only if they have a special contractual status under the Commercial Building Lease Protection Act. The other reasons were as follows: i) the landlord didn't agree with the registration (10.2%); ii) the deposit amount was not large enough to register the *Chonsegwon* (19.1%), iii) the expenses incurred for making the registration (4%), iv) the lack of awareness about the article on the registration and systematic process involved (37.7%).

In addition, the Korean Housing Lease Protection Act and Korean Commercial Building Lease Protection Act protect tenants strongly even though they have a status of secured creditors merely and they are not the tenants who have

[50] HANGOOKBEOBJE YEONGOOWON [KOREA LEGISLATION RESEARCH INST.], JOOTAEKIMDAECHASILTAEAE GWANHAN YEONGOO [EMPIRICAL RESEARCH ON HOUSE LEASE], 51–52 (1993); Youngjoon Kwon & Yong-Shik Lee, *Legal Analysis of Traditional Leasehold in Korea (Chonsegwon) from a Comparative Legal Perspective*, 29 ARIZ. J. INT'L & COMP. L. 263, 278 (2012).

[51] http://211.253.148.167:8083/statHtml/statHtml.do?orgId=142&tblId=DT_S13012_415

Chonsegwon. Therefore, tenants don't have much of a motive to undergo the *Chonsegwon* registration process. The protections provided by the Korean Housing Lease Protection Act and Korean Commercial Building Lease Protection Act are discussed further below.

For the above reasons, the most common lease agreement in Korea is the *Chonse* agreement without registration. A tenant who makes a *Chonse* agreement but doesn't register the *Chonsegwon* only has a contractual status. Therefore, the tenant cannot claim their rights under the lease agreement to the third party who is not the parties of contact from the following day thereof. However, Article 12 of the Korea Housing Lease Protection Act states, "This Act shall apply mutatis mutandis to a contract for lease of an unregistered *Chonse* agreement." Further, Article 17 of the Korean Commercial Building Lease Protection Act states that "this Act shall apply mutatis mutandis to contracts of lease on an unregistered *Chonse* agreement for a building." Therefore, a tenant with an unregistered *Chonse* agreement and a tenant with a regular lease agreement, or *Imdaecha*, have the same protection status. The protections that these tenants can avail are discussed in the next chapter.

2. The Rights of a Tenant with an Unregistered *Chonse* Agreement or a Regular Lease Agreement, as given in the Civil Code

a. Right to claim the property against the third person.

A tenant who makes a general lease agreement cannot claim their right to a property against any third person besides the landlord who entered into the lease agreement with the tenant. Therefore, if the landlord transfers the premises to a new

owner, the tenant would be required to hand over the premises to the new owner. This principle can be explained by the term “right in personam.” However, this makes the tenant’s status unstable and may harm the social economy if the principle is applied to real estate lease agreements. To avoid this problem, the Korean law allows the tenant to claim the property against the third party under exceptional conditions.

Article 621(1) of the Korean Civil Act regulates that the tenant of an immovable may, unless there exists a contrary agreement between the parties, request the lessor to cooperate in effecting the necessary formalities for the registration of the lease. In addition, the lease of an immovable, if registered, shall be effective against the third person from the time the registration has been effective, as per Article 621(2).

Regarding the lease agreement of land to own a building, Article 622(1) states the following:

> When the object of a lease of land is to own a building, if a building on such land has been registered by the tenant, the lease of land shall be effective against a third person even if such a lease of land has not been registered.

This article regulates land leases that enable one to own a building on said land. In case a tenant rents a piece of land and doesn’t register the *Chonsegwon*for land, they can be protected by a tenant with a registration if the tenant registers the possession of the building even if he/she doesn’t register the land which is leased object. Since registration of the possession of the building is deemed to register the *Chonsegwon* for land to protect the tenant of land to own his building.

b. The right to assign or sub-lease the right of lease.

Under Article 629, a tenant can assign their rights or sub-lease the leased object to a third party upon obtaining the landlord's consent. The landlord has the option of declining their consent for a sub-lease.

If the tenant reassigns their rights or sub-leases the property without the landlord's consent, the landlord may rescind the contractual agreement. On the other hand, if a tenant sub-leases the object with the consent of the lessor, the sub-tenant directly assumes the obligations to the landlord. In this case, the sub-tenant may not set a defense against the landlord by paying the rental fee to the sub-landlord, i.e., the original tenant who made a lease agreement with the landlord. If the tenant sub-leases the object with the consent of the landlord, the rights of the sub-tenant cannot be extinguished even if the contract of lease is terminated by an agreement between the landlord and tenant. On the other hand, the landlord can terminate the original tenant's lease if the sub-tenant breaches an obligation since the original tenant is responsible for the demised premises and any breach of obligation by the sub-tenant.

c. The right to demand the purchase of accessories or a building.

If the tenant has attached an article to the house or building that is the object of the lease agreement with the consent of the landlord or purchased the object from the landlord for their own use, the tenant may demand that the landlord purchase such accessories at the time of terminating the lease contract under Article 646 of the Korean Civil Code. The tenant cannot exercise the right to demand the landlord's purchase of accessories when the lease agreement is terminated due to the tenant's failure to fulfill their obligations.

When the buildings, trees, or facilities on the leased land remain intact after the termination of the lease agreement, wherein the agreement is for owning a building or any other structure or for planting, collecting salt, or stock farming, the tenant may first demand a renewal of the contract. In case the landlord does not want to renew the contract, the tenant may ask the landlord to purchase the structures or trees at a reasonable price under Article 643. When the tenant's purchase request is delivered to the landlord, contact is considered to be made.

d. The obligation to pay a rental fee and return the object to the landlord.

A tenant should pay a rental fee for use the demise to the landlord. Paying the rental fee is an essential element of the lease agreement. The fee amount is decided by the agreement, but it can be increased or reduced under the special circumstances upon either party's request. Article 627 of the Korean Civil Code states that if a part of the leased object becomes unusable or impossible to profit from due to losses or any other cause other than the fault of the tenant, the tenant may demand a reduction in the rental fee that is proportional to the unusable part. In addition, Article 628 specifies that if the rent previously agreed upon by the parties becomes unreasonable due to the increase or decrease of the public impost imposed upon the leased object or any other change in the economic situation, either party may demand a raise or reduction of the future rent. For the lease of a building or any other structure, if the amount of rent in arrears reaches the rental amount for two periods, the lessor may rescind the contract. This article is applied to the tenant of an unregistered *Chonse* as

well as the tenant of a typical lease agreement, as mentioned in sub-section IA of this chapter.

The tenant is bound to preserve the object of lease agreement with the care of a good manager during the lease period. In addition, the tenant must restore the borrowed object to its original condition before returning it to the landlord, and the tenant may remove any attachments thereto.

e. The landlord's duty to maintain the condition of premises.

Article 623 of the Korean Civil Act states that a lessor is bound to deliver the object to the lessee and maintain the conditions necessary for the use and profitability of the leased object while the lease is in force. Based on this article, the landlord has a duty to repair the demised premises for the tenant's use and profit. The Korean Supreme Court presented a standard for when the landlord has to repair the demised premises through a series of cases. The following was stated:

> If the damage of the demise or obstacle to use the demise is minor which a landlord can repair very easily and costs a little for repair, it doesn't interfere with a tenant's use of the demise. In this case, the landlord doesn't have a duty to repair the demise under the article 623. On the other hand, the landlord has a duty to repair the demise when the tenant cannot use it and take a profit from it as the purpose of the lease agreement if the landlord doesn't repair the demise.[52]

3. The Tenant's Special Status to be Protected by Other Acts

a. The right to oppose a third party.

[52] Supreme Court [S.Ct.], 2010Da89876,89883, Jun. 14, 2012 (S. Kor.).

A tenant who makes an unregistered *Chonse* agreement or a typical lease agreement can be protected under Article 621(1) by requesting the landlord to cooperate for the registration process. This article only allows for a request to cooperate. If the landlord refuses to cooperate, the tenant cannot force him/her to register the*Chonsekwon* . To resolve this problem, the Korean Housing Lease Protection Act and Korean Commercial Building Lease Protection Act were promulgated. With these acts, the tenant is protected by the specification of simple actions that the tenant can undertake without the landlord's cooperation.

Specifically, if the tenant of the lease agreement moves into the premises and completes the resident registration,[53] the lease will take effect against any third person from the following day thereof even if the lease is not registered under the Civil Act. The lease agreement and resident registration are deemed as made at the time of the moving-in report[54] under Article 3 of the Korean Housing Lease Protection Act. This is why a tenant would prefer to be protected under the Korean Housing Lease Protection Act over Article 621(1) of the Civil Act.

The taking of effect against any third person, as given in Article 3 of the Korean Housing Lease Protection Act, enables the tenant to refuse to deliver the object of the agreement to any junior obligees or other creditors. In addition, the tenant can continue to use the object and profit from it. In this regard, the tenant's

[53] "Resident registration" means that a resident of Korea registers their residential details with the local government under the Resident Registration Act at the time of moving in.

[54] If any of the members of a household change domicile, the person has to file a moving-in report with the head of the local government that has jurisdiction over the new domicile within 14 days of moving in, as given by the Resident Registration Act.

status remains strong even when the owner of the object is changed. The transferee of a leased house or successor of the right to lease a house shall be deemed to have succeeded the status of the landlord.

b. The right to the preemptively recover the deposit.

Any tenant who is provided with a house, completes the resident registration by following the requirements of Article 3, and obtains a fixed date[55] on the lease contract document is entitled to the repayment of the deposit amount based on the converted price of the leased house over any junior obligees or other creditors at the time of an auction conducted under the Civil Execution Act and a public sale under the National Tax Collection Act.[56] No lessee shall be permitted to receive the deposit without delivering the leased house to the transferee thereof.

A tenant who has the right to recover the deposit amount under Article 3 can claim this right only against creditors or security holders who were registered after the tenant's resident registration and obtainment of the fixed date on the contract. However, the tenant who pays a small deposit amount can recover the money against all creditors or obligees, even if they registered their right before the tenant, in certain circumstances, as given in Article 8. Under Article 8 of the Housing Lease Protection Act, the tenant is entitled to receive a repayment of a specified amount of the deposit in preference to other persons holding the security rights of the leased house. In such

[55] "Fixed date" means that the courts or community offices fix a seal with the date to the margin of the lease contract to confirm the date of making the lease agreement.
[56] Jutaek Imdaecha Boho Beob[Korean Housing Lease Protection Act], Act No. 3379, Mar. 5, 1981, amended by Act No.15791, Oct. 16, 2018, art. 3-2 (S. Kor.).

cases, the lessee has to satisfy certain requirements, such as moving into the house and completing the resident registration, before an application for the auction of the house is registered.

When can Article 8 be applied for protecting the tenant? The Enforcement Decree of the Housing Lease Protection Act regulates the range within which a tenant can be protected by this provision. The specified amount of a security deposit to be preferentially repaid under Article 8 of the Act should not exceed the following relevant region-based amounts. 1) Seoul Special Metropolitan City: 37 million won; 2) Over-concentration control regions under the Seoul Metropolitan Area Readjustment Planning Act, Sejong special self-governing city, Yongin-si, and Hwasung-si: 34 million won; 3) Metropolitan cities, Ansan-si, Gimpo-si, Gwangju-si, and Paju-si: 20 million won; 4) Other areas: 17 million won. Therefore, a tenant who pays a deposit amount that's lesser than the specified amount can preferentially recover the deposit amount over all other creditors or obligees, irrespective of whether they register their right before or after the tenant's resident registration.

Specifically, this provision protects the tenant's preferential receipt of a part of the deposit amount over other persons even though the other person holds the security rights of the leased house. For example, if a tenant who lives in Seoul pays a deposit amount of 100,000,000 Korean won to the landlord, the tenant can be refunded only 37,000,000 KRW preferentially than other person without any reference to who holds the security rights under this provision. The tenant can then recover the discrepancy amount in preference over any junior obligees or other creditors under Article 3-2(2) of the Housing Lease Protection Act.

II. LEASE AGREEMENT SYSTEM IN THE U.S.

A. General Concept and Governing Rules

A lease agreement was treated as a conveyance of a real property interest under the traditional concept of the common law in the United States as well as England. The tenant would have two major responsibilities after making an agreement and taking possession of the property. The first was to pay rent on the agreed-upon date to the landlord. The second was to return the property to the landlord, upon the termination of the lease, in the same condition as it was when the lease period commenced. On the other hand, the landlord had only one responsibility to the tenant, which was to not interfere with the tenant's use and enjoyment of the property as long as the tenant fulfilled the responsibilities given in the agreement.[57]

However, this relationship between the landlord and tenant changed due to American urbanization. In accordance with this change, the law changed from the traditional construct of a lease as a property interest to a modern contract paradigm.[58] In Javins v First National Realty Corp., J. Skelly Wright, the Circuit Judge, provided the following explanation:[59]

> [T]he assumption of landlord–tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society … But in the case of the

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[57] Sheldon F. Kurtz & Alice Noble-Allgire, *The Revised Uniform Residential Landlord and Tenant Act: A Perspective from the Reporters*, 52 REAL PROP. TR. & EST. L. J. 417, 419 (2018).
[58] *Id.*
[59] 428 F. 2d 1071 (D. C. Cir 1970) at 1074.

> modern apartment dweller, the value of the lease is that it gives him a place to live … When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well-known package of goods and services — a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

In addition, he quoted Professor Powell's summary of the state of that era as follow:

> [T]he complexities of city life, and the proliferated problems of modern society in general, have created new problems for lessors and lessees and these have been commonly handled by specific clauses inserted in leases. This growth in the number and detail of specific lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient. In practice, the law today concerning estates for years consists chiefly of rules determining the construction and effect of lease covenants.[60]

Some courts also realized that the old property law rules regarding leases were inappropriate for the state of that era. Therefore, courts gradually introduced the modern contract law for the interpretation of the lease agreement.[61] The attempts made by the courts and legislatures to address the shortage of suitable housing and protect vulnerable tenants during the bargaining stage became a part of a larger revolution associated with landlord–tenant law.[62] This revolution led to two key results. First, housing codes to establish the minimum standards of housing quality were widely enacted in the late 1800s.[63]

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[60] Id; 2 R. Powell, Real Property P221(1) at 179 (1967).
[61] 428 F. 2d 1071(D. C. Cir 1970), *supra* note 59, at 1075.
[62] Kurtz; Noble-Allgire, *supra* note 57, at 420.
[63] *Id.*

The New York Tenement Housing Act of 1867 was the first such code.[64] The courts also started to recognize an implied warranty of habitability in all residential leases.[65] In addition, the property-based independent covenants were changed to mutually dependent covenants in contract law, which allowed tenants to enforce their rights, including the warranty of habitability, more effectively.[66] According to the principles of the property-based independent covenants, the tenant could not deny paying rent even if the landlord failed to fulfill his/her responsibilities, as given in the lease contract.[67] Conversely, under the mutually dependent covenants, the tenant could suspend the responsibility to pay rent if the landlord did not fulfill his/her duties, such as failing to make repairs.[68] Therefore, these changes helped strengthen the tenant's warranty of habitability.

Other revolutions took place at the same time. The URLTA enacted the statutory rules that govern security deposits in Article §2.101. The comments mentioned the following:

> [U]RLTA § 2.101 thus purports to regulate the amount that a landlord may require for a security deposit, the reasons why a landlord can retain

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[64] Rachel G. Bratt, *Federal Constraints and Retrenchment in Housing: The Opportunities and Limits of State and Local Governments*, 8 J. L. & POL. 651, 655 (1992).

[65] Javins, 428 F.2d at 1072–73.

[66] Kurtz & Noble-Allgire, *supra* note 57, at 421.

[67] Recent Cases, 36 HARV. L. REV. 615, 625 (1923). It says "Under this theory the failure of consideration through loss of the premises would excuse the defendant from paying an apportioned amount of the rent. Mersey Steel & Iron Works v. Naylor, 9 App. Cas. 434."

[68] Eugene L. Grant, *First Class Condition: Responsibilities, Rights, and Remedies Respecting the Condition of Commercial Leasehold Premises,* 29 REAL PROP. PROB. & TR. J. 735, 743–95 (1995).

some or all of the deposit, and the time period in which landlord has to return the deposit following the conclusion of the tenancy.

In addition, the courts decided to prohibit certain conducts of landlords that are unfavorable to tenants such as retaliatory conduct, retaking possession of the property using self-help, and imposing unfavorable provisions to the tenant in the lease agreement.[69] In Edwards v. Habib, the court held that "In light of the … shortage of housing in Washington … the inequality of bargaining power between tenant and landlord … we do not hesitate to declare that retaliatory eviction cannot be tolerated."[70] In Gorman v. Ratliff, the Arkansas Supreme Court held that the Arkansas statutes on forcible entry and detainer prohibit self-help eviction.[71] In Fernandez v. Vazquez, the court determined, "Underlying the cases abolishing the arbitrary and capricious rule is the now well-accepted concept that a lease is a contract and, as such, should be governed by the general contract principles of good faith and commercial reasonableness."[72] Through this revolution, tenants obtained stronger bargaining power against landlords.

With this trend in the court decisions, the 1972 Uniform Residential Landlord and Tenant Act (URLTA) regulated many articles related to the warranty of habitability, including the landlord's duty to repair and maintain the dwelling unit[73] as well as mitigate damages in the enforcement,[74] unconscionability,[75] obligation of

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[69] Kurtz & Noble-Allgire, *supra* note 57, at 421.
[70] Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968).
[71] Gorman v. Ratliff, 712 S.W.2d 888, 890 (Ark. 1986)
[72] Fernandez v. Vazquez, 397 So. 2d 1171, 1173–4 (Fla. Dist. Ct. App. 1981)
[73] URLTA § 2.104 (1972), 7B U.L.A. 326 (2006).
[74] Id. § 1.105, 7B U.L.A. 295.
[75] § 1.303, 7B U.L.A. 304-06.

good faith,[76] and the prohibition of taking possession through self-help, including the willful diminution of services provided to the tenant by interrupting or causing an interruption of an essential service[77]. These articles are aligned with the trend in the court decisions mentioned earlier that the lease is the contract rather than property and the articles tend to protect the tenant's status. The purpose of the URLTA was to eliminate all the elements of outmoded common law from the landlord–tenant relationship and base all the phases of the rental agreement on contract law.[78] 21 U.S. states enacted some version of the URLTA, and a number of others used it as the model for their own legislation.[79]

In spite of this revolution and the enactment of the URLTA, the necessity to find the right balance in the landlord–tenant bargain was brought up.[80] In 2010, the Uniform Law Commission was urged to revise the URLTA to include the disposition of the tenant's property, security deposits, and lease termination in case of domestic violence or sexual assault. Therefore, the Uniform Law Commission promulgated the Revised Uniform Residential Landlord and Tenant Act (RURLTA) in 2015 by adding new provisions to the URLTA.[81] The RURLTA clarifies each party's duties under a lease and provides new rules for terminating the lease in domestic violence cases and

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[76] § 1.302, 7B U.L.A. 303-04.
[77] id § 4.207, 7B U.L.A. 406-07.
[78] Uniform Law Commission, Residential Landlord and Tenant Act, Revised, https://www.uniformlaws.org/committees/community-home?CommunityKey=e9cd20a1-b939-4265-9f1e-3a47a538d495
[79] Kurtz & Noble-Allgire, *supra* note 57, at 423.
[80] *Id.*
[81] Revised Unif. Residential Landlord & Tenant Act §§ 101-1305 (2015), 7B U.L.A. 50–120 (Supp. 2017).

governing security deposits. It provides new rules for the disposition of a tenant's personal property and fairly allocates the costs of enforcement.[82]

B. The Rights and Obligations of a Tenant in a Lease Agreement

1. The Tenant's Right

a. Right to an implied warranty of habitability.

Under the traditional common law, the landlord's only duty is to not interfere with the tenant's use and enjoyment of the leased property as long as the tenant undertakes the responsibilities outlined in the contract.[83] However, this rule could not be enforced in modern society as the concept of a lease agreement was focused on multi-dwelling houses rather than land units. This meant that all the tenants did not have the skills required to repair their leased property unlike the farmers who were the tenants in the traditional land lease agreements. It made the tenants consider the habitability of the leased property as highly important and changed the balance of the rights and obligations between the landlord and tenant.[84]

This shift in the balance of rights and obligations began with the development of the concept of constructive eviction by the courts.[85] The courts recognized that an eviction need not be a real, physical one and could be of other forms, such as the landlord failing to provide heat or electricity, which can deprive the tenant of the use

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[82] Uniform Law Commission, RURLTA—Why Your State Should Adopt, Sep 2017, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e4f5b25b-e9c1-eb0f-d46e-d96b7be33e11&forceDialog=0

[83] Kurtz & Noble-Allgire, *supra* note 57, at 434.

[84] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078 (D.C. Cir. 1970).

[85] Kurtz & Noble-Allgire, *supra* note 57, at 435.

and enjoyment of the property.[86] The courts defined such situations as constructive evictions and permitted tenants to terminate the lease and not pay any further rent, similar to when a tenant is wrongfully but actually evicted from the property.[87] This rule gradually developed, and the implied warranty of habitability came to be recognized as the landlord's duty.[88]

In the case of Javins v. First National Realty Corp., the court made the concept of implied warranty of habitability stronger by applying it to all apartment leases.[89] The court's rationale has served as the landmark for implied warranty of habitability.[90] Afterwards, this concept was included in the URLTA statutory act, which stated, "this Act recognizes the modern tendency to treat performance of certain obligations of the parties as interdependent."[91]

This duty was then specified and further extended in Section 302 of the RURLTA. The section begins with "[a] landlord has a nonwaivable duty to maintain the premises in a habitable condition, including making necessary repairs."[92] Following this, the section enumerates 13 obligations as examples of the implied warranty of habitability. RURLTA defines "a sublessor, only if the landlord did not consent to the sublease" as a landlord in section § 102(16)(C). Thus, it expands the

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[86] Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826).
[87] *Id* at 731–2.
[88] Stanley A. Lockitski, Comment, *Tenant Remedies The Implied Warranty of Fitness and Habitability,* 16 VILL. L. REV. 710 passim (1971); Kurtz & Noble-Allgire, *supra* note 57, at 435.
[89] Javins v. First Nat'l Realty Corp., 428 F. 2d 1071, 1075–82 (D.C. Cir. 1970).
[90] George M. Armstrong, Jr. & John L. LaMaster, *The Implied Warranty of Habitability: Louisiana Institution, Common Law Innovation*, 46 LA. L. REV. 195, 197–202 (1985).
[91] URLTA § 1.102 cmt. (1972).
[92] RURLTA § 302(a) (2015).

role of an obligator with an implied warranty of habitability to include sublessors who sub-lease a dwelling unit without the landlord's consent. If a sublessor is a landlord for the purposes of Section 302, the sublessor has to comply with Subsection 302(a) except for duties that would require the sublessor to access parts of the premises beyond the sublessor's control.[93]

In addition, Section 302(b) of RURLTA states the following:

> [a] landlord has the duty to ensure the premises have access to essential services, but the lease may require an account with a utility provider of an essential service to the dwelling unit be in the name of the tenant and the tenant pay the periodic cost for the service. If the service is not provided because the tenant fails to pay for the service, the landlord does not fail to comply with this subsection.[94]

By this article, the tenant is guaranteed to be provided essential services such as heating, hot and cold running water, sewage or septic disposal, and electricity. These essential services may include gas and air conditioning if they are required to be supplied to a tenant by the lease agreement or a law other than the URLTA and would create serious threats to the health, safety, or property of the tenant or immediate family member if not supplied.[95] However, the landlord would not be breaching the Section 302 duties when the service is not provided as the tenant would be the one failing to pay for the service.[96]

Articles to regulate a contract in which a tenant undertakes specified repairs are also present in the URLTA. For a single-family residence, the parties may agree, in

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[93] *Id*. § 302(c) (2015).
[94] *Id*. § 302(b) (2015).
[95] Id. § 102(10).
[96] Kurtz; Noble-Allgire, *supra* note 57, at 440–1.

writing, that the tenant would perform certain repairs, maintenance tasks, alterations, and remodeling if the transaction is entered into in good faith.[97] Additionally, the parties of any dwelling unit other than a single-family residence may also agree that the tenant would performs the specified repairs, maintenance tasks, alterations, or remodeling.[98] However, the work is not necessary to cure noncompliance with the landlord's obligations under a building or housing code which materially affects health and safety,[99] and the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.[100] The landlord may not treat performance of a separate agreement as a condition for any obligation or action specified in the rental agreement.[101] The RURLTA allows for a separate agreement regarding a tenant's specified repairs to be applied to all rental property types and is not limited to single-family residences.[102]

b. Right to be protected from retaliatory eviction.

In the case of Edwards v. Habib,[103] the court held that "while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities."[104] The court decided that protecting tenants from retaliatory evictions was important for

[97] URLTA § 2.104(c) (1972).
[98] Id. § 2.104(d).
[99] Id. § 2.104(d)(2).
[100] Id. § 2.104(d)(3).
[101] Id. § 2.104(e).
[102] RURLTA § 302 cmt.
[103] 397 F.2d 687 (D.C. Cir. 1968).
[104] *Id.* at 699.

the tenants to freely exercise their rights under the early housing codes.[105] With the many cases that followed the abovementioned one and the legislatures of several states, 41 states established statutes to protect tenants from retaliatory action and four additional states adopted the doctrine as a matter of the state's common law.[106]

The URLTA regulated the retaliatory conduct provisions upon its promulgation,[107] and Article 9 of the RURLTA expanded upon these provisions, specifying the rights and obligations of the parties.[108] On the protection of tenants from the landlord's retaliatory conduct, Section 901 of the RURLTA states, "[a] landlord may not engage in retaliatory conduct described in subsection (b) if the landlord's purpose is to retaliate against a tenant for engaging in conduct described in subsection (a)."[109] The RURLTA also has an article for presumption of retaliation, i.e., to decide whether a landlord's conduct is retaliatory.[110]

Section 903 states that "evidence that a tenant engaged in conduct described in Section 901(a) within [six] months before the landlord's alleged retaliatory conduct creates a rebuttable presumption that the purpose of the landlord's conduct was retaliation."[111] However, this presumption does not apply "if the tenant engaged in conduct described in Section 901(a) after the landlord gave the tenant notice of the landlord's intent to engage in conduct described in Section 901(b)(1) through (5)."[112]

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105 Kurtz & Noble-Allgire, *supra* note 57, at 479.
106 *Id.*
107 URLTA § 5.101.
108 RURLTA §§ 901–04 (2015).
109 RURLTA § 901(a).
110 RURLTA § 903.
111 RURLTA § 903(a).
112 RURLTA § 903(b).

This presumption can be rebutted, as given in Section 901(c): "[a] landlord may rebut a presumption … by a preponderance of evidence showing that the landlord had sufficient justification for engaging in the conduct that created the presumption and would have engaged in the conduct in the same manner and at the same time whether or not the tenant engaged in conduct described in Section 901(a)."[113] Section 901(a) provides a list of tenant activities that are protected under the Act,[114] and subsection (b) lists the specific types of actions that a landlord is prohibited from taking against a tenant.[115]

There are safe harbors to ensure that the landlord is not liable for any retaliation in both the URLTA and RURLTA. The URLTA mentioned only three scenarios for the same, and these were the same as points (1), (3), and (7) under Section 901(c) of the RURLTA.[116] In comparison with the URLTA, Section 901(c) of RURLTA expands upon the safe harbors for landlords.[117] It regulates that "[a] landlord is not liable for retaliation under" Section 901(a) if

> (1) the violation of which the tenant complained.., was caused primarily by the tenant, immediate family member, or guest;
> (2) the tenant's conduct was in an unreasonable manner or at an unreasonable time or was repeated in a manner harassing the landlord;
> (3) the tenant was in default in the payment of rent at the time notice of the action ... was sent;
> (4) the tenant, immediate family member, or guest engaged in conduct that threatened the health or safety of another tenant on the premises;

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113 RURLTA § 903(c).
114 See RURLTA § 901(a).
115 See RURLTA § 901(b).
116 URLTA § 5. 101(c).
117 Kurtz & Noble-Allgire, *supra* note 57, at 485.

> (5) the tenant, immediate family member, or guest engaged in a criminal act;
> (6) the landlord is seeking to recover possession based on a notice to terminate the lease and the notice was given to the tenant before the tenant engaged in conduct [which is protected under this act]; or
> (7) the landlord is complying or complied with a building, housing, fire, or health code or other law by making a required repair, alteration, remodeling, or demolition that effectively deprives the tenant of the use and enjoyment of the premises.[118]

The regulations for a tenant's remedies under the RURLTA is considerably the same as those in the URLTA. Section 902(a) mentions that "(1) the tenant has a defense against an action for possession, may recover possession, or may terminate the lease; and (2) the tenant may recover [three times] the periodic rent or [three times] the actual damages, whichever is greater."[119] The section 902(b) regulated that "[i]f the tenant terminates the lease…, the landlord must return any security deposit and unearned rent to which the tenant is entitled under [this Act]".[120] The section 902(c) stated that "[a] tenant's exercise of a right under this section does not release the landlord from liability [occurred by noncompliance]".[121]

c. Right to unilaterally terminate the lease due to domestic violence etc.

Section 801 of the RURLTA regulates the termination of periodic tenancy. For week-to-week tenancy, the landlord or tenant may terminate the lease by giving a written notice to the other at least five days before the termination date specified in

[118] RURLTA § 901(c).
[119] RURLTA § 902(a).
[120] RURLTA § 902(b).
[121] RURLTA § 902(c).

the notice.[122] For month-to-month tenancy, the landlord or tenant may terminate the lease by giving a written notice to the other at least one month before the periodic rental date specified in the notice.[123] This means that a tenant can terminate the lease contract relatively quickly in the case of periodic tenancy.[124] However, a tenant or landlord who is in compliance with the terms of the lease contract cannot terminate it prior to the end of the term under the traditional law.[125] If this no-termination rule applies to the lease when a tenant or a tenant's family member has suffered from domestic violence, dating violence, stalking, or sexual assault, it may bring about a severe result as the tenant may lose his/her chance to move from a location known to the perpetrator to a location unknown to the perpetrator.[126]

Therefore, new articles under the RURLTA were created for when a tenant or an immediate family member is a victim of domestic violence, dating violence, stalking, or sexual assault, providing the right for the early termination of a lease without penalty. Article 11 of the RURLTA allows a tenant who is personally the subject of domestic violence, dating violence, stalking, or sexual assault, or whose immediate family member is the subject thereof, to be released from the lease with no additional consequences when the tenant files the appropriate documentation under the conditions set forth by the Act.

Section 1102(a) permits the early release or termination of a lease when a victim of any of the abovementioned acts is a tenant or immediate family member and

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[122] RURLTA § 801(b)(1).
[123] RURLTA § 801(b)(2).
[124] Kurtz; Noble-Allgire, *supra* note 57, at 497.
[125] *Id*.
[126] *Id.*

has a reasonable fear of suffering psychological harm or a further act of violence or assault if the victim continues to reside in the dwelling unit.[127] The tenant is released from the lease contract if the tenant gives the landlord a notice that complies with Section 1102(b) and some form of proof that an act of domestic violence, dating violence, stalking, or sexual assault occurred, as set forth in section 1102(a)(1)–(3). The tenant can perform the action under Section 1102(a) without the landlord's consent.[128]

Section 1103 of the RURLTA regulates the landlord's obligations for an early release or termination of the lease under Section 1102. First, the landlord shall "return any security deposit and unearned rent to which the tenant is entitled under Section 1204 after the tenant vacates the dwelling unit."[129] Second, the landlord "may not assess a fee or penalty against the tenant for exercising a right granted under Section 1102."[130] Third, the landlord may not disclose information that the tenant was required to report to the landlord to obtain the release under section 1102 when there is no exception set forth in section 1103(3)(A) or (B).[131]

Instead of terminating the lease, Section 1106 of RURLTA allows a tenant who is the victim of domestic violence, dating violence, stalking, or sexual assault to change the locks or other security devices without giving the landlord the opportunity

[127] RURLTA § 1102(a).
[128] *Id.*
[129] RURLTA § 1103(1).
[130] RURLTA § 1103(2).
[131] RURLTA § 1103(3).

to change them first.[132] Therefore, this section gives a tenant the right to remain in the dwelling and a chance to change the locks and other security devices as quickly as possible.[133] The locks and other security devices should be changed or rekeyed in a professional manner, and the tenant is expected to give a key or other means of access to the landlord and any other tenant, other than the perpetrator, who is a party to the lease.[134] However, if the perpetrator is a party to the lease, the locks and other security devices may not be changed or rekeyed unless a court order expressly requires that the perpetrator vacate the dwelling unit or restrains the perpetrator from contact with the tenant or immediate family member and a copy of the order has been given to the landlord.[135]

d. Rights related to the security deposit payment.

A tenant has both a right and an obligation to provide a security deposit to the landlord, as agreed upon in the lease agreement. Therefore, I will mention both a tenant's right and an obligation for paid security deposit in this part.

Most of the states have enacted legislations to characterize the nature of the transaction including security deposit as the courts have struggled to define it.[136] These legislations were reflected in the URLTA. Section 2.101 of the URLTA regulated the amount that a landlord may receive as a security deposit, process by which the landlord returns the deposit to the tenant at the end of the tenancy, and a

[132] RURLTA § 1106.
[133] *Id*. cmt.
[134] RURLTA § 1106(a).
[135] RURLTA § 1106(c).
[136] Kurtz & Noble-Allgire, *supra* note 57, at 508.

penalty for when the landlord fails to comply with this Act.[137] Further the RURLTA included an entire article on the security deposit: Article 12 regulates the amount of security deposit, interestin security deposit, safekeeping, and disposition for when the tenancy and the landlord's interest are terminated.[138] Section 1201(b) states that "a landlord may not require the tenant to pay or agree to pay a security deposit, prepaid rent, or any combination thereof, in an amount that exceeds [two times] the periodic rent."[139] However, this limit does not include the first month's rent or fees.[140] Section 1201(d) mentions the situation in which a landlord may require an additional security deposit amount. If a tenant keeps a pet on the premises or is permitted by the lease to make alterations to the premises, the landlord may require the tenant to pay an additional security deposit amount that is commensurate with the additional risk of damage to the premises.[141] This section doesn't prohibit a tenant from voluntarily making other payments. Therefore, the tenant may voluntarily pay the rent for several more months in advance.[142]

One of the main issues regarding the characterization of the transaction is establishing whether the security deposit belongs to the tenant or landlord during the tenancy period.[143] This issue can affect third-party creditors' recovery from a landlord

[137] URLTA § 2. 101.
[138] RURLTA Article 12.
[139] RURLTA 1201(b).
[140] RURLTA 1201(c).
[141] RURLTA 1201(d).
[142] RURLTA 1201 cmt.
[143] Kurtz & Noble-Allgire, *supra* note 57, at 512.

or a tenant in bankruptcy and the landlord's handling of the deposit amount during the tenancy period.[144]

Section 1202 of the RURLTA limits the landlord's interest to a security interest and clarifies that the security deposit belongs to the tenant, thereby benefiting the tenant's creditors.[145] In addition, it regulates both the landlord and tenant's right to the deposit, and it can help a third-party and the tenant understand their right to recover the deposit in the case of bankruptcy. The RURLTA Section 1202 states that the:

> (a) The following rules apply to a landlord's interest in a security deposit:
> (1) The landlord's interest is limited to a security interest.
> (2) Notwithstanding law other than this [act], the landlord's security interest is effective against and has priority over each creditor of and transferee from the
> tenant.
> (3) Subject to subsection (c), a creditor of and transferee from the landlord can acquire no greater interest in a security deposit than the interest of the landlord.
> (b) The following rules apply to a tenant's interest in a security deposit:
> (1) Notwithstanding law other than this [act], the tenant's interest has priority over any right of setoff the bank in which the account is maintained may have for obligations owed to the bank other than charges normally associated with the bank's maintenance of the account.
> (2) The tenant's interest is not adversely affected if the deposit is commingled with the deposits of other tenants.
> (3) The effect of commingling other than that allowed in paragraph (2) is determined by law other than this [act].
> (c) Subsection (a)(3) does not abrogate generally applicable rules of law enabling a transferee of funds to take the funds free of competing claims.[146]

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[144] *Id.*
[145] RURLTA 1202(a)(1); RURLTA 1202 cmt.
[146] RURLTA 1202.

Section 1203 of RURLTA regulates the safekeeping of a security deposit. It specifies how the security deposit should be maintained by a landlord and the compensation to be provided if the landlord doesn't maintain the security deposit as given in Section 1203(a). A landlord is required to segregate the security deposits from his/her other funds, and the safekeeping requirement ensures that an amount equivalent to the deposited funds is maintained. It is not necessary for the landlord to deposit the specific funds received from a tenant into the account.[147]

Section 1204 of the RURLTA regulates the disposition of the security deposit and unearned rent upon the termination of the lease. After the termination of a lease, the tenant is entitled to the amount by which the security deposit and any unearned rent exceed the amount the landlord is owed under the lease agreement or this act.[148] Section 1204(b) and (c) mention the landlord's obligation to determine the security deposit amount to return as well as the process and timeline to do so, and the landlord is required to provide a record of the property damage or unfulfilled obligations of the tenant if the amount is less than the sum of the tenant's security deposit and unearned rent. Section 1204(d) provides the tenant with the affirmative right to recover the discrepancy amount if the landlord fails to pay the proper amount.[149] On the contrary, Section 1204(f) of the RURLTA gives the landlord the right to recover the insufficient amount which the tenant should pay additionally to satisfy the tenant's obligationsfrom the tenant.

[147] RURLTA 1203.
[148] RURLTA 1204(a).
[149] RURLTA 1204(d).

Section 1205 of the RURLTA regulates the disposition of the security deposit and unearned rent after a transfer of the landlord's interest in the premises.[150] It provides guidelines for when the landlord's ownership of the leased property terminates due to a voluntary sale, foreclosure, or the landlord's death.[151]

Generally, a successor to a landlord's interest in the premises, such as a purchaser of the premises or a representative of the landlord's estate, has all the rights and obligations of a landlord with respect to the security deposit held by the predecessor landlord that has not been returned to the tenant, irrespective of whether the security deposit was transferred or distributed to the successor.[152] However, there is an exception for when the property ownership is terminated by foreclosure: The successor's liability is limited to the security deposit received by them.[153]

e. The tenant's right to remove fixtures

A fixture can be defined as a former chattel that is connected to the land. It is considered as a part of the subject realty by disinterested third parties. The fixture is connected to the land due to its annexation or association in use with the land. Based on a substantial number of decisions, tenant fixtures can be classified into three categories: trade fixtures, agricultural fixtures, and domestic fixtures (which includes ornamental fixtures).[154]

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150 RURLTA 1205 cmt.
151 Kurtz & Noble-Allgire, *supra* note 57, at 529.
152 RURLTA 1205(d).
153 RURLTA 1205(e).
154 Restatement (Second) of Property, Landlord & Tenant § 12.2 (1977), comment a.

A trade fixture can be defined as that which the tenant attaches to the demised premises to carry out the tenant's trade or business. In the context of the tenant's right to remove the trade fixture, the court divides such fixtures into removable and non-removable trade fixtures that generally improve the demised property. Based on the type of trade fixture, previous cases have held that a tenant cannot remove equipment that was installed for general purposes such as for heating the demised property. On the other hand, a tenant has a right to remove any equipment that was installed for the particular needs of the tenant's trade or business.[155] In addition, a tenant cannot remove a chattel if the chattel is so annexed to an existing structure that it becomes an integral part of the structure.

Agricultural fixtures that are annexed to the property leased for agricultural purposes are treated as same as trade fixtures.[156]

A domestic fixture can be defined as an annexation made by a residential tenant to improve the comfort, convenience, or aesthetics of the leased demise. The court tends to distinguish between attachments that fulfill a particular need of the tenant and attachments that generally tend to improve the leased demise. The tenant does not have the right to remove attachments, such as oil furnaces, that improve the

[155] Appliance Buyer Credit Corp. v. Crivello, 168 N.W. 2d 892, 898 (Wis. 1969); R&D Amusement Corp. v. Christianson, 392 N.W. 2d 385, 388 (N.D. 1986).
[156] Squillante, Alphonse M., *The Law of Fixtures: Common Law and the Uniform Commercial Code – Part I: Common Law of Fixtures,* 15 HOFSTRA L. REV. 191, 238–239 (1987).

leased demise. On the other hand, the tenant has the right to remove attachments that fulfill a particular need of the tenant, such as a chandelier.[157]

f. The right to transfer the lease agreement.

It is a general rule that the interests of the landlord and tenant are freely alienable, in whole or in part, unless there is contractual agreement or statutory provision that prohibits the same.[158] There is a major exception to this rule, however. Based on the nature of the tenancy at will, the tenant at will may continue to be effective only as long as both parties agree to continue it. If one of the parties attempts to transfer their respective interests, it is usually construed as the transferor no longer intending to continue the tenancy.[159] If one of the parties transfers or attempts to transfer their respective interests, the tenancy at will is terminated unless the transferee and the other party of the tenancy at will approve of the transfer.[160]

There is another well-recognized exception to the abovementioned rule. While the rent and other benefits expected to be derived by the landlord under the lease depend upon the special skills and expertise of the tenant, the tenant is not entitled to assign or sublease the property without the landlord's consent.[161] Usually, under the lease agreement formed, the rent is a percentage of the tenant's production, profits, or

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[157] Raymond v. Strickland, 52 S.E. 619 (Ga. 1905); Schofer v. Hoffman, 34 A. 2d 350 (Md. 1943).
[158] Restatement (Second) of Property: Landlord & Tenant § 15.1.
[159] Restatement (Second) of Property: Landlord & Tenant § 1.6, § 15.1. (1977); see L. S. Tellier, *Annotation, Sublease or Assignment of Tenancy at Will,* 167 A. L. R. 1030 (1947).
[160] *Id.*
[161] Crump v. Tolbert, 198 S. W. 2d 518 (Ark. 1946); Restatement (Second) of Property: Landlord & Tenant § 15.1 (1977).

sales amount. The existence of the implied covenant against assignment of the demised premises may be denied if the lease also reserves a substantial minimum rent. A high minimum rent negates the implication of reliance and, therefore, the implied covenant against assignment as well.[162]

Regarding the covenants against the transfer of the tenant's interest, the courts uphold the covenants that prohibit the tenant from assigning or sub-leasing all or any part of the demised premises without the consent of the landlord.[163] Although the courts uphold the covenants against the transfer of the tenant's interest, the covenants are construed against the landlord and in favor of the tenant. For example, a covenant against assignment without the consent of the landlord is not effective enough to prevent the tenant from sub-leasing the demised premises and vice versa.[164]

2. The Tenant's Duties

a. Duty to pay rent and refrain from committing waste

Under the traditional common law concept, wherein the lease is considered as a conveyance of a property interest, tenants have only two obligations. The first is to pay the rent, and the second is to refrain from committing waste upon or to the detriment of the leased property.[165] Therefore, a tenant has an obligation to repair damages apart from those caused by "reasonable wear and tear."[166]

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[162] Williams v. Safeway Stores, Inc., 424 P. 2d 541 (Kan. 1967).
[163] Restatement (Second) of Property: Landlord & Tenant § 15.2.(1977); Serge v. Ring, 170 A. 2d 265 (N.H. 1961).
[164] De Baca v. Fidel, 297 P. 2d 837 (Cal. 1985).
[165] Kurtz & Noble-Allgire, *supra* note 57, at 452.
[166] *Id*.

Section 3.101 of the URLTA regulated a tenant's duty to maintain the leased property. This section is the converse of Section 2.104. It established the minimum duties of a tenant, which were consistent with the public standards of health and safety.[167] Section 3.101 required that a tenant shall

> (1) comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety;
> (2) keep that part of the premises that he occupies and uses as clean and safe as the condition of the premises permit;
> (3) dispose from his dwelling unit all ashes, garbage, rubbish, and other waste in a clean and safe manner;
> (4) keep all plumbing fixtures in the dwelling unit or used by the tenant as clear as their condition permits;
> (5) use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances including elevators in the premises;
> (6) not deliberately or negligently destroy, deface, damage, impair, or remove any part of the premises or knowingly permit any person to do so; and
> (7) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises.[168]

The comments under Section 2.104 of the URLTA explained that the repair and maintenance of the dwelling unit and premises were imposed upon the landlord. It stated that major repairs and even access to essential systems outside the dwelling unit are beyond the capacity of the tenant. On the other hand, the duties of cleanliness and proper use of the leased property were imposed upon the tenant.[169]

This provision was reflected in the RURLTA with only minor changes. Section 501(b)(3) specifies that a tenant shall keep the dwelling reasonably safe and sanitary

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[167] URLTA § 3.101 cmt. (1972).
[168] Id. § 3.101.
[169] Id. § 2.104 cmt.

except with respect to duties imposed on the landlord by the lease, this act, or a law other than this act.[170] Thus, the comment under Subsection (b)(3) states that the tenant is obligated to keep the dwelling unit in a safe and sanitary condition unless the duty to do so is imposed upon another, such as the landlord.[171]

Section 501(b)(7) also provides regulations for the tenant's destruction of the premises. Section 501(b)(12) states, "unless the landlord and tenant otherwise agree, shall use the dwelling unit only for residential purposes." However, there are many cases of tenants using their unit for incidental purposes. Section 501(b)(12) of the RURLTA leaves the decision about whether the tenant's incidental use of the unit would constitute as a non-residential use to judicial determination.[172] If the parties agree that the tenant can use the unit for both residential and business purposes under Section 501(b)(12), the actual damages dealt with by the tenant due to the landlord's non-compliance with the lease or this act may include foreseeable damages attributable to the business use.[173]

The RURLTA regulates any other tenant's commonsensical duties in Section 501(b) and tries to clarify the meaning of "normal wear and tear," which is the exception to the tenant's duty to return the leased premises to the landlord in the same condition as when the lease period began. Section 501(a) of the RURLTA defines "normal wear and tear" as follows:

> [In] this section, "normal wear and tear" means deterioration that results from the intended use of a dwelling unit, including breakage

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[170] RURLTA § 501(b)(3).
[171] Id. § 501 cmt.
[172] *Id.*
[173] *Id.*

> or malfunction due to age or deteriorated condition. The term does not include deterioration that results from negligence, carelessness, accident, or abuse of the unit, fixtures, equipment, or other tangible personal property by the tenant, immediate family member, or guest.

b. The duty to accept the landlord's access to the unit under certain circumstances.

Under the traditional view of leases, the landlord does not have a right to enter the leased property unless the tenant defaults on the rent payment.[174] However, from the perspective of the contract law that evolved from this traditional view, the landlord has the right to enter the tenant's unit for certain specified reasons.[175]

The URLTA regulated the circumstances under which the landlord can access the tenant's unit in Section 3.103. It states that the landlord can enter the tenant's dwelling unit "[i]n order to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors"[176] or for emergency reasons,[177] with the tenant's consent obtained in advance.

The RURLTA followed the basic concepts of the URLTA, but the articles were rearranged and the instructions related to several issues were expanded upon.[178] Section 701(a) of the RURLTA states that a landlord may not enter a dwelling unit unless entry is permitted by the lease agreement, the tenant's consent, or a court order

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[174] Kurtz & Noble-Allgire, *supra* note 57, at 472.
[175] Hiram H. Lesar, Landlord and Tenant, in 1 AMERICAN LAW OF PROPERTY 173, 253 (Little, Brown and Company ed. 1974) (1952).
[176] Section 3.103(a) of URLTA
[177] Id 3.103(b).
[178] Kurtz; Noble-Allgire, *supra* note 57, at 473.

or if the tenant has abandoned the unit and entry is permitted by a law other than the RURLTA.[179] The tenant may not unreasonably withhold consent for the landlord to enter the dwelling unit to inspect it, make necessary or agreed-upon repairs, alterations, or improvements, supply a necessary or agreed-upon service, or exhibit the unit to a prospective or actual purchaser, mortgagee, tenant, worker, contractor, or public official responsible for enforcing a building, housing, fire, or health code or other law.[180] Section 701(c) requires the landlord to enter the unit only at a reasonable time and with the tenant's consent. The landlord shall give the tenant a notice of at least 24 hours regarding the landlord's intent to enter the unit.[181] Section 701(d) provides an exception to the above and states that the landlord can enter the dwelling unit without the tenant's consent for routine maintenance or pest control. However, the landlord should give the tenant a notice of at least 72 hours regarding the intent to enter the unit or a fixed schedule for the maintenance or pest control at least 72 hours before the first scheduled entry into the unit.[182] Section 701(e) also provides an exception to the landlord's access to the tenant's dwelling unit. In case of an emergency or when maintenance or repairs are to be done at the tenant's request, the tenant's consent is not required, but the landlord should provide a notice that is reasonable for the circumstances.[183] If the tenant is not present and the notice is not

[179] Section 701(a) of RULRTA.
[180] *Id* 701(b).
[181] *Id* 701(c).
[182] *Id* 701(d).
[183] *Id.* 701(e).

given, the landlord shall leave a notice of the entry in a conspicuous place within the unit, stating the date and time of entry as well as the reason for it.[184]

III. A COMPARISON OF THE TENANT'S RIGHTS AND OBLIGATIONS IN KOREA AND THE U.S.

A. The Similar Tenant Rights and Obligations

There are several rights and obligations under the lease agreements of Korea and the U.S. that are similar in both the countries. This is because the rights and obligations are about the nature of lease agreement and depict a common concept related to the lease agreement in each legal system. Since this thesis is focused on the differences between Korea and the U.S. and the importance of referring to the differences in each legal system, the similarities between the two systems are summarily reviewed.

1. Rights and Obligations Related to the Leased Object

The tenant's rights and obligations related to the nature of the lease agreement should be similar in both the countries. For example, the tenant's right to use the demised premises and obligations to pay the rental fee, return the object upon the lease agreement's termination, maintain the original condition of the demised premises, and refrain from committing waste to or upon the leased property are the same in both the U.S. and Korea.

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[184] *Id.*

In addition, the landlord's duty to maintain the premises, which is similar to the implied warranty of habitability, is the same in both the countries. The habitability of the leased premises is an important term of the lease agreements of both the countries, and the landlord is considered to have breached his obligation if he doesn't provide the tenant with habitable leased premises.

2. Rights and Obligations Regarding the Deposit Money

The rights and obligations related to the deposit money is also similar in both the countries, with the tenants protected by a special or uniform act. In Korea, a transferee of a leased house or successor of the right to the lease of a house is deemed to have succeeded to the status of landlord. In the U.S., a successor to a landlord's interest in the premises, such as a purchaser of the premises or a representative of the landlord's estate, has all rights and the obligations of a landlord with respect to the security deposit that has not been returned to the tenant by the predecessor landlord, irrespective of whether the security deposit was transferred or distributed to the successor. Therefore, a tenant who doesn't collect the deposit money after the lease agreement gets terminated is protected in both the countries.

However, there is a difference between the U.S. and Korea in the successor's landlord status. In Korea, the successor has the same rights and obligations as the original landlord, not only for the deposit money.

Therefore, a tenant in the U.S. cannot choose to remain within the premises if the leased premises are sold to a new owner even if the duration of the lease has not ended. On the other hand, a tenant in Korea can choose to remain for the duration of the lease agreement and collect the deposit money from the new owner or immediately quit the agreement, even if the lease duration hasn't ended, and collect the deposit from the original landlord. Thus, the tenant has the option of choosing to remain if the duration of the lease agreement has not expired and collecting the deposit money from the new owner, as per the successor's obligation to have the lessor's status under Article 3(4) of the Korean Housing Lease Protection Act. This is related to the right to claim the premises over a third party and is discussed further in a latter section of this chapter.

3. Duty to Accept the Landlord's Access to the Unit Under Certain Circumstances

This duty is also similar among the tenants of both the countries. The duty to maintain the premises is one of the important duties of any landlord based on the nature of the lease agreement, as we reviewed above. The duty to accept the landlord's access is a duty of the tenant that corresponds to the abovementioned duty of the landlord. In Korea, Article 624 of the Civil Act regulates that the lessee may not object to a lessor who performs any act deemed necessary for the preservation of the object

leased. This is the same as the duty of the landlord within the Article 701 of the RULTA.

B. The Different Tenant Rights and Obligations

1. The Right to Assign or Sub-Lease a Right of Lease

A tenant with a registered *Chonse* agreement can freely assign or sub-lease their rights. This is a logical conclusion that's been made based on the status of a tenant with a right in rem. On the other hand, a tenant with an unregistered *Chonse* or typical lease agreement is required to get consent from the landlord for a sub-lease.

A tenant with a lease agreement in the U.S. is similar to a tenant with a registered *Chonse* agreement in Korea as they would be able to freely transfer their interest in the demised premises in principle. However, there is a covenant against the transfer of the tenant's interest that's common, with requirements such as the landlord's consent in place.

A landlord's refusal to provide consent without reasonable ground can be considered as an infringement of the tenant's right to the assignment of the sub-lease. Therefore, the view of the court to restrict landlords from withholding their consent in the U.S. is an important reference point for a tenant's right to assign or sub-lease the demised premises if they hold an unregistered *Chonse* agreement or a typical lease agreement in Korea. Specifically, the view of the court to restrict the termination through a franchise agreement is analogous to the tenant's

right to collect the premium in Korea. This topic is examined in detail in Chapter 4.

2. Right to Claim the Premises Against a Third Person

A tenant with a registered *Chonse* agreement can claim the leased property against not only a counter party but also a third party due to the tenant's status of right in rem. A tenant with an unregistered *Chonse* agreement or a typical lease agreement can stake their claim against a third party under Article 621(1) of the Civil Act or the special acts even though they only have a right in personam. On the other hand, a tenant in the U.S. has no option other than to move out when the leased premises are sold due to the lack of the right to claim the premises against a third party.

This is the most important difference between the lease agreements of Korea and the U.S. In the U.S., there are several rent control acts for states where the rental market is in high demand, such as New York, California, etc. These acts limit the reasons that can be provided to evict a tenant. For example, California limits the eviction reasons to the tenant violating a significant term of the lease or engaging in illegal or prohibited activities, or the landlord or family member wanting to move into the unit or substantially remodel the property even if the duration of the fixed lease term reaches termination. However, the protection provided by the rent control acts is limited to the restrictions for eviction. There are still situations that the tenant cannot claim the property over a new owner once

the premises are sold such as Ellis Act Evictions of California. Therefore, this right to claim the premises against a third party that's present in Korea can be referred in order to protect the right to remain of tenants when the premise is sold to new owner in U.S.

3. Right to Demand the Purchase of Accessories of a Building

In Korea, a tenant has the right to demand that the landlord purchases the accessories of a building when the agreement period ends if the accessories had been attached with the consent of the landlord or purchased from the landlord. In this case, the landlord cannot refuse the tenant's demand. There is no such right in the U.S., but tenants have the right to remove textures.[185]

Therefore, the regulations in the Korean Civil Act can be referred in order to protect tenants of house lease or land lease to own the building when the accessories for the building are valuable to the landlord and society in the U.S.

4. Right to Unilaterally Terminate the Lease due to Domestic Violence

Unlike the provisions under the RURLTA, tenants in Korea do not have the right to unilaterally terminate a lease in cases of domestic violence etc. In Korea, several acts have been established to protect the

[185] Restatement (Second) of Property, Landlord & Tenant, art. 12.2 (1977), comment a.

victim of domestic violence and punish the perpetrator. These include ths Act on Special Cases concerning the Punishment, etc of Crimes of Domestic violence and Act on the Prevention of Domestic violence and Protection, etc. of victims. This indicates that the Korean legal system regards a domestic violence case as a criminal case and not a civil case related to the lease agreement. While shelter is provided to victims under the Act on the Prevention of Domestic violence and Protection, etc. of victims, there is no protection provided through the lease agreement. Therefore, Section 801 of the RURLTA can be a good reference to protect victims of domestic violence to Korea. However, this thesis is focused on the tenant's right to remain on the leased premises based on the lease agreements of both the U.S. and Korea as well as the tenant's right to collect the premium amount for a commercial building in Korea. Therefore, this topic of domestic violence will not be specifically examined in this thesis.

5. Right to be Protected from Retaliatory Evictions

Unlike the RURLTA in the U.S., there are no rights that protect tenants from retaliatory evictions in Korea. There are several presumable reasons for the same. First, most of tenants in Korea are protected by the Housing Lease Protection Act. It specifies a minimum lease period, and the tenant is allowed to remain on the premises for two years. Second, tenants can be evicted due to defaulting on payments over two months or a

breach of the lease agreement. . Therefore, if the tenant files a suit against the landlord because of the landlord's default, the tenant is guaranteed to stay in the demise for 2 years at minimum even though the landlord wants to evict him. In this regard, the Korean legislator has not recognized the necessity of the Article 9 of the RURLTA.

However, a landlord can claim other reasonable grounds for committing a retaliatory eviction such as the tenant violating a significant term of the lease. Therefore, protection from retaliatory evictions is necessary in Korea, and it can help protect a tenant in danger of lease termination before the agreement period ends.

CHAPTER 3. THE EXISTING STANDARDS TO PROTECT TENANTS WITH LEASE AGREEMENTS

I. EXISTING STANDARDS IN THE U.S. LEGAL SYSTEM TO PROTECT TENANTS

A. Standards to Protect Tenants

1. Overview

In the early 1940s, the members of the American Law Institute and National Conference of Commissioners on Uniform State Laws realized that law reforms were required to control the injustices rampant in the marketplace.[186] The members' efforts to regulate marketplace abuse had been analyzed by Allen R. Kamp.[187] Based on his efforts, most of the U.S. states enacted the Code to control the injustices by the mid-1960s. Realizing the injustices in the contractual content and protecting the party with an unequal level of bargaining power were mandated as social duties by the Code provisions.[188] The doctrines of good faith and unconscionability were used to control the injustices.[189] Many commentators have mentioned the significance of the doctrines of good faith[190] and unconscionability[191] in contract law. However, there

[186] Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647 (2009), 667.
[187] Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code: 1949–54*, 49 BUFF. L. REV. 359 (2001); Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–49*, 51 SMU L. REV. 275 (1998).
[188] U.C.C. § 1–304, § 2–302; U.C.C. § 2–719 (3).
[189] Carolyn Edwards, *supra* note 186, at 669.
[190] John S. Sebert, *Rejection, Revocation, and Cure Under Article 2 of the Uniform Commercial Code: Some Modest Proposals*, 84 NW. L. REV. 375, 383 (1990).

were some confusion around the scope and meaning of the doctrines as the legislatures had not established guidelines for the application of the doctrines.[192] The legislatures entrusted the courts with the task of deciding the details for applying the doctrines.[193] The doctrines of good faith and unconscionability which were established by the courts to control injustices such as unfair terms in lease agreements are discussed in the following sections.

2. The Doctrine of Unconscionability

A number of scholars have declared that the doctrines of good faith and unconscionability are forms of state action and judicial restraint. They worried that these doctrines, which allow the courts to control the terms of the contract, may restrict the exercise of freedom of contract and decrease the certainty and predictability of the marketplace.[194] Professor Richard Danzig argued that such doctrines are simply tools that allow the courts to assess contracts and encourage the judge's value of the parties.[195] Jean Braucher also criticized the standard of unconscionability or unfairness as being vague and stated that the doctrine is

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[191] Carol B. Swanson, *Unconscionable Quandry: UCC Article 2 and the Unconscionability Doctrine*, 31 N. M. L. REV. 359, 361–62 (2001).
[192] Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L. J. 619, 621–26 (1981).
[193] John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1043 (1976).
[194] Carolyn Edwards, *supra* note 186, at 671.
[195] Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code,* 27 STAN. L. REV. 621, 629–30 (1975).

ineffective in protecting consumers.[196] For this reason, the scholars insisted that these doctrines should be applied with extreme caution, as contract law fundamentally seeks to protect private autonomy and preserve market efficiency.[197]

On the other hand, other scholars consented the legislatures' incorporation of the doctrines that allow courts to address the evils of contract practice.[198] John J. Murray, Jr., mentioned that without good faith, "commercial transactions would be seriously impeded by the resulting lack of trust."[199] John S. Sebert mentioned that the expansion of the doctrine of good faith was the most important theoretical development in American contract law.[200] Robert S. Summers also applauded the movement to control the fairness of the agreement by arguing that the doctrines of good faith and unconscionability were "one of the hallmarks of our time."[201]

Even though the debate about the efficiency of social controls in contract relationships was refueled among the commentators, the courts believed that state action to protect the fairness of the contract, such as by controlling the unfair terms in a lease agreement, restricts the parties' freedom of contract during the 1960s and 1970s.[202] However, the court also recognized the necessity to consider the "concern for the uneducated and often illiterate individual who is the victim of gross inequality

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[196] Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B. U. L. REV. 349, 396 (1988).
[197] Carolyn Edwards, *supra* note 186, at 671.
[198] *Id*.
[199] John J. Murray, Jr., *"Basis of the Bargain" Transcending Classical Concepts,* 66 MINN. L. REV. 283, 320 (1982).
[200] John S. Sebert, *Rejection, Revocation, and Cure Under Article 2 of the Uniform Commercial Code: Some Modest Proposals,* 84 NW. L. REV. 375, 383 (1990).
[201] Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 834 (1982).
[202] Carolyn Edwards, *supra* note 186, at 672.

of bargaining power."[203] Therefore, the courts had to choose between promoting the freedom of the contract by judicial restraint and promoting the fairness of the contract by imposing limitations on the freedom.[204] In this situation, the consensus that unconscionability should be applied only when "lopsidedness begins to scream" was reached.[205] For the exceptional application of the unconscionability, the courts developed the two-prong test. The two-prong test requires both procedural unconscionability and substantive unconscionability to be applied. Professor Arthur A. Leff referred to bargaining naughtiness as "procedural unconscionability," and to evils as "substantive unconscionability" in the resulting contract.[206] Therefore, the doctrine was applied to protect the poor, inexperienced, uneducated, and low-income groups since "they are the most vulnerable to oppressive bargains."[207] In this situation, the presumption of party competence, which is basic concept of the freedom of contract, could be ignored.[208]

Even though the Code was adopted by the state legislatures, the doctrine of unconscionability was used as a tool for fraud, duress, and undue influence on the margins of the law unless a legislative mandate or extraordinary circumstances demanded otherwise.[209] Regarding the application of the doctrine of

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[203] Jones v. Star Credit Corp., 298 N. Y. S. 2d 264, 265 (N.Y. Sup. Ct. 1969).
[204] Carolyn Edwards, *supra* note 186, at 672.
[205] *Id.* at 672–3; Karl N. Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341, 402 (1937).
[206] Arthur Allen Leff, *Unconscionability and the Code – The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).
[207] Kugler v. Romain, 279 A. 2d 640, 652 (N.J. 1971).
[208] Carolyn Edwards, *supra* note 186, at 673.
[209] *Id.*

unconscionability, the following was mentioned by the court during the El Paso Natural Gas Co. v. Minco Oil & Gas Co. case.[210]

> Our court system cannot act as the mother hen watching over its chicks, standing ready to ameliorate every unpleasant circumstance which might befall them … One's right to negotiate a bargain, to exercise free will, to choose a path, and to even make a bad deal must be admitted and respected.

In summary, the doctrine of unconscionability is one of the standards that protects a tenant who is vulnerable to oppressive bargains. However, the usage of this doctrine requires the tenants to satisfy the two-prong test. Therefore, other, stronger standards need to be discussed for justice in the marketplace and effective protection of tenants.

3. The Doctrine of Good Faith

The Restatement (Second) of Contracts states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[211] The Uniform Commercial Code defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing,"[212] and it explicitly regulates "every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement."[213]

The doctrine of good faith began to attract attention in the late 1970s. Professor Burton stated, "Good faith performance cases typically involve arm's-length

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[210] El Paso Natural Gas Co. v. Minco Oil & Gas Co., 964 S. W. 2d 54, 62 (Tex. App. 1997).
[211] Restatement (Second) of Contracts § 205 (1981).
[212] 3 U.C.C. § 1–201(b)(20) (amended 2003).
[213] *Id.* § 1–304.

transactions, often between sophisticated business persons."[214] The relatively strong party can exercise their discretion based on the contract with specific terms to confer the discretion of the party. On the other hand, the counter party relies on the doctrine of good faith for their defense.[215] Although the doctrine of good faith is traceable to earlier times, its performance was developed in the law of contract in the early 1900s.[216] However, guidance about when and how the doctrine would be applied was not provided through court cases or the Code's official comments.[217] Only the scholars provided different visions of the doctrine's scope, meaning, and effects.[218] Under this situation, the doctrine of good faith was incorporated into the common law,[219] but this codification did not discourage courts from imposing limitations on the doctrine's use.[220] Many courts held that the doctrine of good faith is not breached if a party's actions are clearly permitted by the terms of the contract.[221] In the case of

[214] Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith,* 94 HARV. L. REV. 369, 383. (1980).
[215] *Id* at 383–4.
[216] Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 566 (2006).
[217] Carolyn Edwards, *supra* note 186, at 679.
[218] *Id*; Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers,* 69 IOWA L. REV. 497 (1984); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code,* 30 U. CHI. L. REV. 666 (1963); Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* 54 VA. L. REV. 195, 216–20 (1968); Summers, *supra* note 201.
[219] Restatement (Second) of Contracts § 205 (1981).
[220] Carolyn Edwards, *supra* note 186, at 680.
[221] *Id.*

Centerre Bank v. Distrib's, Inc., the court mentioned rejected the debtor's claim and argued that good faith applies to the call for the payment of a demand note:[222]

> The imposition of a good faith defense to the call for payment of a demand note transcends the performance or enforcement of a contract and in fact adds a term to the agreement which the parties had not included.

The case of Corenswet, Inc. v. Amana Refrigeration, Inc.[223] is an example of how the court imposed limitations on the use of good faith. This case was about the exclusive distributorship agreement, which allowed for the termination of a contract by either party "at any time for any reason" after a ten-day notice. Corenswet sued to prevent Amana from terminating the relationship on the grounds that Amana's attempted termination was arbitrary and capricious.[224] The court made a decision about applying the doctrine to a contract regarding the termination by either party "at any time for any reason" as follows:

> When a contract contains a provision expressly sanctioning termination without cause there is no room for implying a term that bars such a termination. In the face of such a term there can be, at best, an expectation that a party will decline to exercise his rights.[225]

This court's view was based on the plain meaning rule that had been a standard for the interpretation and enforcement of contracts for over a century.[226] The plain meaning rule means that otherwise relevant information about the words used in an agreement is forbidden when the statutory word is

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[222] Centerre Bank v. Distrib's, Inc., 705 S. W. 2d 42, 48 (Mo. Ct. App. 1985).
[223] 594 F. 2d 129 (5th Cir. 1979).
[224] *Id* at 131.
[225] *Id* at 138.
[226] Carolyn Edwards, *supra* note 186, at 681.

plain or unambiguous.[227] When the plain meaning rule is applied, judicial intervention can be discouraged. On the other hand, the court can rewrite the contract when the word of the contract is not plain and does not function as a social duty.

Even though this case is about an exclusive distributorship and not a lease, the court's view can be applied to lease agreements as well, since the plain meaning rule that the court's view was based on can be applied to lease agreements by the U.S. Supreme Court.[228] The case concerned a 99-year ground lease, and the main issue was the meaning of the rent payment clause. The trial court granted a summary judgment to the landlord, held that the lease was not ambiguous, determined the meaning of the rental clause, and awarded the rent amount to the landlord based upon the trial court's interpretation of the rental clause and the application of the plain meaning rule.

However, this court's view is different from the view of Korean Supreme Court. Article 2 of the Korean Civil Act is similar to the doctrine of good faith. This is a general provision of the Civil Act, and its functions include rewriting the agreement if a clause is against the doctrine of good faith regardless of the existence of the plain meaning clause which is contrary to the doctrine. Therefore, Article 2 of the Korean Civil Act, which is similar to the

[227] William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule,* 84 U. CHI. L. REV. 539, 566 (2017).
[228] Berg v. Hudesman, 115 Wash. 2d 657 (1990).

doctrine of good faith, can be applied even if the agreement has an express clause against the doctrine.[229]

Therefore, this doctrine would be more useful for protecting tenants in Korea since the doctrine of good faith can be used as the defense even if there is an express clause that's disadvantageous to the tenant in the agreement, provided that there are some limitations to the application of the doctrine in contract cases for different reasons since the Korea court is very careful to use the general provision. This limitation is further discussed in section III A of this chapter.

B. The Background for the Development of these Standards

Under the doctrine of freedom of contract, parties can exercise their free will and decide on the form and terms of a contract, and the parties' decision should be honored. It is inevitable that the freedom of contract ensures that the supervision of contractual terms is reduced to a bare minimum.[230] This is the meaning of contractual justice.[231] Historically, the interventions taken to address the agreement by regulations were limited.[232] The notion that harsh or unfair terms need to be invalidated was insufficient in the sphere of contract law, unlike public policy.[233] Due to the narrow scope of doctrine, which invalidated unfair terms such as the doctrines

[229] Kim Yong-Dam, annotation on the Civil Act (edit 4), at 134 (2010).
[230] *Id* at 144.
[231] *Id.*
[232] P. S. Atiyah, Freedom of Contract and the New Right, in ESSAYS ON CONTRACT, 355-–358 (1986).
[233] Reshma Korde, *Good Faith and Freedom of Contract*, 2000UCL Jurisprudence Rev. 142, 144(2000).

of duress and mistake in the agreements, the contents of the contracts were free from the external intervention.[234]

However, the exceptions to the freedom of contract became important in spite of the prevailing view,[235] resulting in deviations from the traditional court decisions. In the case of Redgrave v. Hurd,[236] the court adopted misrepresentation to avoid a contract, which could be applied even if it is innocent. In addition, the court held that the doctrine of undue influence made the unfair contracts to be avoided.[237]

The new doctrines such as deviations that were gradually introduced by the court increased in number. The classical stance of the contract law, which gave autonomy to the parties, was changed to a modern stance that is limited and regulated by the law or public intervention.[238]

The modern contract law provides provisions to control the process by which contracts are made as well as interventions based on the contents of contract. Under the U.S. law, "procedural unconscionability" is a tool used to control the process of making contracts. To intervene due to the contents of a contract, the English law requires a notice to explain the unusualness of the term by printing it in red ink on the face of the document, along with a red hand pointing toward it.[239]

There is a statutory intervention that limits and regulates the contents of a contract. The Consumer Credit Act of 1974, s. 67–68, has helped curtail the unfair

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234 *Id* at 145.
235 Id.
236 Redgrave v. Hurd (1881) 20 ChD 1.
237 Wright v. Carter [1903] 1 Ch 27, Reshma Korde, *supra* note 233 at 146.
238 Id.
239 Lord Denning, J Spurling Ltd v. Bradshaw [1956] 1 WLR 461.

terms to the party that suffers the loss and made consumers rescind contracts on grounds of undue pressure.[240]

In spite of the trend in the exceptions made to the freedom of contract by courts and regulations, courts have tried to find a balance for the protection of consumers, recognizing that consumers are rational adults who obtain legal advice.[241] In the case of Multiservice Bookbinding Ltd v. Malden,[242] the court held that even though the contract had harsh and unfair terms, it had to be upheld since the consumers had been advised by their lawyers and understood the important elements of the contract.

In conclusion, contract law can control the formation and implementation of a contract using an initial test of validity, as discussed above. However, once a contract has passed this test, exercising control over the terms of contract due to unfairness is problematic as it can pose a conflict with the freedom of contract. Notwithstanding this problem, the public policy has tried to promote contractual justice.[243] Therefore, standards need to be established to decide whether substantive unfair terms and articles incorporated into model laws or uniform acts are required.

C. The Necessity for Comparative Legal Studies

Despite the standards present to protect tenants, new standards to strengthen the protection are required, since the established standards have elements that need to

[240] Reshma Korde, *supra* note 233 at 147.
[241] *Id* at 148.
[242] Multiservice Bookbinding Ltd v. Malden [1979] Ch 84.
[243] Reshma Korde, *supra* note 233, at 148.

be satisfied if a tenant wants to use any of them as a defense, and a landlord can decide to terminate or not renew a lease at the end of the agreement period under the general doctrine of common law, as mentioned above. Therefore, studies on the acts and statutes of countries that have articles to provide strong protection to tenants, such as an article that provides a tenant the right to renew a lease agreement, is required. With the results from the comparative studies, tenants can be protected in a clearer and more predictable manner.

II. EXISTING STANDARDS IN THE KOREAN LEGAL SYSTEM TO PROTECT TENANTS

A. Standards to Protect Tenants

1. Overview

By the common view of Korean scholars, the liberal economy was a highly developed one, and it underwent a change towards monopolistic capitalism. The liberal economy contributed to the development of capitalism and had some unintended side effects; it increased the gap between the rich and poor and divided the capitalists and workers into different classes. Due to these situations, critics stated that freedom of contract functioned as a capitalist's tool to control the economically weaker segment of people and force them into contracts. The scholars who brought up this problem also pointed out the necessity to balance the economic power of the parties to a contract and protect the vulnerable party.

Consistent with the argument that presents the necessity of protecting people with weak bargaining powers, such as tenants, the Current Civil Act and several

special acts, which mean the acts are applied preferentially, include various limitations on the freedom of contract to protect the economically weaker people or control the economy on the basis of social requirements.

The various types of the standards that are in place to protect tenants are discussed in detail below.

2. Forced Contract

a. Forced contract in several public service acts.

Some acts include articles that force a party to make a contract. In a forced contract, the person or entity that provides people with important and essential services or products cannot refuse to make a contract and has an obligation to make a contract with equal conditions. A forced contract has the same effect as a contract made by the parties themselves.

While this is not directly related to the standards that protect tenants, a forced contract can be used when the legislation to protect the tenant is made. Forced contracts are made for public businesses, to meet the minimum requirements for life, and to maintain economic order. Therefore, it can be used and referred to in the lease contract managed by the government or an entity delegated by the government for the poor. There are several situations in which a party may be forced to enter into a contract. The following acts regulate the articles related to forced contracts.

There is a type of forced contract that regards public business. Article 8 of the Railroad Service Act states that “Every railroad service provider shall commence transportation on the date or within the period designated by the Minister of Land,

Infrastructure and Transport,"[244] and Article 20 regulates, "Every railroad service provider shall … not engage in any act … such as … refusing to conclude a transportation contract without any justifiable grounds."[245] Article 14 of the Electricity Utility Act states that "No operator of electricity generation business and operator of electric sales business shall refuse to supply electricity without just ground prescribed by Presidential Decree."[246] The Telecommunications Business Act enumerates acts by telecommunication business operators that are prohibited. Subsections 1 and 2 under Article 50 of the Telecommunications Business Act regulate several prohibited acts as follows:[247]

> 1. Acts that place unfair or discriminative conditions or restrictions on the provision of equipment and facilities, joint utilization, interconnection or joint-use services, wholesale services, provision of information, etc.;
> 2. Acts that unfairly refuse to conclude an agreement on the provision of equipment and facilities, joint utilization, interconnection or joint-use services, wholesale services, provision of information, etc. or fail to implement a concluded agreement without justifiable grounds.

Article 39 of the Water Supply and Waterworks Installation Act regulates that "No general waterworks business operator shall refuse to supply tap water, without justifiable grounds prescribed by Presidential Decree, to a person that wants to have

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[244] Railroad Service Act, Act No. 7303, Dec. 30, 2004, amended by Act No. 16637 Nov. 26, 2019, art 8 (S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/main.do (login and search required).

[245] *Id* at art. 20.

[246] Electricity Utility Act, Act No. 953, Dec. 31, 1961, amended by Act No. 16945, Feb. 4, 2020, art. 14 (S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/main.do (login and search required).

[247] The Telecommunications Business Act, Act No. 3686, Dec. 30, 1983, amended by Act No. 16824, Dec. 10, 2019, art. 50 (S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/main.do (login and search required).

tap water supplied."[248] The Urban Gas Business Act regulates gas wholesale dealers and general urban gas business entities' obligation to supply natural gas. Article 19 mentions the obligation. Subsection 1 of Article 19 regulates that no gas wholesale dealer shall refuse or suspend the supply of natural gas he/she is supposed to supply to general urban gas business entities etc.[249] Subsection 3 of Article 19 regulates that no general urban gas business entities shall refuse to supply urban gas to gas users except in cases permitted by the act.[250] Article 26 of the Passenger Transport Service Act regulates that a transport employee shall not refuse passengers or forces them to alight on the way to a destination without good cause.[251] The Postal Service Act has a criminal penalty provision for when a person who engages in the postal service refuses the service. Article 50 of the Postal Service Act states the following:[252]

> If a person who engages in postal services refuses to handle postal items without justifiable grounds or intentionally causes delay in handling postal items, he/she shall be punished by imprisonment with labor of up to one year or by a fine of up to 10 million won.

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[248] The Water Supply and Waterworks Installation Act, Act No. 939, Dec. 31, 1961, amended by Act No. 16607, Nov.26, 2019, art. 3 9(S. Kor), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/main.do (login and search required).

[249] The Urban Gas Business Act, Act No. 3133, Dec. 5, 1978, amended by Act No. 16937, Feb. 4, 2020, art. 19(1) (S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/main.do (login and search required).

[250] *Id* at art. 19 (3).

[251] The Passenger Transport Service Act, Act No. 916, Dec. 30, 1961, amended by Act No. 16632, Nov. 26, 2019, art. 26(S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/main.do (login and search required).

[252] The Postal Service Act, Act No. 542, Feb. 1, 1960, amended by Act No. 16753, Dec. 10, 2019, art. 50(S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/main.do (login and search required).

As reviewed above, a person or entity that provides people with important and essential services or products should make a contract with the person who needs the service and satisfy the elements in the acts. In Korean acts, this forced contract is used for public service agreements at present, but it could be referred to for public rental housing agreements.

b. Forced contract in the Civil Act.

There are forced contracts in the Civil Act. They force a party to make a contract by imposing an obligation that prevents the party from refusing to make the contract. The owner of the right to the surface of a land (a "superficiary" hereinafter) is entitled to use the land of another person for the purpose of owning buildings, other structures, or trees thereon under the Civil Act.[253] At the termination of a superficies, the superficiary shall restore the land to its original condition by removing the buildings, other structures, or trees.[254] This is an obligation imposed upon superficiaries by the Civil Act. However, the tenant's fulfillment of his obligation can be disadvantageous to the social economy and the landlord. For example, a superficiary may lease a land of the settlor to own the superficiary's building. If the supreficiary removes the building from the land, the investment for the building becomes meaningless, which would be disadvantageous for the social economy. At the same time, removing the building may decrease the value of the settlor's land,

[253] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 279 (S.Kor.).
[254] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 285(1) (S.Kor.).

which would be disadvantageous for the settlor. Therefore, there is a forced contract for the settlor's request to purchase the structures on the land. Under Section 285(2) of the Civil Act, if the settlor of a superficies makes a request to purchase the structures or trees when the superficies agreement is terminated, tendering a reasonable price therefore, the superficiary may not refuse such a request without a justifiable reason.[255] Thus, when the settlor requests to purchase the superficiary's structures such as buildings for a reasonable price, the agreement made is a forced one.

There is a forced contract that comes into use with the *Chonsegwon.*[256] When a *Chonsegwon* is extinguished according to the terms for the duration of the *Chonsegwon*, the person with the *Chonsegwon* shall restore the subject matter thereof to its original condition and has the right to remove any things which were attached to said subject matter. However, if the settlor of the *Chonsegwon* requests to purchase the attached things, the person with the *Chonsegwon* may not refuse to sell them without justifiable reasons.[257]

Under Article 646 of the Civil Act, if the lessee of a building or any other structure has attached an article to such a building with the consent of the lessor for the benefit of the lessee's use, the lessee may demand that the lessor purchase such accessories when the lease contract terminates. It is the same if the accessories

[255] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 285(2) (S.Kor.).
[256] See Chapter 1.2. for details.
[257] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 316(1) (S.Kor.).

attached the building are purchased from the lessor.[258] Further, the sub-lessee also has the right to demand the purchase of accessories under Article 647 of the Civil Act.[259]

In this type of forced contract, the contract is regarded as having been made when the request is delivered. Therefore, a tenant of a registered *Chonse*, a tenant of a lease agreement, and a sub-lessee of a lease agreement can be protected by requesting to make an agreement under these forced contracts.

3. General Provision in the Civil Act

The general provision to protect tenants is similar to the doctrine to protect tenants in the U.S. Article 104 is similar to the doctrine of unconscionability, and Article 2 is similar to the doctrine of good faith. Each general provision of the Korean Civil Act is specifically reviewed below.

The Civil Act has general provisions that can make a juristic act be null from Article 103 to 105. Article 103 regulates that a juristic act that is contrary to good morals and other social order shall be null and void. Article 104 regulates that a juristic act that has conspicuously lost fairness due to strained circumstances, rashness, or inexperience of the parties shall be null and void. On the other hand, Article 105 declares that the parties' intentions take priority over the statutes unless the intention is not against good morals or another social order. Based on these articles, agreements with contents related to Articles 103 and 104, which are against good morals and

[258] *Id* at art. 646.
[259] *Id* at art. 647.

other social orders, shall be void, regardless of the contents of the contract made by the parties.

The Korean Supreme Court applies Article 104 when the two elements are satisfied. First, it is overwhelmingly one-sided and favors the party with the superior bargaining power based on objective grounds. Second, the party who has the superior bargaining power exploits the counter party's strained circumstances, rashness, or inexperience, according to subjective grounds.[260] In most cases involving the tenant claiming a defense based on Article 104 of the Civil act, the court prefers to not apply Article 104 alone, as the court prefers to apply specific articles and not general articles to contracts in Korea as well as applies mandatory provisions or special acts, such as the Housing Lease Protection Act, to protect tenants.

Article 2 of the Civil Act regulates that the exercise of rights and performance of duties shall be in accordance with the principles of trust and good faith. It also regulates that no abuse of rights shall be permitted. This article is similar to the doctrine of good faith in U.S. However, Article 2 does not play a role that's like the doctrine of good faith in the U.S. Since Article 2 is a highly common provision of the Korea Civil Act, it only holds a meaning of declaration. It is usually mentioned and subordinately applied along with the application of other specific articles of the Civil Act.

4. Mandatory Provisions

[260] Supreme Court [S.Ct.], 98da58825, May. 28, 1999 (S. Kor.)

There are mandatory provisions that protect tenants in the Civil Act. Mandatory provisions are articles that make the terms that are unfair to the tenant void.

The Korean Civil Act has many articles that regulate a tenant's rights, including (1) the right to demand a reduction in the rent fee or cancel the agreement if the leased object is partially destroyed,[261] (2) the right to demand an increase or reduction in the rent fee due to a change in the circumstances,[262] (3) a landlord's right to cancel the agreement when the tenant doesn't fulfill the obligation to pay the rental fee on time,[263] (4) the right to provide a notice of cancellation of a future lease without a fixed period, [264] and (5) the right to demand the renewal of a contract for

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[261] Article 627 (Partial Loss of Object Leased, and Right to Demand Reduction of Rent and Right of Rescission for Future)
(1) If a part of the leased object has become unusable or impossible to profit from due to loss or any other cause other than the fault of the lessee, the lessee may demand a reduction in the rent that's proportion to the part that has been lost.
(2) If, as mentioned in paragraph (1), the remaining part of the object is not sufficient to enable the lessee to attain the objective for which the lease was made, the lessee may rescind the contract for the future.

[262] Article 628 (Right to Demand an Increase or Reduction of Rent)
If the rent previously agreed upon by the parties has become unreasonable due to the increase or decrease of the public impost imposed upon the object leased or any other change in the economic situation, either party may demand of the other party a raise or reduction in the future rent.

[263] Article 640 (Rent in Arrears and Rescission of Lease for Future)
In the case of the lease of a building or any other structure, if the rent amount in arrears reaches the total rent for two periods, the lessor may rescind the contract.

[264] Article 635 (Notice of Rescission for Future of Lease without Fixed Period)
(1) If a lease period has not been fixed, either party may give notice to the other party at any time to rescind the lease for the future.
(2) Rescission of the lease for the future shall be effective upon the expiration of the periods mentioned in each of the following subparagraphs, from the day on which the other party has received the notice mentioned in paragraph (1):
1. Six months if the lessor has given notice of rescission of the lease to the lessee, and one month if the lessee has given notice of rescission of the lease to the lessor, in the case of a land unit, building, or other structure;
2. Five days in the case of a movable.

the purchase of a building.[265] There are articles that protect the rights of a sub-tenant in the sub-lease agreement as well. They can be listed as follows: (1) confirmation of the sub-lessee's rights,[266] (2) notice of cancellation for the future to the sub-lessee,[267] and (3) a right to demand to make a lease agreement with the same condition for the purchase of a building.[268]

To avoid a situation in which the landlord includes different terms in the contract with respect to the articles that protect a tenant, the Civil Act has a mandatory provision in Article 652. It regulates that "[a]ny agreement entered by the parties in contravention of the provisions of Articles 627, 628, 631, 635, 638, 640, 641, and 643

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[265] Article 643 (Lessee's Right to Demand Renewal of Contract and Right to Demand Purchase of Building, etc.)
The provisions of Article 283 shall apply mutatis mutandis to buildings, trees, or any other facilities on land remaining after the expiration of the period of the lease of land where the object is to own a building or other structure or for planting, collecting salt, or stock farming.

[266] Article 631 (Confirmation of Sub-Lessee's Rights)
If the lessee has sub-leased the object with the consent of the lessor, the rights of the sub-lessee shall not be extinguished even when the contract of lease is terminated by an agreement between the lessor and the lessee.

[267] Article 638 (Notice of Rescission to Sub-Lessee)
(1) If a lease has been terminated by the notice of rescission with respect to its unexpired rental period and the leased object has lawfully been sub-leased, the lessor may not set up a claim against the sub-lessee based on the rescission of the lease unless a notice is given to the sub-lessee.
(2) The provisions of Article 635 (2) shall apply mutatis mutandis, wherein the sub-lessee receives the notice mentioned in paragraph (1).

[268] Article 644 (Sub-lessee's Right to Demand Lease Contract and Right to Demand Purchase of Building)
(1) In the case of a land lease wherein the lessee's objective is to own a building or other structure or for planting, collecting salt, or stock farming and the land has been lawfully sub-leased, if any building, tree, or other facility on the land remains subsisting at the time when the periods for lease and sub-lease have concurrently terminated, the sub-lessee may demand that the lessor give him a lease with the same terms as those of the former sub-lease.
(2) The provisions of Article 283 (2) shall apply mutatis mutandis, if, in the case of paragraph (1), the lessor does not desire to lease the land.

through 647 which is unfavorable to either the lessee or sub-lessee shall be void." Therefore, a tenant can be protected by this mandatory provision even if the landlord forces him/her to agree to unfair terms in the lease agreement.

Other mandatory provisions to address the unfair terms in lease agreements are also present. Article 398(2) mentions that a court may reduce the amount to a more reasonable and appropriate sum if the amount of damages is unduly excessive.[269] The act authorizes the court to rewrite the terms of the contract. In addition, the Interest Limitation Act limits the maximum rate of interest of a loan contract between individuals. Article 2(1) of the Interest Limitation Act states that "the maximum interest rate under a loan contract shall be prescribed by Presidential Decree to the extent not exceeding 25 percent per annum,"[270] i.e. it prescribes the maximum interest rate as 24% per annum. Article 2(3) of the Interest Limitation Act declares that any amount exceeding the maximum interest rate under the contract shall be void.[271] It means that the interest rate decided by the parties is limited by the Interest Limitation Act. Based on the mandatory provisions, a tenant can be protected when the agreement imposes an excessive amount for damages or excessive rate of interest for an overdue monthly payment on the tenant.

Other mandatory provisions regulate the terms and conditions. The term "terms and conditions" refers to the content of a contract that a party prepares in a

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[269] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 398(2) (S.Kor.).
[270] Interest Limitation Act, Act No. 8322, Mar. 29, 2007, amended by Act No. 12227, Jan. 14, 2014, art. 2(1)(S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/main.do (login and search required).
[271] *Id* at art. 2(3).

specific form in advance and enter into with multiple other parties, regardless of their name, type, or scope.[272] It is not unusual for an entity or individual to repeatedly rent out the properties they own, as a landlord, to a tenant as a manner of business in the modern society. When a landlord repeatedly rents their many properties to many tenants, the same form prepared in advance is used. In such cases, the contents of the agreement can be controlled by the Act on the Regulation of Terms and Conditions for the tenant's protection. Article 7 of the Act on the Regulation of Terms and Conditions prohibits a clause that exempts a landlord with a status of a business person's liability. It states the following:[273]

> A clause in the terms and conditions concerning the liability of contracting parties that falls under any of the following subparagraphs shall be null and void:
> 1. A clause which exempts a business person from liability for intentional or gross negligence on the part of the business person, his/her agents, or his/her employees;
> 2. A clause which limits, without a substantial reason, the extent of indemnification payable by a business person, or which passes a risk to be borne by a business person to a customer;
> 3. A clause which, without a substantial reason, excludes or limits the warranty liability of a business person, or tightens requirements of customers to exercise the rights under the warranty thereof;
> 4. A clause which excludes or limits the warranty for the subject-matter of a contract for which a business person has provided a sample, or has indicated the quality, performance, etc. without considerable reasons.

Article 8 of the act declares that any clause in the terms and conditions that obligates customers to incur a heavy loss, including, but not limited to, excessive

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[272] Act on the Regulation of Terms and Conditions, Act No. 3922, Dec. 31, 1986, amended by Act No. 15697, June. 12, 2018, art. 2(1)(S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/main.do (login and search required).
[273] *Id* at art. 7.

liquidated loss for delay, shall be null and void.[274] In addition, Article 11 of the act protects the customer's rights and interests:[275]

> A clause in terms and conditions concerning the rights and interests of customers which falls under any of the following subparagraphs shall be null and void:
> 1. A clause which, without a substantial reason, excludes or limits a customer's rights of defense, offset of damages, etc., which are provided for by Acts;
> 2. A clause which, without a substantial reason, deprives customers of the right to perform their obligations during a given time;
> 3. A clause which unreasonably limits a customer's right to enter into contracts with a third party;
> 4. A clause which, without any justifiable reason, allows a business person to divulge confidential information of customers he/she has obtained in the course of his/her business.

Based on the mandatory provisions, a tenant can be protected from the unfair terms that exempt a landlord's liability and impose an excessive compensation amount on the tenant. The tenant's rights regulated by Article 11 cannot be excluded or limited by the act when the lease agreement involves terms and conditions.

B. The Background of the Standard

The concept of freedom of contract is based on modern civil law. The modern civil law guarantees people the freedom and right to pursue an individual benefit through free competition in the free market. The principle of private autonomy was the one of its basic concepts, and it was incorporated into the Korean Civil Act. There are several other rights such as the freedom of contract, freedom of association,

[274] *Id* at art. 8.
[275] *Id* at art. 11.

freedom of will, freedom to exercise a right, and freedom of business that are based on modern civil law.[276]

Rapid industrialization took place during the late 19th and early 20th centuries, and monopolistic capitalism increased in the liberal economy. This situation caused a strong economic class to appear, which had a bad influence on the society and resulted in an increased gap between the rich and poor and incompatibility among the classes. The legal sphere faced the issue of the economically stronger class having the power to rule the weaker class by combining the tools of ownership and agreements. This meant that the modern civil law that guaranteed the individuals' freedom and rights could not establish the market order against the expectations of the stronger class. Therefore, it was necessary to protect the party with the weaker bargaining powers. In the case of lease agreements, specifically, the standards to protect the tenants reviewed above were incorporated into the statutes.

There are specific statutory grounds for incorporating the standards. In the Korean Civil Act, there is no direct article that admits to making new standards to protect tenants, excluding each article's regulation of tenant rights for each particular case. However, Article 105 of the Civil Act regulates, "If the parties to a juristic act have declared an intention which differs from any provisions of statutes, which are not concerned with good morals or other social order, such intention shall prevail."[277]

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[276] Yon, Hwa Jun, *A Study on the Principle of Freedom of Contract and its Problems,* 10 UAMNONCHONG 270, 271.

[277] Minbeob[Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 1496, Oct. 31, 2017, art. 105 (S.Kor.).

Under this article, the standards to protect the tenant can be admitted if the terms of agreement are in conflict with good morals or any other social order.

In addition, Article 103 regulates that "a juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void." This means that the standards in place to protect tenants by voiding the unfair terms if they are contrary to good morals or any other social order are based on the general provision of the Civil Act.

With regard to the above, it is necessary to clarify the definition of the phrase acts contrary to good morals and social order; in actuality, the definition is not clear.[278] Usually, "good morals" and "social order" are used in combination and not separately.[279] The Supreme Court of Korea defined acts contrary to good morals and other social orders as follows:

A juristic act which has for its object such matters that are contrary to good morals and other social orders means that the act satisfies these two elements: (1) the rights and obligations that emerged from the agreement can be deemed as acts against a social order such as the agreement; and (2) if the rights and obligations that emerged from the agreement are executed in force by the law, this forced execution is against good morals and other social orders even if the contents of the agreement are not against good morals and other social orders, such as an agreement that states he/she would never get a divorce for any reason;[280] or a monetary consideration is combined with the agreement, making the contents against good morals and other social orders

[278] Kim Yong-Dam, annotation on the Civil Act (edit 4), at 397 (2010).
[279] *Id* at 399.
[280] Supreme Court [S. Ct.] 69 mui 18, Aug. 19, 1969(S.Kor.).

even though the contents of the agreement alone are not against good morals and other social orders, such as an agreement stating the witness would obtain a financial reward for their testimony in favor of the accused; [281] or the motive of the agreement is against good morals and other social orders, such as a loan agreement for gambling provided by a lender who knows the debtor's motive.[282]

Therefore, whenever the court decides that the terms of an agreement are against good morals and other social orders, the case should be voided as per Article 103 and 105.

C. The Necessity to Research the Doctrine of Common Law

In Korea, there are several standards in place to protect tenants, such as the forced contracts, general provisions, and mandatory provisions mentioned above. Among those standards, forced contracts through the Civil Act and mandatory acts have specific limits to which the tenant can be protected. For example, Article 646 of the Civil Act can protect the tenant's right to demand the landlord's purchase of accessories when the lease agreement ends. Therefore, the act cannot protect the tenant in general and for the right to renew the lease agreement.

The general provisions are similar to the doctrines of unconscionability and good faith in the common law. The general provisions alone should theoretically be able to protect tenants when applied. However, the Korea Supreme court prefers to apply the general provisions in combination with other specific provisions than the

[281] Supreme Court [S. Ct.] 93da 40522, Mar. 11, 1994 (S.Kor.).
[282] Supreme Court [S. Ct.] 93da55234, Dec. 22, 1994 (S.Kor.)(annotation; gambling is prohibited in Korea).

aforementioned alone to decide a case. In addition, the general provisions can void the unfair terms in the agreement but don't allow the tenant to renew the agreement after its termination. The problem with the lease agreement in Korea is different. A tenant with a residential housing lease agreement should have the right to renew a lease agreement when the agreement terminates as a security of tenure. A tenant with a commercial building lease agreement should have the right to collect the premium amount paid to the former tenant at the time of moving into the demised premises. The problem is that the general provisions cannot protect these rights of the tenant. Therefore, new standards that protect the tenant's security of tenure and right to collect the premium are required. To this end, the functioning of the doctrines of common law in the U.S., such as the doctrines of good faith and unconscionability, can be referred to.

III. COMPARISON OF THE EXISTING STANDARDS TO PROTECT TENANTS IN KOREA AND THE U.S.

In the U.S., the doctrines of unconscionability and good faith are the standards that protect tenants. Similar standards to protect tenants in Korea are present, including general provisions such as Article 2 and Article 104 of the Civil Act. However, unlike the U.S. standards, these general provisions cannot play an active role in tenant protection. The Korean courts are careful with applying general provisions such as Article 103 to cases and hardly adopt the general provisions to make decisions, especially for cases in the area of private autonomy. The Korean Supreme Court stated the following:

> When the court intends to limit the parties' right and obligation of the cases in the area of private autonomy such as the penalty which is imposed when a party breaches a term of agreement by applying the general provision such as an article 103, the court should be very careful to consider all the circumstances including the motive to make a contract, the contents of a contract etc.[283]

In Korea, there are forced contracts and mandatory provisions. A forced contract does not require the landlord's acceptance of the agreement if the tenant so requests. The mandatory provision binds only the landlord, so the tenant can choose whether to follow the provision. This means that the tenant can make preferential choices regardless of the mandatory provision.

The following example can be considered for the application of these standards. A tenant of a commercial building lease agreement is protected by the right to request for a renewal up to 10 years from the enforcement of the agreement, even if the duration of the initial agreement is two years. Therefore, the tenant of this commercial building lease can enjoy his rights with the certain knowledge that the landlord cannot refuse his request for 10 years. The tenant can enjoy his security of tenure for at least two years even if the agreement's duration is less than two years.

The standards in both the U.S. and Korea have the same purpose of favoring the tenant of a lease agreement. The difference is the way they are presented as a statute or doctrine. Although both the countries have existing standards to protect tenants in lease agreements, some gaps are present in them, which will be discussed in the next chapter, and each standard can be used in the other law system based on a comparative study to fill these gaps.

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[283] Supreme Court [S. Ct.] 2014da14511, Oct. 12, 2015 (S.Kor.).

CHAPTER 4. THE UNFAIR TERMS IN THE LEASE AGREEMENTS

I. COMMERCIAL LEASE AGREEMENT

A. Problems in the Commercial Lease Agreements in the U.S. and Korea

1. The Requirements for ProtectingTenants of Commercial Lease Agreements in the U.S.

The general rule of the common law is that the landlord can displace the tenant from the rental unit for "any reason or no reason" by terminating or refusing to renew the rental agreement, without limitations.[284] It is clear that the landlord has the power to choose whether the agreement is maintained.[285] In the case of a periodic tenancy, the only limitation is that the landlord has to provide an appropriate notice to the tenant before terminating or refusing to renew the rental unit.[286]

This means the tenant is only protected by a prior notice if the tenancy is a periodic one. If the lease agreement is for a tenancy at will, the tenant is hardly protected from the landlord's decision to terminate the lease. In such a situation, the tenant is evicted when the landlord decides to terminate the lease agreement, as is the principle under the common law.

The reason for the landlord's right to terminate being problematic in the U.S. is that there is no way for the tenant to collect their investment in the demised

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[284] Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law,* B. C. L. Rev. 503, 540 (1982).
[285] *Id.* at 539.
[286] Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 492 (1985).

premises. For example, a tenant of commercial lease agreement opens a restaurant and builds up the value of the restaurant through efforts such as retaining patrons, investing in good interiors, and more. When the lease agreement expires due to the landlord's decision, the tenant doesn't have any right to collect the amount invested into the restaurant premises under the common law system.

To solve this problem, scholars have theoretically attempted to limit the landlord's termination of tenancy at will. The attempts to prohibit the landlord's right to terminate the lease agreement for a tenancy at will started after the holding of Foley v. Gamester.[287] Foley v. Gamester was a kind of standard case that was applied to a termination by the landlord of an agreement of tenancy at will under the tenant's control. In this case, the owner of the land signed and delivered to the defendant an instrument whereby she "had letten and demise to" the defendant the land in question "for as many years as desired by the tenant." The defendant entered into possession of the land and erected thereon a gasoline filling station. Two years later, the owner conveyed the premises to the plaintiff. Afterwards, the plaintiff notified the tenant to quit the lease agreement. The defendant tendered rent to the plaintiff after the notice, but the plaintiff refused to accept it.[288] The plaintiff instituted summary dispossess proceedings and argued that "as the lessee could terminate the tenancy at his will, he

[287] 271 Mass. 55, 170 N.E. 799 (1930), noted in Note, Landlord and Tenant Tenancy at Will-Foley v. Gamester, 10 B.U.L. REV. 570 (1930), See Note, *Landlord and Tenant-"Lease" Defined-Tenancy at Will*, 14 TEX. L. REV. 109 (1936); Note, *Landlord and Tenant Tenancy at Will of the Lessee,* 33 W. V. A. L. Q 307 (1927).
[288] 271 Mass. 55–56, 170 N. E. at 799.e.

was in fact a tenant at will"[289] and, therefore, the landlord had the option of terminating the agreement. The court held for the landlord and stated that "the lessee is not bound for any definite period and is at liberty at any time to terminate the tenancy, the estate is not a term of certain duration, and as the lessee is not bound to remain for any definite period, the landlord is not prevented from ending the relation."[290] The court defined the lease agreement in case as a tenancy at will based on Lord Coke's view.[291] Lord Coke's rule presents a concept of mutuality of obligation, stating "every lease at will must, in law, be at the will of both parties."[292] This court's holding is not unusual based on the theory of illusory promise, but it is a harsh ruling against the tenant since defining this lease agreement as a tenancy at will was not consistent with the parties' intentions and expectations when they first made the agreement.

Several approaches to solve this problem protect the tenant by prohibiting the landlord from terminating the agreement at his/her will. First, the tenant's installment and operation of a service station on the leased property was suggested to be viewed as an implied offer for a reasonable lease period.[293] The implied acceptance would have occurred when the landlord failed to object to the tenant's installment and

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[289] *Id*. at 56, 170 N. E. at 799.
[290] *Id.* at 56–57, 170 N. E. at 799.
[291] Edward Chase & E. Hunter Taylor, Jr., *Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571, 667 (1985).
[292] 271 Mass. 57, 170 N. E. 799–800.
[293] Edward Chase & E. Hunter Taylor, Jr., *supra* note 291, at 669–670.

operation of the service station.[294] In conclusion, there was a bargain based on the circumstantial inferences of the case. From this view, the problem was not the validity of the contract but the clarification of a reasonable duration. The exact time was up to the court's judicial determination.[295]

Second, the tenant's installment and operation of the gas station constitutes reliance on the landlord's promise to allow the tenant to remain on the premises for as many years as desired.[296] This view focuses on the tenant's conduct, which relied on the landlord's original promise. The difference between this view and the first opinion is the conclusion. The conclusion of the second view is that a tenant can remain on the leased premises for as long as they choose to for a reasonable period. It can be a lease for life or shorter, in accordance with the tenant's choice.[297] Thus, the landlord cannot choose to quit the lease agreement at any time.

The third view is that the tenant's power to terminate at any time should be subject to implied requirements of reasonableness. These implied requirements of

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[294] Blaustein v. Burton, 9 Cal. App. 3d 161, 184, 88 Cal. Rptr. 319, 334 (1970). ("The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words.").

[295] Beeson v. LaVasque, 144 Ark. 522, 223 S.W. 355 (1920). For discussions of the need for certainty in the term of years, see *Note, Lease-Definiteness of Term-"Duration of War",* 2 ARK. L. REV. 126 (1947); Note, Landlord and Tenant: Need for Certainty of Duration of Term in ESTATES FOR YEARS, 32.
CALIF. L. REV. 199 (1944); Note, *Leases for the 'Duration of the War'*, 39 ILL. L. REV. 85 (1944).

[296] Edward Chase & E. Hunter Taylor, Jr., *supra* note 291 at 669–670; S. Williston, A Treatise on the Law of Contracts § 140, at 607–19.

[297] Thompson v. Baxter, 107 Minn. 122, 119 N. W. 797 (1909). (lease at will if tenant creates life estate); Restatement of Property § 21, comment a (1936). (lease at the will of the tenant creates "either an estate for the life of the transferee or an estate in fee simple determinable depend[ing] upon whether the required words of inheritance, if any are required for the creation of an estate of inheritance, are present").

reasonableness would consist of giving a notice or remaining on the premises until a good cause to terminate occurs.[298] This analysis is focused on the implied bargain in the original word of the agreement while the first and second opinions need the tenant's additional conduct to be concrete for the illusory promise.[299]

These opinions can limit the landlord's right to terminate an agreement under certain conditions, but it is not a direct approach to collecting the tenant's investment in the demise premises. Therefore, it is necessary to find ways to protect the tenant's right to collect the investment amount by performing a comparative study.

2. Method to Protect the Tenant's Right to Collect his Investment in Korea

a. A tenant's right to request for renewal.

Article 10(1) of the Korean Commercial Building Protection Act regulates that when a tenant requests for the renewal of a contract between six months and one month before the expiration of the lease period, the landlord shall not refuse it without justifiable grounds. Article 10 enumerates eight justifiable grounds to refuse the renewal as follows:

> Article 10 (Request, etc. for Contract Renewal)[300]
> (1) Where a tenant requests for renewal of a contract between six months and one month before the expiration of period of lease, a landlord shall not refuse it without justifiable grounds: Provided, That in cases falling under any of the following subparagraphs, this shall not apply:

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[298] Edward Chase & E. Hunter Taylor, Jr., *supra* note 291, at 671–672.
[299] *Id*. at 672
[300] Sanggagunmul Imdaecha Boho Beob[Commercial Building Lease Protection Act], Act No. 6718, Aug. 26, 2002, amended by Act No. 16912, Feb. 4, 2020, art. 10 (S. Kor.).

1. Where such tenant has been in arrears with an amount equivalent to three period of rent.
2. Where such tenant has entered lease by deceit or other fraudulent means;
3. Where such landlord has provided such tenant with substantial compensation by mutual consent;
4. Where such tenant has subleased all or part of the leased building without the consent of such landlord;
5. Where such tenant has destroyed all or part of the building intentionally or by gross negligence;
6. Where the purpose of lease is frustrated because all or part of a leasehold building has been severely damaged;
7. Where such landlord needs to recover possession of the building in order to demolish or reconstruct all or part of the building for any of the following grounds:
(a) Where, at the time of entering into the lease contract, such landlord notifies such tenant of a plan for demolition or rebuilding specifically stating the time and period of construction, etc., and complies with the plan;
(b) Where there are safety hazards due to decrepitude, damage, partial destruction, etc. of the building;
(c) Where there has been demolition or rebuilding pursuant to other Acts or subordinate statutes;
8. Where such tenant has substantially violated the responsibilities of tenant or grave reasons for which the continuation of lease is difficult exist.

Article 10(2) regulates that a tenant's right to request for a renewal of the contract may be exercised within the extent that the entire period of the lease, including the period of the initial lease, does not exceed 10 years. Thus, this article protects the tenant's use of and profit from the demise for 10 years by restricting the landlord from terminating the lease agreement without justifiable grounds. Through the use of the premises for 10 years, the tenant has the chance to collect the investment made into the demise.

For the 10-year period in which a tenant can request for the renewal of a contract, the tenant also can be protected from a rent increase. As per Article 10(3), a lease renewed by the tenant's request for renewal shall be deemed to have been

renewed under the same conditions as those of the former lease, and the rent and security deposit may be increased or decreased only within the five percent of the rent and deposit amount, respectively, at the time the request is made. The landlord cannot increase the rent or deposit beyond five percent even if the original lease agreement is terminated and renewed by the tenant's request for renewal for 10 years.

b. A tenant's right to collect the premium.

In Korea, parties commonly enter into a "premium contract" when they create a lease agreement for a commercial building. A premium is defined as a monetary fee, other than the deposit and rent, paid to a lessor or a lessee as a price for the transfer or use of tangible or intangible property value, including business facilities, equipment, customers, credit, business know-how, and business benefits generated from the location of a commercial building. It is paid by the person who conducts or intends to conduct a business in a commercial building, the subject-matter of the lease in the Commercial Building Lease Protection Act.[301] A premium contract is defined as a contract that requests any person who intends to be a new lessee to pay a premium to the lessee in the act.[302] Normally, the premium agreement is made between a former tenant and a new tenant. The new tenant pays the premium to the former tenant since the former tenant improved the value of the demise through their efforts during the lease period. For example, if the former tenant invested in good kitchen supplies and fancy interiors to maintain many guests, the value of the premises as commercial

[301] *Id* at art. 10-3 (1).
[302] *Id* at art. 10-3 (2).

property would have bene improved by the former tenant's effort, and they deserve to collect a premium from the new tenant who will enjoy this improved value of the premise. This premium agreement is a separate agreement from the lease agreement.

The use of the premium agreement was a custom in Korea but not protected by law before 2015, similar to the current U.S. system. However, there were many social problems related to the tenant's right to collect the premium. Premium collection was only protected when the new tenant made a lease agreement (not the premium agreement)[303] with the landlord, since the former tenant required a person to pay the premium to the former tenant. If the landlord changed the usage of the premises such that the new tenant did not require the tangible or intangible things, the former tenant could not collect the premium. If the landlord decided to manage the premises on their own and did not make a lease agreement with a new tenant, the former tenant could not collect the premium. There were many situations in which the landlord terminated the lease agreement, and the demised property, which was the leased object, was managed for business purposes by the landlord without having to make a new lease agreement, allowing the landlord to enjoy the improved value of the demise. In addition, the landlord could also terminate the lease agreement without creating a new one once the duration of the former lease agreement ended. In such a situation, the former tenant could not collect the premium since there was no new tenant to collect it from when the former lease agreement ends. Afterwards, the landlord could receive a

[303] The premium agreement is separate from the lease agreement. The lease agreement is made between the landlord and new tenant. The premium agreement is made between the former tenant and new tenant. So, the tenant requires a new lease agreement, since the new tenant pays the premium to the former tenant only after the new tenant moves in by effect of the lease agreement.

premium amount by making a premium agreement with a new tenant. In this case, the landlord could receive the deposit money, monthly payment, and the premium even though he did not try to improve the value of demise.

Despite this situation and the premium being incredibly high before 2015, the act did not protect the lessee's right to receive the premium. Due to this, many incidents such as tenant suicides occurred because the tenant could not collect the premium upon being evicted. A case in 2013 involved a tenant of a commercial building committing suicide because she couldn't collect her premium amount of 70,000,000 KRW. The congress realized the necessity for a legislation of the premium in act and revised the Commercial Building Protection Act to add an article that protects the lessee's right to receive the premium from a new lessee on June 13, 2015. The added article is as follows:

> Article 10-4 (Protection of Opportunity of Collecting Premiums, etc.)
> (1) No lessor shall obstruct any lessee in receiving any premium pursuant to a premium contract from a person arranged by the lessee to become a new lessee, by committing any of the following acts *from six months prior to the expiry of the lease period until the end of the lease*: Provided, That the same shall not apply where any of the grounds set forth in the subparagraphs of Article 10 (1) exists:
> 1. Requesting a person arranged by the lessee to become a new lessee to pay premiums; or receiving premiums from a person arranged by the lessee to become a new lessee;
> 2. Preventing a person arranged by the lessee to become a new lessee, from paying a premium to the lessee;
> 3. Requesting a person arranged by the lessee to become a new lessee, to pay remarkably large-amount of rents and deposits, compared with the tax on a commercial building, public charges, rents and deposits of surrounding commercial buildings and other charges;
> 4. Refusing to conclude a lease contract with a person arranged by the lessee to become a new lessee, without any justifiable grounds.
> (2) In any of the following cases, justifiable grounds prescribed in paragraph (1) 4 shall be deemed to exist:
> 1. Where a person arranged by the lessee to become a new lessee, cannot afford to pay deposits or rents;

> 2. Where a person arranged by the lessee to become a new lessee, is likely to violate the duty of a lessee or any reasonable ground exists, which makes it impracticable to maintain lease;
> 3. Where the subject-matter of the lease is a commercial building and has not been used for commercial purposes for at least 18 months;
> 4. Where a new lessee selected by the lessor concludes a premium contract with the lessee and pays premiums.
> (3) Where a lessor violates paragraph (1), incurring any loss to a lessee, he/she shall be liable to compensate for such loss. In such cases, damages shall not exceed the lesser amount of a premium to be paid to a lessee by a new lessee and premium as at the time when the lease expires.
> (4) Claim for damages to a lessor pursuant to paragraph (3) shall expire by completion of prescription if it is not exercised within three years from the date when the lease expires.
> (5) A lessee shall provide information to the lessor, to the best of his/her knowledge, on the financial capacity of the person arranged by the lessee to become a new lessee, such person's willingness and ability to pay deposits and rents and to perform duties as a lessee.

By this revision the tenant's collection of the premium is protected, and the landlord has a responsibility to not obstruct the lessee's receipt of the premium. If a landlord violates the responsibility, he/she shall compensate for the tenant's loss. The amount of loss shall not exceed the lower amount between the premium amount paid by the tenant upon moving in and the premium amount at the time the lease expires.[304]

In addition, the court protects the tenant's right to collect the premium from the landlord and not exceptionally from the new tenant. The landlord is not a party involved in the premium agreement, so the landlord is not usually liable to return the premium to the tenant who paid the premium. However, the Korean Supreme Court decided that the landlord is liable for returning the premium. According to the Supreme Court, the one of the holdings was as follows:

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[304] Sanggagunmul Imdaecha Boho Beob[Commercial Building Lease Protection Act], Act No. 6718, Aug. 26, 2002, amended by Act No. 16912, Feb. 4, 2020, art. 10-4(3) (S. Kor.).

> [T]he lessor is not liable for returning the premium in the case that the use of tangible or intangible valuable things is done during the agreement period in principal. Provided, in the case that ①the lessor acquires the tangible or intangible things when the lease agreement terminates, so the tenant cannot collect the premium through the premium agreement which sells the tangible or intangible thing to the new tenant when the lease agreement terminates, ② the lessor terminates the agreement before the duration ends even the specific duration is guaranteed in the agreement by his fault , so the tenant cannot enjoy the value of tangible or intangible things he provided, the lessor is liable to return the premium to the tenant exceptionally.[305]

With these articles and cases, the tenant has the opportunity to be compensated for his/her investment into the demise during the period of the agreement.

3. Comparison and Summary

In the U.S., a tenant does not have the right to collect the amount invested into the demise when the lease agreement is terminated, as per the common law. However, the franchise agreement is automatically terminated, without a notice being required, when the agreement period ends, unlike the residential lease agreement. In this situation, the requirement to protect the tenant's right to collect the amount invested into the demise arises if the tenant increases the value of the demise due to the time and expense spent. For this, the implied covenants of good faith and fair dealing or implied good cause for termination is used to limit the landlord's right to terminate the lease agreement, since it is unfair if the landlord's termination is accepted without any limitation in that situation.

[305] Supreme Court [S. Ct.] 2013Da63257, Dec. 26, 2013(S.Kor.).

Unlike in the U.S., there are some ways to protect a tenant's right to collect the premium by forcing the agreement to be maintained for some period or imposing the responsibility to not obstruct any lessee's receipt of the premium on the landlord. First, the tenant has the right to request for a renewal of the contract up to a period of 10 years, and the landlord cannot refuse the tenant's request without eight justifiable grounds, as regulated by the act. Second, the tenant has the right to collect the premium, and the landlord has the responsibility of not obstructing the tenant in receiving the premium from the new tenant. These articles are regulated to protect the tenants who make the demise more valuable by investing the effort and expense. These protect the tenant's utilization of the investment.

Protecting the tenant's right to collect the premium is required in the U.S. as well. If the tenant's right and landlord's responsibility specified by Korean law are adapted into the U.S. law, the problem of not collecting the investment when the agreement is terminated by a landlord's unilateral notice can be solved. The introduction of this provision would be useful.

B. Commercial Lease Agreement in Korea

1. The Problems in the Articles of Premium in the Korea Act

Article 10-4 guarantees the tenant's right to collect the premium by imposing the responsibility of not obstructing the tenant on the landlord from six months prior to the expiry of the lease period until the end of the lease. This means that the lessor

can obstruct any tenant's receipt of the premium[306] pursuant to a premium contract,[307] from a person arranged by the tenant to become a new tenant, by committing acts against Section 10-4(1) after the termination of the lease agreement. Therefore, there are many cases which try to avoid the act for the purpose of protecting the tenant's right to collect the premium; i.e., the tenant cannot retain his/her own financial interest in the Korean Commercial Building Lease Protection Act after the termination of the agreement.

2. Comparative Study to Solve the Problem of the Korean Commercial Building Lease Protection Act

a. Implied Covenant of Good Faith and Fair Dealing

To solve this problem, the doctrine that allows tenants to sub-lease property in the U.S. and the case law that restricts the termination of franchise agreements by the implied covenant of good faith and fair dealing can be referred to. If the doctrine is applied, the tenant can claim that a new premium agreement would be made with a new tenant (it can be considered a sub-lease), and the landlord cannot terminate the lease agreement before the tenant makes the new premium agreement by implied covenant of good faith and fair dealing. A discussion on the doctrine of the implied

[306] "Premium" refers to a price, other than the deposit and rent, paid to a lessor or a tenant for the transfer or use of tangible or intangible property value, including business facilities, equipment, customers, credit, business know-how, and business benefits generated from the location of a commercial building. It is paid by a person who conducts or intends to conduct a business in a commercial building, the subject-matter of the lease.

[307] "Premium contract" refers to a contract which requests any person who intends to be a new tenant to pay a premium to a tenant.

covenant of good faith and fair dealing must mention the Julian v. Christopher case.[308]

In the Julian v. Christopher[309] case, the Maryland Court of Appeals stated, "Since the Klawans decision, this Court has recognized that in a lease, as well as in other contracts, there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly with the others."[310] The Court held that "if lease contains 'silent consent' clause providing that tenant must obtain landlord's consent in order to assign or sublease, such consent may not be unreasonably withheld; reasonable objections could include financial irresponsibility or instability of transferee, or unsuitability or incompatibility of intended use of property by transferee."[311] This means the court held that the landlord should reasonably withhold his consent to the sub-lease based on the implied covenant of good faith and fair dealing.[312] In addition, the Court held that "refusal to consent was solely for the purpose of securing a rent increases, such refusal would be unreasonable unless the new subtenant would necessitate additional expenditures by, or increased economic risk to, the landlord."[313]

After this holding, the cases regarding the sub-leasing of franchise agreements in the U.S. changed from subjective lessors' discretion to consent sub-lease to imposing reasonable requirements on a lessor's refusal to approve the sub-lease. By applying this case law, the tenant's right to receive the premium after termination is

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[308] Julian v. Christopher, 575 A. 2d 735 (Md. 1990).
[309] Julian v. Christopher, 575 A. 2d 735 (Md. 1990).
[310] *Id*. at 739 (quoting Food Fair v. Blumberg, 234 Md. 521, 534, 200 A.2d 166, 174 (1964))
[311] *Id*.
[312] *Id*. at 740.
[313] *Id*. at 739.

protected, as the lessor is required to not obstruct any tenant in receiving any premium without reasonable cause or the implied covenant of good faith and fair dealing. The following sub-section includes a discussion on the tenant's right to sublease in the U.S.

(1) Case law about sub-leasing without the lessor's consent.

A "majority rule" for the lessor's consent to sub-lease was present, such as in the case of Jacobs v. Klawans in Maryland. The majority rule allows a landlord absolute discretion in consenting to sub-leases unless limited by the agreement.[314] However, the Maryland Court of Appeals overruled the Klawans in Julian v. Christopher[315] and opted the "minority rule." The minority rule imposes reasonable requirements on a lessor's refusal to approve a sub-lease unless the agreement clearly allows the lessor absolute discretion in consenting to the sub-lease.[316]

In addition, a lease is an agreement in which "there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly with the others."[317] If an agreement grants discretion to a party, it should be followed on the basis of the principles of good faith and fair dealing. According to the court, the implied covenant of good faith and fair dealing imposes a standard of reasonableness on withholding consent unless the consent clause allows a lessor to exercise subjective discretion.[318]

In accordance with these case law, the Landlord and Tenant Act 1988 made three fundamental changes to protect the tenant's right to sub-lease. First, it imposed a

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[314] Restatement (second) of property § 15.1 (1976).
[315] Julian v. Christopher, 575 A. 2d 735 (Md. 1990).
[316] Jon M. Laria, *Julian v. Christopher: New Standards for Landlords' Consent to Assignment and Sublease*, 50 MD. L. REV. 464, 465 (1991).
[317] 320 Md. 1 at 9, 575 A.2d 735 at 739.
[318] 575 A. 2d 735; Laria, *supra* note 316, at 468.

statutory duty on a landlord who receives a written application for consent to sub-lease to give consent unless there are reasonable grounds to not do so. Second, the lessor has the burden of showing that the refusal was reasonable. Third, a tenant has the right to sue for damages suffered as a result of a lessor's unreasonable refusal. This minority rule can be cited when the landlord obstructs the tenant's process of obtaining the premium after the termination of commercial building lease agreement, and the landlord should cooperate with the tenant and follow the principles of good faith and fair dealing when this minority rule is applied.

In this regard, a tenant who want to get a premium from a new tenant can be protected under Korea Commercial Building Lease Protection Act if the tenant does not receive the premium after the termination of agreement such as in the Julian v. Christopher case. If the tenant tries to make an agreement with a new tenant but the agreement cannot be made until the agreement is terminated by the lessor's unreasonable performance, the tenant can claim the premium after the termination. The following part includes a discussion on when the tenant can use the reasonableness after termination claim to get the premium by reviewing the law of good faith for cases involving the termination of a franchise agreement.

(2) Cases involving the implied covenant of good faith and fair dealing in franchise agreements.

(a) Restriction on termination by the implied covenant of good faith and fair dealing

In Bak–A–Lum Corp. v. Alcoa Building Prods, the court applied the covenant to the exclusive distributorship agreement, by which the defendant could terminate the

agreement at will. In this case, the defendant intentionally misled and caused damage to the plaintiff. The court ruled that the defendant's termination was a breach of the implied covenant of dealing in good faith if the franchisee, the plaintiff, embarked substantial investment or committed expansion.[319]

In Days Inn Worldwide, Inc. v. Sai Baba, Inc., the franchisee asserted that the franchisor "improperly expanded its discretion to remove [Franchisee] from its national reservation service by misrepresenting the hotel's status to callers." In addition, the franchisee argued that the franchisor created the franchisee's "failing quality assurance scores" to quit the franchise agreement and receive the liquidated damages. In this case, the court held that "the implied covenant of good faith and fair dealing cannot override an express term in a contract but a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term."[320]

(b) Terminations that did not breach the covenant of good faith in the franchise agreements.

In BP West Coast Products LLC v. Robert Greene, the United States District Court, E.D. California held that the franchisor's decision to sell the facility was in good faith and normal course of business.[321] The court provided the following explanation:

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[319] Bak–A–Lum Corp. v. Alcoa Building Prods., 69 N. J. 123, 130 (1976).
[320] Days Inn Worldwide, Inc. v. Sai Baba, Inc., 300 F. Supp. 2d 583, 591 (N. D. Ohio 2004).
[321] BP West Coast Products LLC v. Robert Greene, 318 F. Supp. 2d 987 (E. D. Cal. 2004).

> [T]he court finds no disputed issue of fact on whether BPWCP's decision to sell the Facility was in good faith and in the normal course of business. BPWCP has provided evidence that BPWCP decided to sell the Facility as part of an annual evaluation of capital employed and market performance for its retail facilities in accordance with its overall business strategy.[322]

Under the court's decision, even though the franchisor's "motive was based in part to obtain money from an immediate sale and continue to receive money in the future from the franchise," it was not an improper motive made in bad faith.[323]

In Harara v. ConocoPhillips Co., a federal district court held that a "franchisor's nonrenewal decision was made in good faith and in the normal course of business."[324] The court explained that the franchisor's decision to sell the station and divest some stations throughout the country was made in good faith since it was based on a "determination by senior management" and several other factors, "including a significant decline in the volume of plaintiff's gasoline sales," "… economically challenged neighborhood with a very high crime rate and drug and gang problems."[325]

In Amoco Oil Co. v. Dickson, the court found that the termination could be permitted by a good cause for termination, even an insufficient return on the franchisor's investment coupled with the franchisor's good-faith decision to stop operating the business. In addition, the Court ruled that "Due cause … is not limited to dealer breaches and does include supplier's business decisions."[326]

In Chic Miller's Chevrolet, Inc., v. General Motors Corp., the franchisee

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[322] *Id*. at 996.
[323] *Id*.
[324] Harara v. ConocoPhillips Co., 377 F. Supp. 2d 779 (N. D. Cal. 2005).
[325] *Id.* at 785.
[326] Amoco Oil Co. v. Dickson, 378 Mass. 44, 45 (1979)

asserted that the franchisor terminated the dealership agreement in bad faith due to a ‘‘grand plan to reduce the market place [in the Bristol area] from three to two [Chevrolet] dealers.’’ However, the court ruled that “long term plan that called for reducing the number of dealerships in a possibly oversaturated market is not alone evidence of bad faith.”[327]

In Stadium Chrysler Jeep, L.L.C. v. DaimlerChrysler Motors Co., the franchisee, Stadium Chrysler Jeep, claimed that the franchisor, DaimlerChrysler, breached the implied covenant of good faith and fair dealing by terminating the agreement and refusing to negotiate, since the franchisor had “an implied contractual duty of good faith and fair dealing towards [Franchisee] under the [Sales and Service Agreement].”[328] In this regard, the court held that the franchisor has the right to terminate the production and distribution of vehicles in accordance with the franchise agreement and its additional terms,[329] since the agreement and additional terms “unmistakably” and “with specificity” expressed the parties’ rights related to the termination of production and distribution under the court’s decision.[330] Therefore, the franchisor’s termination of the agreement did not breach the implied covenant of good faith and fair dealing.[331]

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[327] Chic Miller’s Chevrolet, Inc. v. General Motors Corp., 352 F. Supp. 2d 251, 260 (D. Conn. 2005).
[328] Stadium Chrysler Jeep, L.L.C., v. DaimlerChrysler Motors Co., 324 F. Supp. 2d 587, 601 (D.N.J. 2004).
[329] *Id*.
[330] *Id*.
[331] Frank J. Cavico, *The Covenant of Good Faith and Fair Dealing in the Franchise Business Relationship,* 6 BARRY L. REV. 61, 96 (2006).

b. Implied Covenant of Good Cause for Termination

The implied covenant of good cause for termination has a specific meaning for the protection of a tenant as compared to the implied covenant of good faith and fair dealing. Good faith and fair dealing allows the franchisor's termination with solid business reason to finish the agreement while prohibiting vindictive and coercive termination by the lessor. That means that the implied covenant of good cause for termination "extends beyond the good faith obligation"[332] and is subject to interruption only if the failure to comply with lease conditions meets two requirements. The first requirement is that only the tenant who follows the terms and conditions of lease agreement can be protected by the good cause.[333] In the Shell Oil Co. v. Marinello case, the New Jersey Supreme Court held that good cause was applied when the tenant failed to substantially comply with his obligations under the lease agreement.[334] The second is that the lifetime right to occupy may be unreasonable under the circumstances of agreement. If that is the case, the lease agreement can be interpreted to allow the tenant to occupy only for a reasonable period and not for life.[335]

Irrespective of whether a lessor terminates the lease agreement with good cause, it will depend on the court's decision. The court will take into account various factors. One factor is the relative financial ability of lessor and tenant.[336] The second factor is the application of equitable doctrines such as how long the tenant had

[332] *Id*. at 852; See also Bell, supra note 286 at 525 (1985).
[333] Roisman, *supra* note 2, at 853.
[334] Shell Oil Co. v. Marinello, 307 A.2d 598, 600 (N.J. 1973).
[335] Chase & Taylor, *supra* note 291, at 674.
[336] Roisman, *supra* note 2 at 854.

occupied the property, how much the tenant invested in the property, lessor's past tendency about the continued agreement, and how many times the lessor had already renewed the agreement.[337] Another factor is the lessor's goal to terminate the agreement.[338]

The Supreme Court of New Jersey also stated the good cause to terminate. Shell Oil Co. v. Marinello case involved an integrated lease and dealer agreement in a franchise relationship.[339] The Supreme Court of New Jersey held the following:

> [T]he provision giving Shell the absolute right to terminate on 10 days notice is void … lease and dealer agreements which may be negotiated in good faith between the parties, the restriction that Shell not have the unilateral right to terminate, cancel or fail to renew the franchise, including the lease, in absence of a showing that Marinello has failed to substantially perform his obligations under the lease and dealer agreement, I.e., for good cause…"[340]

c. Application of the franchise cases to the lease agreement

The court has applied the doctrine of implied covenant of good faith and fair dealing to the franchisor's ability to terminate the franchise agreement. However, the courts that admit to limiting the franchisor's ability to terminate the contract asserted that the court limited not the landlord's ability but the franchisor's ability.[341] In the concurring opinion by Justice Pomeroy in the case of the Supreme Court of Pennsylvania, the court stated the following:

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[337] *Id* at 855.
[338] See Barreto v. Portugal, 334 Eur. Ct. H.R. (ser. A) at I 1 (1995).
[339] Shell Oil Co. v. Marinello, *supra* note 334, at 603.
[340] *Id.*
[341] Roisman, *supra* note 2, at 845; See Chase & Taylor, *supra* note 291, at 687.

> [I] agree with the conclusion of the majority that the agreement between William M. Razumic and Atlantic Richfield Company (Arco), although largely couched in language defining a lessor-lessee relationship, contained elements of a franchise relationship as well; the case cannot be treated and decided, therefore, as if we were dealing only with a lease.[342]

The "Razumic's distinction between leases and franchises pervades the case law, with courts refusing to impose a good faith obligation in transactions that are labeled leases."[343] However, many scholars pointed out that the distinction is not appropriate or the "good faith" should be applied to the lease contract before or after the court's decision. Professor Glendon mentioned that the Court can apply "good faith" to the lease law:

> [E]ven without legislation, the case law developments could go quite far in the direction of limiting the landlord's ability to terminate tenancies. The increasing disposition of courts to carry new and old principles of contract law over into residential lease law, together with the "good faith" clause in URLTA section 1.302, modelled on the Uniform Commercial Code's section 1-203, might well result in holding landlords to a standard of good faith that would be much broader in scope than the retaliatory eviction concept.[344]

Professor Bell argued that courts should apply the implied good faith to the landlord's responsibilities:

> [R]ather than following a constitutional or public theory or imposing a good cause standard, courts should imply a good faith obligation on landlords. The tenant deserves recognition of a more extensive and uniform expectation of continued occupancy which does not significantly affect the landlord's operation of his business or require legislation to completely restructure the landlord-tenant relationship. The obligation of good faith, which is already implied in leases, as it is in all contracts, should be interpreted by courts to prohibit a landlord's exercise of otherwise permissible termination rights in a bad faith

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342 Atlantic Richfield Co. v. Razumic, 390 A. 2d 736, 745 (Pa. 1978).
343 Chase & Taylor, *supra* note 291, at 687.
344 Glendon, *supra* note 284, at 542.

> manner that contravenes the tenant's expectation of continued occupancy.[345]
>
> Chase and Taylor stated that the distinction was improper:
>
> [T]he courts adhering to this dubious distinction between leases and franchises have failed to distinguish between historical and logical incidents of common law tenancies. If the obligation to deal in good faith were precluded by common law concepts, then the recent and widely adopted doctrine of retaliatory eviction would be quite impossible. That doctrine imposes a negative obligation on the landlord to avoid dealing in bad faith, which is analytically akin to the affirmative obligation to deal in good faith, an obligation which we believe should be generally recognized. It is curious that courts that have no difficulty requiring the landlord to avoid the one should have such great difficulty in requiring him to achieve the other. Perhaps if courts were to see this connection, the obligation to deal in good faith would lose its apparently alien appearance.[346]

As stated by many scholars, the distinction between the franchise and lease agreements is improper. Therefore, the implied covenant of good faith and fair dealing regarding a franchisor's ability to terminate a franchise agreement can be applied to a lease agreement to protect tenants under the Korean Commercial Building Lease Protection Act.

C. Comparison and Solution to the Korean Commercial Building Lease Protection Act

The purpose of Article 10-4 of the Korean Commercial Building Protection Act is to guarantee the tenant's right to collect premium. However, there is a gap in protecting the tenant's right to collect the premium when the article is interpreted in a literal manner. Under Article 10-4, a lessor can obstruct any tenant's receipt of a

[345] Bell, *supra* note 286 at 508.
[346] Chase & Taylor, *supra* note 291, at 698–99.

premium from a new tenant after termination of the lease agreement. There is no way to protect the tenant's right to collect the premium after the lease agreement is terminated even if the landlord intentionally obstructs the original tenant from making new premium agreement with a new tenant by refusing to make a lease agreement with the new tenant.

There are theories on the protection of a tenant of a franchise by allowing them to sub-lease and limiting the landlord's right to terminate a franchise agreement in the U.S. The theories include the implied covenant of good faith and fair dealing and implied covenant of good cause for termination. If the theories are adopted to the Korean legal system for when the court make decisions, the tenant's collection of the premium can be guaranteed by allowing the sub-leasing of the premises, which involves making a new lease agreement with a new tenant and receiving a premium from the new tenant. In addition, the landlord cannot terminate a lease agreement to avoid the responsibility of not obstructing the tenant's receipt of the premium from the new tenant without reasonable grounds.

The standard of reasonableness when the tenant claims the premium after termination can be decided based on former court cases. By analyzing the cases, the following standards can be presented. First, the lessor cannot obstruct the tenant from collecting a premium from a new tenant after the termination of the lease when the tenant has made a substantial investment in or committed to the expansion of the premises. Second, the lessor's motive can be considered to decide the reasonableness. If the motive behind the lessor obstructing the tenant's receipt of the premium from a new tenant is to directly get the premium amount from new tenant, the tenant can

claim the premium from the lessor as compensation for damages even if the agreement has been terminated, provided that the period within which the tenant can claim the premium after the agreement has expired is within reasonable limits. This reasonable time limit can be regulated by creating new acts or articles.

II. THE RESIDENTIAL LEASE AGREEMENT

A. Problems with the Residential Lease Agreement in the U.S. and Korea

The residential lease agreement of the U.S. has the same issue as the commercial lease agreement, which is that the landlord can choose not to make a successive agreement with the same tenant once the lease agreement is terminated in the case of a term of tenancy and to terminate the agreement by giving a notice in the case of a periodic tenancy. In addition, the landlord can terminate the agreement at any time for a periodic tenancy. These are the principles under the common law. Therefore, it is necessary to find ways to protect the tenants by placing limitations on the landlord's right to terminate the lease agreement in the U.S.

The same problem occurs in Korea. There are two acts that protect tenants in Korea: the Korean Housing Lease Protection Act and Korean Civil Act. The Korean Housing Lease Protection Act is strongly protects the tenant as a holder of a real right who can claim this right against everyone and not only the other party involved in the agreement. Regardless of the goal of the Korean Housing Lease Protecting Act, it does not guarantee the tenant's security of tenure. The landlord can choose to not renew the agreement by giving a notification between six months and one month before the term of the lease expires. The tenant cannot claim the right to stay on the

premises if the landlord decides not to renew the agreement. It is similar to the situation of the term of tenancy in the U.S. To guarantee the security of tenure for tenants in the U.S. and Korea, ways of limiting the landlord's right to terminate the agreement are required.

With regard to the abovementioned problem, it is first necessary figure out the reason for the landlord refusing to renew the agreement when the period ends. The Korean Housing Lease Protection Act prevents the landlord from increasing the deposit money and/or monthly rent fee over 20% of the original amounts during the period of the lease agreement.[347] Therefore, the landlord's increase of the monthly rental fee or deposit money is limited while the lease agreement is maintained, but the landlord can increase the deposit money and/or monthly rent fee without any limitations when the period of agreement ends. Thus, the landlord provides the current tenant with the chance to renew the lease agreement if the tenant agrees to increase the deposit money and/or monthly rental fee by the percentage deemed suitable by the landlord. If the tenant is unable to pay the increased deposit amount, the landlord refuses to renew the lease agreement. To protect the tenant's right to security of tenure in Korea, it is necessary to prevent the landlord's right to increase the deposit money and/or monthly rent fee without limitations when the period of lease agreement ends.

A comparative study can be used to suggest a good solution to the legal system of both the U.S. and Korea to fill in the gaps in the security of tenure. A comparative study can be utilized for imposing limitations on the landlord's right to terminate the

[347] Jutaek Imdaecha Boho Beob[Korean Housing Lease Protection Act], Act No. 3379, Mar. 5, 1981, amended by Act No.15791, Oct. 16, 2018, art. 7(S. Kor.).

lease agreement through the U.S. legal system and for preventing the landlord's right to increase the deposit money and/or monthly rent fee without limitations when the agreement ends through the Korean legal system. The current tenant's rights to claim their tenancy in both these countries are discussed in the next chapter to figure out what new protections are required.

B. Legal Basis for Tenants to Claim their Rights in the U.S. and Korea

1. Uniform Residential Landlord and Tenant Act in the U.S.

The residential landlord–tenant law has been developed since the mid-20th century.[348] Rabin called the transformation involving additions to the tenant's right to the possession and limitations on the landlord's right as a "revolution" in residential landlord–tenant law.[349] Even though the protection for tenants with lease agreements for private houses developed slower than for tenants who participated in the government housing program, the courts and legislatures tried to limit the landlord's right to terminate the lease agreement.[350] However, only a few jurisdictions restricted the landlord's right to terminate the lease agreement based on a good cause and enacted legislations to protect the security of tenancy.[351] The jurisdictions that

[348] *Id*.
[349] Edward H. Rabin, *The Revolution in Residential Landlord–Tenant Law: Causes and Consequences,* 69 CORNELL L. REV. 517, 519 (1984).
[350] Roisman, *supra note* 2 at 832.
[351] Id. at 834.

established legislations to protect the tenant were Connecticut,[352] New Hampshire,[353] New Jersey,[354] District of Columbia,[355] and California.[356]

Following this, the first uniform act to regulate the rights and duties of the landlord and tenant in the lease agreement was enacted. The Uniform Residential Landlord and Tenant Act (hereinafter "URLTA"), which was first approved in 1972, regulates that "Every duty under this Act and every act which must be performed as a condition precedent to the exercise of a right or remedy under this Act imposes an obligation of good faith in its performance or enforcement."[357]

However, security of tenure was little accomplished even after the URLTA was finalized. The one achievement of the URLTA for security of tenure was eliminating tenancy at will and making a monthly tenancy the default if the lease term is not definite.[358] The problem is that the tenant can be protected only by the written notice to the tenant within 60 days under this provision.[359] Upon the end of the agreement, the tenant cannot be guaranteed the right to stay for an additional period. The act also adopted a protection against retaliatory eviction. This provision was made to protect the tenant from the landlord's retaliatory action resulting from complaints about the condition of the premises or the tenant's association with a tenant's union or similar

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[352] Conn. Gen. Stat. Ann., § 47a–23c (2016). ("Prohibition on eviction of certain tenants except for good cause").
[353] N.H. Rev. Stat. Ann. § 540:2 (2014). "Termination of Tenancy" requires good cause to terminate any tenancy for restricted property.
[354] N.J. Stat. Ann., § 2A: 18-61.1 to 18-61.12 (2013).
[355] DC ST, § 42-3505.01 to 3505.08 (2001).
[356] CA CIVIL, § 798.56 (2004). ("Authorized reasons for termination").
[357] Unif. Residential Landlord and Tenant Act, § 1.302, 7B U.L.A. 427–508 (1985 & Supp. 1998).
[358] Unif. Residential Landlord and Tenant Act, § 1.401(d), (1972).
[359] *Id.* § 4.301(b), § 4.301(c), and § 4.301(d).

organization.[360] However, it didn't provide a regulation for a generalized provision for security of tenure such as minimum lease term or automatic renewal.[361] Therefore, some scholars and courts pointed that ""[m]any of the new rights acquired by tenants as landlord-tenant law was transformed in the 1960s and 1970s could have been virtually nullified if landlords could terminate or refuse to renew the leases of tenants who exercised them."[362]

In 2011, the ULC appointed a drafting committee to revise and update the URLTA. The revised Uniform Residential Landlord-Tenant Act (hereinafter "RURLTA") does not reinforce the tenant's rights and, instead, reduces the protections afforded to tenants in some important areas. The first is with respect to the notice period to terminate a periodic lease. The URLTA regulated a 60-day notice period for terminating the periodic lease agreement, but the RURLTA reduced the period to one month.[363] Second, the RURLTA's regulation of the presumption of retaliation is the same as the URLTA. However, the RURLTA shortened the period within which the retaliation is presumed from one year to six months.[364] It added a new provision to protect the tenant victims of domestic violence and abuse. However, the new provision cannot act as a generalized provision; It is only for tenants who are

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[360] *Id.* § 5.101(a).
[361] Melissa T. Lonegrass, *A Second Chance for Innovation Foreign Inspiration for the Revised Uniform Residential Landlord and Tenant Act*, 35 UALR L. REV. 905, 948 (2013).
[362] Mary Ann Glendon, supra note 284 at 540.
[363] Joan Zeldon et. al., Draft Revised Uniform Residential Landlord and Tenant Act § 801(b)(2) (Oct. 25, 2013), www.uniformiaws.org/shared/docs/Residential%20Landlord%20and%20Tenant/2013novRURLTAMtgDraftClean.pdf.
[364] *Id*. § 904.

victims of domestic violence. Therefore, general tenants who face a financial crisis but not domestic violence cannot take advantage of the provision.

Another issue with the URLTA is that the act has only been adopted by 20 states,[365] due to which this act cannot be broadly applied as the standard to regulate the rights and duties of the tenant and landlord in the lease agreement.

Therefore, there is no general principle to force the landlord to create a successive agreement in the common law. Even though the uniform act attempts to regulate the duties of landlord, the uniform act cannot force the landlord to make a successive lease agreement with the tenant. Therefore, if the tenant wants to stay in the demised premises after the agreement period ends, the tenant has no right to claim to do so under the uniform act and general principles.

2. Automatic Renewal Unless the Landlord Refuses Within a Specified Period in Korea

Article 6 of Korean Housing Lease Protection Act regulates the renewal of contract. Subsection (1) of Article 6 states the following:

> [I]f the lessor fails to notify the lessee of a refusal of the renewal, or to give notification to the lessee to the effect that he/she would not renew the contract without any change in the condition, six months to one month before the term of the lease expires, the lease shall be deemed to have been renewed under the same conditions as the former one at the time the term expires. The same shall apply to cases where the lessee has not notified by one month before the term of the lease expires.

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[365] *Residential Landlord and Tenant Act*, UNIFORM LAW COMMISSION, (Jun. 22, 2017), http://www.uniformlaws.org/Act.aspx?title=Residential%20Landlord%20and%20Tenant%20Act%201972.

Unlike the Housing Lease Protection Act mentioned above, Article 10 of the Korean Commercial Building Protection Act regulates that when a tenant requests for the renewal of a contract between six months and one month before the expiration of the lease period, the landlord shall not refuse it without justifiable grounds.

However, the Housing Lease Protection Act only has an implied lease renewal right. Therefore, if the lessor wants to change the terms and conditions after the contract's termination, the lessor cannot request for its renewal. The security of tenure of a tenant in a housing lease agreement cannot be as strongly protected as that of a tenant in a building agreement by the law. This indicates the unfairness of the article in the Korean Housing Lease Protection Act.

C. Claims Referred To Based On a Comparative Study of the U.S. Residential Lease Agreement

1. Foreign Legislations Used for the Comparative Study

Judge J. Skelly Wright argued that "any change in the relative rights of tenants and landlords should be undertaken by the legislature, not the courts."[366] There are some advantages when the protection for tenant is reformed by legislation rather than the courts. Professor Korngold explained the advantages to using legislation rather than the courts when the law reforms are made as follows:

> Law reform by legislation rather than judicial decision offers certain advantages. Legislatures can engage in fact finding, fully consider an issue, and determine public policy and priorities as well as craft comprehensive solutions. In contrast, courts can only decide issues before them. Moreover, principles of separation of powers arguably require that legislatures make policy choices. Landlord-tenant reform

[366] Edwards v. Habib, 397 F.2d 687, 690 (1968).

> by statute presumably is allowed for those benefits as well as blunting some criticism of the so-called 'activist' courts.[367]

By considering using legislations to provide tenants the right to make a successive agreement even after the lease term ends, the acts enacted by other countries to protect the tenant can be emulated by the URLTA and legislation of each state or federal state. Below is a review of the comparative legislations that can be referred to in order to provide the right to a successive lease agreement.

a. France

In France, a legislation promulgated in 1948 regulated *le droit au maintien dans les lieux* (the right to remain on the premises) for residential tenants. [368]The Mermaz Act made this principle stronger by mandating minimum lease terms, regulating automatic lease renewals, and strictly limiting lease termination for the tenants to remain in the premises and enjoy the protection by the law.[369] The terms of

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[367] Gerald Korngold, *Whatever Happened to Landlord-Tenant Law?,* 77 NEB. L. REV. 703, 706 (1998); See also, Gerald Korngold, *Seller's Damages from a Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts*, 20 NOVA L. REV. 1069, 1084–87 (1996).

[368] Article 4 du loi 48-1360 du I septembre 1948 portant modification et codification de la législation relative aux rapports des bailleurs et locataires ou occupant de locaux d'habitation ou à usage professional et instituant des allocations de logement [Article 4 of Law 48–1360 of September 1, 1948 for the modification and codification of legislation concerning the relationship between lessors and lessees], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 2, 1948, p. 8659 (Fr.); see Lonegrass, Melissa T, *supra* note 112, at 951.

[369] Loi 89–462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n' 86-1290 du décembre 1986 [Law 89–462 of July 6, 1989 tending to ameliorate lease relations and modifying Law 86–1290 of Dec. 23, 1986], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 1989, p. 8541 [hereinafter

lease agreements are valid for three or six years, and they are automatically renewed. At the end of the agreement, the reasons to refuse the automatic renewal are limited to one of three specified reasons. Each provision is reviewed specifically below.

The period of the lease must be at least three years if the landlord is an individual and at least six years if the landlord is *une personne morale* (a legal entity such as a company).

Regarding the automatic renewal, there are narrow grounds to avoid it. First, the landlord can refuse to renew because of the un motif légitime et sérieux (for a serious and legitimate reason) such as the tenant's failure to perform his/her obligations.[370] This means that the court accepts only a serious violation of conduct as grounds for eviction. The French court has considered the following reasons as serious and legitimate enough to refuse automatic renewal: the failure of a lessee to pay the entirety of the rent (but not a lessee who pays off a debt within a period fixed by the court); the failure of a lessee to procure rental insurance; prohibited sub-leasing; the exercise of a commercial activity from the leased residence; the lessee's failure to use the premises peacefully, including aggressive behavior by the lessee toward neighbors or excessive noise; and demolition of the apartment complex.[371]

"Mermaz Act"] at art. 10. A lease for a term of less than three years is permitted for limited circumstances, such as when the lessor can show the need to reoccupy the home for professional or personal reasons. In no event, however, can the lease be shorter than one year.
Id. at art. 11

[370] *Id*. at art. 15.

[371] Code des Baux L. 6 Juill. 1989, cmts. 65–76 (Fr.); Loyers et Copropriété, Dec. 2002 at 278; See also Lonegrass, Melissa T, *supra* note 112, at 952.

The second reason for avoiding automatic renewal is if the landlord or the landlord's relatives need to occupy the property.[372] Finally, the landlord can refuse the renewal if he/she wants to sell the property.[373] However, the landlord needs to offer the right of first refusal of the premises to the tenant. In all of these situations, the landlord has to provide a timely written notice of termination to the tenant.[374]

A landlord faces further difficulties in terminating an agreement before the term's end. If the landlord does not include the so-called clause résolutoire (resolutory provisions), the tenant has the right to remain within the property until the termination of the original lease period even if the tenant severely breaches the lease agreement such as by not paying the rent.[375]

In contrast to the landlord, the tenant can terminate the agreement at any time by providing a three-month notice.[376] In addition, if the tenant has exigent circumstances such as when the lessee obtains a job, is transferred, or loses a job, the lessee can terminate the agreement following a notice of only one month.[377]

Despite this strong protection for tenants in French law, commentators criticize the French law due to the procedural framework in place for eviction. Under the French law, the procedures for eviction take a long time to oust the tenant from the premises even if the substantive law governing renewal allows the landlord to

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372 Mermaz Act, *supra* note 116, at art. 15.
373 *Id.*
374 *Id.*
375 Mermaz Act, *supra* note 116, at art. 4(g).
376 Mermaz Act, *supra* note 63, at arts. 12, 15.
377 *Id.* at art. 15.

terminate the lease.[378] The landlord needs to request an eviction order from the court and give a notice to the tenant to quit the premises if the landlord fails to oust the tenant when the agreement period ends.[379] When the notice is served, the tenant has an initial period of two months to leave. Afterwards, the tenant is permitted to petition the court for additional time to find another dwelling.[380] Usually, the additional time allowed by the court is six months.[381] During the initial and additional periods after receiving the notice, the tenant is allowed to petition for an additional grace period ranging between a month and a year due to "serious unfair consequences" such as a family's inability to procure housing, employment, or schooling for children due to the eviction.[382] The following elements are considered for a judge's decision of the term of grace period:[383]

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[378] Melissa T. Lonegrass, *supra* note 361, at 957.

[379] *Id*.

[380] *Logement vide relevant du secteur privé: impayés de loyers et expulsion* [Empty slot in the private sector: unpaid rent and eviction], SERVIC-PUBLIC.FR: LE SITE OFFICIEL DE L'ADMINISTRATION FRANÇAISE [SERVICE-PUBLIC: THE OFFICIAL WEBSITE OF THE FRENCH ADMINISTRATION], https://www.service-public.fr/particuliers/vosdroits/F31272 (last visited July. 30, 2018).

[381] Natalie Boccadoro & Anthony Chamboredon, France, in EUROPEAN UNIV. INST., TENANCY LAW AND PROCEDURE IN THE EU 18; See also Melissa T. Lonegrass, *supra* note 112, at 957.

[382] Code de la Construction et de L'habitation [C. Civ.] [Building And Housing Code] art. L.613-1 (Fr.); Code des Procedures Civiles D'execution [CPCE] [Code of Civil Enforcement Proceedings], arts. L.412-3-4, L.412-6-8; Résiliation du bail et expulsion du locataire [Terminate the lease and evict the tenant], SERVIC-PUBLIC.FR: LE SITE OFFICIEL DE L'ADMINISTRATION FRANÇAISE [SERVICE-PUBLIC: THE OFFICIAL WEBSITE OF THE FRENCH ADMINISTRATION], http://vosdroits.service-public.fr/Fl213.xhtml (last visited Jul. 30, 2018).

[383] Code des Procedures Civiles D'execution [C.P.C.E.] [Code of Civil Enforcement Proceedings] art. L.412-4 (Fr.).

> [t]he good or bad will manifested by the lessee in the execution of his obligations; the respective situations of the lessor and the lessee, notably concerning age, health, familial circumstances or finances; atmospheric circumstances, as well as the diligence manifested by the lessee in securing another dwelling.

With all the processes in place for appeals, evictions can be extended for years. A tenant can also be evicted after getting an eviction order from the court. However, even with an eviction order, the eviction may be delayed further by *la tréve hivernale* (the winter truce), which prohibits the landlord from evicting the tenant during the winter months between November 1 and March 15.[384]

Even if the landlord overcomes all the obstacles imposed by the law, a lawful eviction cannot occur if the local officials decide to exercise their legal option to allow the tenant to render compensation to the landlord instead of an eviction.[385]

Due to these delays and the complex eviction procedure, the efficacy of the substantive law is obscured, and commentators criticize the French law. Regardless of these criticisms, it could be considered as a reference for the U.S. law but with limits to the landlord' right to refuse a successive lease agreement when the lease period ends.

b. South Korea (Korea, Republic of)

Two laws govern the relationship between the landlord and tenant of a residential lease agreement in Korea. The first is the Korean Housing Lease Protection Act, which is applied by priority. The second is the Civil Act, which is a

[384] Code des Procedures Civiles D'execution [C.P.C.E.] art. L412-6 (Fr.).
[385] Melissa T. Lonegrass, *supra* note 361, at 958.

subsidiary law applied to the lease agreement when there are no specific articles in the Korea Housing Lease Protecting Act to be applied.

Two points under these Korean laws can be referred to for the U.S. law to give tenant's the to claim their right to stay in the demised premises after the lease period ends against the landlord's decision to terminate the agreement: the article that states a minimum mandatory lease period[386] and the article that nulls an agreement if it is unfavorable to a tenant. Whether the agreement is unfavorable to a tenant can be decided by the provisions of current legislation. For example, if the parties agree that the landlord can terminate at any time when the agreement is automatically renewed, it would be null since Article 6 of the Korean Housing Lease Protection Act regulates that the lease period should be two years when the lease is automatically renewed. Therefore, an agreement that violates this provision would be nulled because it is unfavorable to the tenant.

As reviewed above, there is a mandatory minimum lease agreement period specified in the Korean Housing Lease Protection Act. Article 4 regulates that "with respect to a lease whose term is not fixed or is fixed for less than two years, the term of such lease shall be deemed to be two years: Provided, That the lessee may claim that the term fixed for less than two years shall be valid." Therefore, the tenant enjoys a minimum of two years of fixed rent, and the tenant has the option of terminating the lease before the end of the two-year period. However, the landlord cannot terminate

[386] Jutaek Imdaecha Boho Beob[Korean Housing Lease Protection Act], Act No. 3379, Mar. 5, 1981, amended by Act No.15791, Oct. 16, 2018, art. 4 (S. Kor.).

the agreement before the term ends (before two years have passed) unless the tenant breaches an obligation under the agreement.

The minimum period is maintained when the agreement is automatically renewed, too. If the lessor fails to notify the lessee of a refusal of the renewal or that the contract would not be renewed changes in the condition, between six months and one month before the term of the lease expires, the lease shall be deemed to have been renewed under the same conditions as the former one upon expiry. The same shall apply to cases wherein the lessee has not been notified one month before the term of the lease expires.[387] In case the agreement is renewed by this article, the term of the lease shall be deemed to be two years. By this article, the tenant can have a minimum period tenancy again. While the landlord has mandatory minimum period to follow, the tenant can notify the landlord of the termination of the lease at any time, and the termination shall enter into force upon the lapse of three months from the date the notification was received.[388] This right to implied renewal can be enjoyed only by tenants who have fulfilled their obligations and not tenants who defaulted on their rent payment up to two installments thereof or seriously violated the obligations under the lease contract and provisions.[389]

In addition, with respect to the tenant's right to receive deposit money, the law regulates that "even though the period for lease has expired, the relations of lease shall be deemed to continue until a deposit is repaid to a lessee."[390] Since the deposit

[387] Id at art. 6.
[388] Id at art. 6-2.
[389] Id at art. 6(3).
[390] Id at art. 4(2).

money in Korea is a large part of the lease amount, special focus is placed on a tenant's maintenance of the lease agreement until the tenant can get the deposit money back even after the lease period ends.

Another article that can be referred to is the provision, "any agreement in violation of the provisions of this Act which is unfavorable to a tenant shall be null and void."[391] If the parties make an agreement that is against the tenant, the landlord cannot request the court to enforce the agreement.

c. England

In England, there are two types of private tenancy: assured tenancy and assured shorthold tenancy. In the case of an assured tenancy, the landlord can terminate the lease only upon proving one of several statutorily regulated grounds for possession to hold. Some of these grounds are mandatory, and the court must grant possession if the landlord proves them to hold true. The mandatory grounds in the Housing Act are as follows:

> (1) the landlord's desire to occupy the home as a dwelling; (2) the foreclosure of a mortgage by a mortgagee; (3) termination of a fixed-term holiday letting; (4) termination of a fixed-term student letting; (5) tenant is a minister; (6) landlord intends to demolish or reconstruct the premises or carry out substantial works on them; (7) property subject to periodic tenancy devolves by testament of tenant; (8) two months'

[391] Jutaek Imdaecha Boho Beob[Korean Housing Lease Protection Act], Act No. 3379, Mar. 5, 1981, amended by Act No.15791, Oct. 16, 2018, art. 10 (S. Kor.); Sanggagunmul Imdaecha Boho Beob[Commercial Building Lease Protection Act], Act No. 6718, Aug. 26, 2002, amended by Act No. 16912, Feb. 4, 2020, art. 15 (S. Kor.).

> rent arrears, both at the date of the notice seeking possession and at the date of hearing.[392]

Others are discretionary measures, and the possession is justified when the court decides that the order for possession is reasonable. There are 10 discretionary grounds: (1) suitable alternative accommodation; (2) rent arrears at the time of the notice seeking possession and at the issue of the proceedings; (3) persistent delay in paying the rent, even if no arrears now; (4) any other breach of the tenancy agreement; (5) waste or neglect by the tenant or other resident causing deterioration of dwelling; (6) the tenant or a person residing in or visiting the premises is guilty of conduct causing a nuisance or has been convicted for immoral/illegal use of the premises or for an arrestable offence committed in the locality; (7) (for registered social landlords only) the tenant is guilty of domestic violence, and victim is driven from the premises and is unlikely to return; (8) ill-treatment of furniture by tenant or another resident causing deterioration; (9) tenant is ex-employee of landlord living in accommodation needed for another employee; (10) false statement by the tenant to obtain the tenancy.[393]

Although the assured tenancy is relatively secure for the tenants' protection, it rarely applies to a private lease agreement, and the assured shorthold tenancy has become the most common form of lease for the private sector in England due to the

[392] Housing Act, Schedule. 2, 1988 (Eng.); see also Melissa T. Lonegrass, *supra* note 112, at 953.
[393] Housing Act, Schedule 2, 1998 (Eng.); see also Melissa T. Lonegrass, *supra* note 112, at 953–4.

clear advantage given from the form.[394] It can be terminated by either party with no reason or any reason if either party gives a notice of two months.[395] Even though either party has the right to terminate at any time, the act states that an assured shorthold tenancy cannot be terminated within six months from the beginning of the tenancy.[396] The aim of introducing the assured shorthold tenancy as a part of a reform package was to deregulate the English tenancy law and increase the size of the private rental sector.[397] The assured shorthold tenancy has become the default form of tenancy granted by private sector landlords due to the 1996 legislation making the shorthold the default lease form.[398]

As the assured shorthold tenancy is the most common lease form, a tenant in the private lease sector is in a rather tenuous position. The primary criticism of shorthold tenancy is that its lack of security makes tenants vulnerable to retaliatory eviction.[399] Attempts to ameliorate the problem by preventing improper evictions by law have done little to help the tenants.[400] Even though both civil and criminal sanctions exist against improper evictions, they generally prohibit only unlawful

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394 Peter Orji & Peter Sparkes, *Tenlaw: Tenancy Law and Housing Policy in Multi-Level* at 92, https://www.tenlaw.uni-bremen.de/reports/England&WalesReport_09052014.pdf.

395 Housing Act, c. 50, § 21(1)(b), 1988.

396 *Id.* § 20(1)(b).

397 James Driscoll, *Housing: The New Law: A Practical Guide To The Housing Act 2004,* 1–2 (2007).

398 Melissa T. Lonegrass, *supra* note 361, at 954.

399 Debbie Crew, *The Tenant's Dilemma Warning: Your Home Is At Risk If You Dare Complain,* CITIZENS ACTION BUREAU (2007), https://www.citizensadvice.org.uk/global/migrated_documents/corporate/tenants-dilema---document.pdf

400 Jill Morgan, Unlawful Eviction and Harassment, in THE PRIVATE RENTED SECTOR IN A NEW CENTURY: REVIVAL OR FALSE DAWN? 109-22 (Stuart Lowe & David Hughes eds., 2002).

landlord behaviors; retaliatory actions are considered lawful behaviors.[401] The severe problem is that these sanctions are rarely imposed. The law commission mentioned to both the police and prosecutors that criminal convictions have been negligible and in decline, and they lack incentives to prosecute landlords,[402] whereas civil actions are also relatively scarce, and private litigants lack incentives to file suits. In the process of litigation, the damages are calculated as the difference between the value of the property, to the landlord, with and without the tenant's occupation.[403] However, calculating the relative values of the property with and without the tenant's occupation is a difficult process because of its practical matter.[404] As a result, the tort action in civil litigation cannot deter retaliatory conducts by landlords against tenants.[405]

Even though critics emphasize the need to deter landlords' abusive conducts, it is unlikely that a retaliatory scheme in England will be implemented, as the Law Commission did not recommend the adoption of retaliatory eviction in its proposal of

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[401] *Supplementary Paper 1: The Law On Housing Conditions And Unlawful Eviction,* THE LAW COMMISSION, 1.68–1.86, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/Housing_Encouraging_Responsible_Letting_Supplementary_1.pdf

[402] *Consultation Paper No. 181: Encouraging Responsible Letting 3.35,* THE LAW COMMISSION (2008), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp181_Housing_Encouraging_Responsible_Letting_Consultation.pdf

[403] *Supplementary Paper 1: The Law on Housing Conditions and Unlawful Eviction*, LAW COMMISSION, *supra* note 155, 1.82–1.83.

[404] *Id.* 1.84.

[405] *Id.* 1.85.

reforms to tenancy law presented to the parliament.[406] In the final report, the Law Commission concluded that prohibitions on retaliatory eviction "may be of symbolic importance but be of little practical effect."[407] The Law Commission suggested that a statutory scheme that gives landlords the incentive to follow the housing standards would be more effective in tenant protection.[408]

2. Comparison between the Laws in the U.S. and Other Countries

I focus on the common law and uniform act as approaches to limit the landlord's right to terminate the agreement in this chapter. I don't consider the rent control acts enacted in some areas of the U.S. since it is not a general principle. Even though the uniform act has not been generally adopted, it can be established as a standard if the legislators of a state consider enacting a local landlord–tenant law. Therefore, the uniform act is included in this chapter and not the rent control acts of each state.

As mentioned above, there is no rule under the common law that prevents a landlord from terminating a lease agreement under certain conditions once the lease period ends. The URLTA doesn't have any articles that prevent the landlord's rights either. However, other countries have provisions to limit the landlord's termination of the tenancy under certain conditions.

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[406] Housing: Encouraging Responsible Letting, THE LAW COMMISSION (2008), 6.98–6.99, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc312_Housing_Encouraging_Responsible_Letting.pdf

[407] *Id*. 6.99.

[408] *Id*. 6.1–6.111.

First, France and South Korea have mandatory minimum lease terms. Only a tenant can enjoy the benefits of the mandating minimum lease terms and claim a shorter period than the minimum lease term in Korea.

Second, in France, a landlord can terminate a lease agreement only because of one of three specified reasons, such as the tenant's failure to perform his obligations, even after the lease period ends. Therefore, the landlord's right to terminate the lease agreement when the term ends is narrowly limited.

Third, even though either party of an assured shorthold has the right to terminate the agreement at any time similar to the tenancy at will in the U.S., the France act regulates that an assured shorthold tenancy cannot be terminated within six months since the tenancy began.

These provisions can be referred to for improving the residential agreement in the U.S. If the mandatory minimum period for the lease or a landlord cannot terminate the agreement is regulated in the agreement, the landlord's right to terminate can be limited within a certain period. In addition, the limitations on the landlord's right to terminate the agreement specifying that the landlord should have a reasonable reason to refuse to renew the lease agreement when the lease ends can be referred to for the U.S. agreements to reinforce the stability of tenure.

D. Claims based on a Comparative Study Referred to in Korean Residential Lease Agreements

1. Rent Control Act in the U.S.

a. Overview.

As previously discussed, the landlord's right to increase the monthly rental fee or deposit money is limited while the lease agreement is maintained, but the landlord can increase the deposit money and/or monthly rent without any limitations when the period of agreement ends in Korea. It is common for the landlord to not renew the lease agreement if the tenant is unable to pay the increased deposit amount specified by the landlord when the original agreement is terminated as the demand for the *Chonse* or lease agreement in the city areas is constantly on the rise. Therefore, restricting the landlord's right to increase the deposit money and/or monthly rent without limitations is required even after the period of lease agreement ends for the tenant's security to reside.

Here, the Rent Control Acts in U.S. can be considered for a comparative study. Before reviewing the rent control acts, it should be noted that there are, indeed, controversies on whether the Rent Control Act is good or bad. Many economists argue that rent controls are not beneficial to tenants, especially low income tenants, unlike what was intended.[409] Although there are such controversies, this paper does not defend nor advocate for the implementation of the Rent Control Act as it goes beyond the scope of the thesis. The rent control act will merely be reviewed, particularly the provisions for rental increases and eviction control, to refer to in the context of the Korean law.

In Korea, there is currently an agreement between the government and ruling party to provide the right to requests the renewal of a contract to tenants of residential

[409] Richard E. Blumberg, Bria Quinn Robinns, and Kenneth K. Baar, *The Emergence of Second Generation Rent Controls*, 8 CLEARINGHOUSE REV. 240, 240 (1974–1975).

lease agreements, which is the same as the right provided to tenants of commercial lease agreements. This means that the tenants of residential agreements are guaranteed the right to reside at the demised premises for a minimum of four years, and the landlord cannot refuse to renew the residential lease agreement without justifiable grounds regulated in the statue. Under this revision, the tenant has the right of request for renewal once. This relates to two meaningful concerns in this thesis. First, there is a controversy around limiting the landlord's right by giving the right to request a renewal to the tenant with a residential lease as it can infringe on the landlord's property right, too. However, the Korean government and most scholars agree that it is necessary to strongly protect tenants since stability of residence is a critical social issue in Korea. Protecting tenants is of value in Korea. In this society, referring to the U.S. Rent Control Act can be meaningful. Second, there is a lack of measures to prevent the landlord from increasing the deposit or monthly rental fee even though the law gives tenants the right to request for a renewal of the lease. It can guarantee tenants the right to reside for four years but cannot prevent an increase in the deposit money or monthly rent when the agreement period ends. Therefore, referring to the U.S. Rent Control Act is necessary.

I cannot tell the rent control act is good or bad in this thesis. However, it could be reference to suggest how to protect the tenant of housing lease agreement in Korea at the points I mentioned above. Therefore, I will review the rent control act at this point in this thesis.

b. Provisions to control the rental fee.

The Rent Control Act is a measure used to control rent increases and halt or slow down the incidence of a tenant not being able to acquire affordable housing. It seeks to protect tenants against excessive increases in the rent as well as ensure landlords obtain fair returns on their investments.[410] Most rent control laws regulate periodic increases in the base rent. This can be a statutorily predetermined amount, an amount based on a predetermined statutory formula, or an amount based on the decision of an administrative board.[411] Individual adjustments can be made to reflect increases or decreases for maintenance purposes by a petition from the tenant or landlord in addition to the periodic increase regulated by the rent control laws.

Rent control laws usually have one or two basic formulae to adjust the general rent. The first is the return-on-investment formula, and the second is the percentage-increase method.[412] The return-on-investment formula can be implemented through a statute mandating a maximum return on the assessed value of the property.[413] The D.C. Code Ann. § 42–3502.12 is an example.

> § 42–3502.12. Hardship petition.
>
> (a) Where an election has been made under § 42-3502.06(c) to seek a rent adjustment through a hardship petition, the Rent Administrator shall, after review of the figures and computations set forth in the housing provider's petition, allow additional increases in rent which would generate no more than a 12% rate of return computed according to subsection (b) of this section.

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[410] Guggenheim v. City of Goleta, 638 F. 3d 1111 (9th Cir. 2010).
[411] Val Werness, *Rent Controls: A White Paper Report,* LEGAL RESEARCH CENTER, Appendix 1 at 17–18 (Oct. 2016).
[412] See San Jose Mun. Code, ch. 17.23.440 (1979).
[413] Richard E. Blumberg, *supra* note 409 at 240.

The return-on-investment formula can be enforced by using an indefinite standard, such as ordinance, which permits adjustments made by an individual or general.[414] The "maintenance net operating income" approach has been praised by commentators for its fairness and ease of administration.[415] "A typical maintenance of net operating income formula presumes the landlord's net operating income at the time rent control began provided a just and reasonable return. In order to maintain this net operating income at a constant level, the law permits rent increases that will enable the landlord to recoup increases in ongoing operating expenses."[416]

The other formula to adjust the general rent is the percentage increase method. This formula usually fixes the rent increase based on an objective index such as the consumer-price index or cost-of-living index.[417] For example, the Rental Housing Commission of Washington D.C. annually determines the adjustment of the general applicability of the rent ceiling. The rent ceiling is regulated by the D.C. Code as follows:

> On an annual basis, the Rental Housing Commission shall determine an adjustment of general applicability in the rent charged established by subsection (a) of this section. This adjustment of general applicability shall be equal to the change during the previous calendar year, ending each December 31, in the Washington, D.C., Standard Metropolitan Statistical Area Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for all items during the preceding calendar year. No adjustment of general applicability shall exceed 10%. A housing provider may not implement an adjustment of

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[414] See MHC Operating Ltd. P'SHIP V. City of San Jose, 106 Cal. App. 4th 204, 130 Cal. Rptr. 2d 564 (2003).
[415] Palomar Mobilehome Park Assn. v. Mobile Home Rent Review Com., 16 Cal. App. 4th 481, 486, 20 Cal. Rptr. 2d 371 (1993).
[416] Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th at 768–769, 66 Cal.Rptr.2d 672, 941 P.2d 851.
[417] Val Werness, *supra* note 411 at 17, 110.

> general applicability, or an adjustment permitted by subsection (c) of this section for a rental unit within 12 months of the effective date of the previous adjustment of general applicability, or instead, an adjustment permitted by subsection (c) of this section in the rent charged for that unit.[418]

This statute limits the rent increase to 10% or less. The second approach using other statutes involves regulating a fixed annual percentage increase.

In California, the rent control law limits annual rent increases as well as total rents charged by a landlord. The law limits increases during a 12 month period to 5% plus the increase in the consumer price index up to a maximum of 10% of the monthly rent fee as follows:

> 1947.12.[419]
>
> (a) (1) Subject to subdivision (b), an owner of residential real property shall not, over the course of any 12-month period, increase the gross rental rate for a dwelling or a unit more than 5 percent plus the percentage change in the cost of living, or 10 percent, whichever is lower, of the lowest gross rental rate charged for that dwelling or unit at any time during the 12 months prior to the effective date of the increase. In determining the lowest gross rental amount pursuant to this section, any rent discounts, incentives, concessions, or credits offered by the owner of such unit of residential real property and accepted by the tenant shall be excluded. The gross per-month rental rate and any owner-offered discounts, incentives, concessions, or credits shall be separately listed and identified in the lease or rental agreement or any amendments to an existing lease or rental agreement.

The rent control law of New York City operates under the maximum base rent (MBR) system.[420] Every two years, the State Division of Housing and Community Renewal (DHCR) determines how much the rental fee for a rent-controlled unit can

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[418] D.C. Code Ann. § 42–3502.06(b).
[419] AB-1482 Tenant Protection Act of 2019: Tenancy: Rent Caps. Section 3, 1947.12.
[420] NYC Local L. 1970, No. 30.

be increased.[421] The rent actually paid by the tenant is called the maximum collectible rent (MCR). The DHCR is entitled to allow an annual increase in the MCR of up to 7.5% until the demise's MCR reaches the MBR, since the MCR is usually lower than MBR.[422] These limitations are regulated in the NYCRR as follows:

> 2201.5 Next Term Biennial adjustment of maximum rents.
>
> (a) Effective January 1, 1974 and biennially thereafter, the administrator shall adjust the maximum rent for each housing accommodation subject to these regulations to reflect the changes, if any, in the components of the maximum gross building rental defined in section 2201.4(b) of this Part. Such adjustment shall be made whether or not the property, or any housing accommodation therein, received or was eligible for maximum base rents under section 2201.4 of this Part.
>
> (b) On or after January 1, 1974, the administrator may require landlords of properties containing housing accommodations subject to control under these regulations to report the actual operating and maintenance expenses for such properties, in such form and manner as he may prescribe, and may adjust the allowance for operating and maintenance expenses in accordance with such data. In addition, the administrator may provide for an alternative standard operating and maintenance expense allowance based upon cumulative objective data.
>
> 2201.6 Collectibility.
> **(a)**
> (1) No new maximum rent established pursuant to section 2201.4 of this Part, or adjustment pursuant to section 2201.5, 2202.7, 2202.8, 2202.9 or 2202.10 of this Title, or any combination thereof, shall increase the rent collectible from a tenant in occupancy by more than 7 ½ percent in any one calendar year, except as provided in section 2202.7 of this Title.
> (2) The base for computation of the limitation provided in paragraph (1) of this subdivision shall be:
> (i) as of January 1, 1972, the maximum rent on December 31, 1971 (including any conditional increases then in effect), less the amount of

[421] 9 NYCRR § 2201.5(b).
[422] 9 NYCRR § 2201.6.

> any rent exemption under section 2202.20 of this Title in effect on December 31, 1971; and
> (ii) after January 1, 1972, the maximum rent collectible pursuant to this section.
> (b) Where the maximum rent for a housing accommodation on December 31, 1971 exceeds the maximum base rent established pursuant to section 2201.4 of this Part, such prior maximum rent shall continue in effect until the maximum base rent, as adjusted from time to time pursuant to these regulations, shall equal or exceed such prior maximum rent; at which time the maximum base rent as so adjusted shall become the maximum rent for such housing accommodation.
> (c) No increase in maximum rent pursuant to this section, in any year other than a year in which a maximum rent, established pursuant to section 2201.4 of this Part or adjusted pursuant to section 2201.5, takes effect, shall be collectible until the landlord shall have given notice thereof to the tenant on a form prescribed by the administrator. A copy of such form shall be filed with the administrator within 30 days of its transmittal to the tenant. Failure to comply with the provisions of this paragraph shall authorize the administrator to revoke the landlord's entitlement to any such increase.

c. Eviction control.

In addition to the limitation on the rent increase, the rent control acts also control a tenant's eviction from a demise to promote the public policy goals of rent regulation.[423] The most important goal of the rent control acts is to protect the tenants, so many acts require the landlord to have a "just cause" for evicting a tenant. A just cause for eviction can be one of the following reasons: use of the unit for illegal or immoral purposes, non-payment of rent, landlord requires possession for own or immediate family member's use, or continued violation of provisions of the lease, such as committing waste or being a nuisance.

The limited reasons for eviction from the demise apply even when the term of the lease agreement has terminated as long as the tenant continues to pay rent and the

[423] Carol Necole Brown, Experiencing Housing Law 1268 (2016).

rent control act still covers the unit. However, the tenant may be required to execute a new written lease agreement similar to the one that ended to avoid eviction in some situations.

There are examples of the good causes for eviction being regulated in the legal sphere. The D.C. Rental Housing section of the District of Columbia Statutes & Court Rules regulates 10 conditions that can be considered as good causes for eviction. District of Columbia Statutes & Court Rules § 42-3505.01 regulates the conditions that can be considered as good causes for the landlord to recover his possession. The conditions under the Code are as follows: (a) non-payment of rent; (b) violation of an obligation of tenancy; (c) performance of illegal action in the rental unit; (d)(e) person's immediate and personal use and occupancy as a dwelling by the landlord or a buyer of the rental unit; (f) alterations or renovations made to the rental unit; (g) demolishment of the housing accommodation; (h) substantial rehabilitation of the housing accommodation; (i) discontinuation of the housing use and occupancy of the rental unit; or (j) conversion of the rental unit or housing accommodation into a condominium or cooperative.[424]

The New Jersey Statutes Annotated 2A:18-61.1 set forth the grounds for good cause. The grounds under the Statues are as follows: (a)(f)(j) non-payment of rent or increased rent (b) destruction of the peace and quiet by the occupants; (c) willfully or negligently destroy, damage, or injure the premises; (d) violate or breach any of the landlord's rules and regulations; (e) demolish, compliance with the inspectors, correction illegal occupancy or retirement the premises from the rental market; (h)

[424] D.C ST, § 42–3505.01 (2001).

retire permanently the rental unit from residential use or use as a mobile home park; (i) landlord propose a reasonable change of substance to the terms and conditions of the lease at the time of termination; of a lease and tenant refuses to accept that(k)(l) conversion to a condominium, cooperative, or fee simple ownership or park sites; (m)–(q) commission of the specific kind regulated in (m)–(q) or violation of human trafficking provisions.[425]

Some other articles in the rent control acts protect tenants from. The New Jersey Eviction Law regulates that "It is in the public interest of the State to maintain for citizens the broadest protections available under State eviction laws to avoid such displacement and resultant loss of affordable housing," and it presents the example of citizens to be protected as "vulnerable seniors, the disabled, the frail, minorities, large families and single parents."[426]

For protecting minorities from eviction, the minimum condition that the lessor should comply to is also regulated in the Rent Control Act. The District of Columbia Statutes & Court Rules is one.[427] DC ST § 42-3505.01 (K) regulates the article for restrictions on evictions depending on the weather, as given below.

> [N]otwithstanding any other provision of this section, no housing provider shall evict a tenant on any day when the National Weather Service predicts at 8:00 a.m. that the temperature at the National Airport weather station will fall below 32 degrees Fahrenheit or 0 degrees Centigrade within the next 24 hours.
>
> (k-1) Subsection (k) shall not apply:
>
> (1) Where, in accordance with and as provided in subsection (c) of this

[425] N.J. Stat. Ann., § 2A: 18–61.1 (2013).
[426] N.J. Stat. Ann., § 2A: 18–61.1a (d) (2013).
[427] D.C. ST, § 42–3505.01 (2001).

> section, a court of competent jurisdiction has determined that the tenant has performed an illegal act within the rental unit or housing accommodation;
>
> (2) Where a court of competent jurisdiction has made a specific finding that the tenant's actions or presence causes undue hardship on the health, welfare, and safety of other tenants or immediate neighbors; or
>
> (3) Where a court of competent jurisdiction has made a specific finding that the tenant has abandoned the premises.

The California Civil Code has a similar provision for eviction control. Section 1946.2 of the California Civil Code regulates that "after a tenant has continuously and lawfully occupied a residential real property for 12 months, the owner of the residential real property shall not terminate the tenancy without just cause."[428] Regarding the "just cause" for eviction, lists of "at fault" just causes and "no fault" just causes are enumerated in 1946.2.(b).[429] These codes in the U. S. rent control acts that protect tenants can be considered to be added to the Korean Housing Lease Protection Act.

E. Comparison of the Acts to Protect Tenants in the U.S. and Korea

Korea Housing Lease Protect Act only allows for implied renewal, imposing a responsibility to notify the tenant of the refusal to renew on the landlord between six months and one month before the term of the lease expires. Therefore, if the lessor wants to change the terms and conditions after the termination of the contract, the lessor cannot request for a renewal of the lease.

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[428] California Civil Code, § 1946.2(a).
[429] *Id,* 1946.2(b).

Under the common law doctrine, the tenant does not have the right to renew. However, some jurisdictions enacted rent control acts to protect tenants through statutes. The acts impose limitations on increases in the rent even after the lease agreement is terminated unlike the Korean law. There are two ways to limit the rental increase: using the return-on-investment formula or the percentage formula. The tenants are protected from rental fee increases and eviction therefrom even after the term of the lease agreement.

In addition, the landlord can evict the tenant only with a good cause, as regulated by the law. Therefore, the landlord has a narrow right to terminate the lease agreement, especially when the tenant is a vulnerable party, and has a duty to avoid the termination of the lease agreement under certain circumstances.

If these provisions are adopted into the Korean law, the problem of the landlord refusing to renew the agreement after its term expires, aiming to increase the rent can be solved, and the security of tenure for tenants can be established.

III. SUMMARY

Justice Holmes described the necessity of security of tenancy in a Supreme Court case as follows:

> [H]ousing is a necessary of life. All the elements of a public interest justifying some degree of public control are present . . . The preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law. If the tenant remained subject

> to the landlord's power to evict, the attempt to limit the landlord's demands would fail.[430]

Security of tenancy is important to the tenant, and the tenant should be protected by the right to remain in the leased residential house. Therefore, several ways to protect the tenants in both Korea and the U.S. were proposed in this chapter.

In the Korean legal system, there are two special acts to protect the tenants: the Korean Housing Lease Protection Act and Korean Commercial Building Lease Protection Act. However, these acts consist of flaws in those acts, which make them insufficient to completely protect the tenants from the gaps in the law.

To rectify the above and further protect the tenants under the Korean Housing Lease Protecting Act, the rent control acts of the U.S. can be referred to, adopting them to protect the tenant's right to remain in the demise and prohibiting the landlord from raising the rent or deposit even after the agreement period ends. In addition, codes such as New Jersey Eviction Law, District of Columbia Statutes & Court Rules can be considered as additions to the Korean Housing Lease Protection Act.

Regarding the residential lease agreements in the U.S., several attempts were made to use case laws and acts to reinforce the tenant's security of tenure. In case law, there were several attempts to create a holding of courts, such as in Myers v. East Ohio Gas Co, Thomas v. Goodwin, and L. E. Cooke Corp. v. Hayes, and to revise the rule of Foley v. Gamester, which states "the lessee is not bound to remain for any definite period, the landlord is not prevented from ending the relation." However, none of these attempts could clearly explain the reason for the courts' decision to

[430] Block v. Hirsh, 256 U.S. 135, 156–58 (1921).

protect the tenants through holdings. Therefore, it is not sufficient to protect the tenants using the prior case law attempts. Regarding the acts, several jurisdictions adopted legislations to protect tenants. In addition, the URLTA and RULTA were approved as uniform acts for tenants. However, the legislations of each jurisdiction have not been widely adopted, and the URLTA and RURLTA cannot protect a tenant when a landlord terminates or refuses to renew a lease.

To overcome these problems related to the tenant's right to remain as well as provide strong tenant protections through legislations rather than the court, the laws in France, South Korea, and England can potentially be emulated. Based on the comparative study, adopting a minimum mandatory period for a lease agreement can enhance the protection of the tenants in U.S. The minimum mandatory lease period given in the Korean acts can, especially, be a good reference. The minimum lease period in Korea is mandatory only for the landlord, so the tenant can claim a lease period that's lesser than mandatory period. Thus, only the landlord is bound to the mandatory period for a lease agreement, and the tenant can enjoy the flexibility of tenure.

In the case of commercial lease agreements in the U.S, there are no protections in place when the agreement is terminated for tenants who expend their efforts and money to value up the demise. For these tenants, the right to request for a renewal of the contract for a maximum of 10 years and right to collect the premium from a new tenant, which are given in the Korean law, can be referred to. By using these concepts, the tenant can be guaranteed the use of the premises, which were valued up due to the tenant's time and expense, for up to 10 years and collect the invested amount once the

agreement is terminated in the form of a “premium” from a new tenant by making a “premium agreement.” With these measures, the commercial lease agreement between a landlord and tenant in the U.S. can be made fair.

To protect tenants from the gaps in the Korean Commercial Building Lease Protection Act, applying common law doctrines, codes and/or court decisions according to the interpretation based on the common law doctrines, codes directly can be effective. The case law that allows tenants to sub-lease property in the U.S. and restricts the termination of franchise agreement using the implied covenant of good faith and fair dealing can be applied to the interpretation of the Korean Commercial Building Lease Protection Act by the courts. Applying these case laws would ensure that the tenants of a commercial building are guaranteed to receive a premium amount from the new tenants without the landlord’s obstruction, even after the termination of the agreement. To be specific, the tenant can receive the premium from the new tenant after the termination of the lease if the original tenant tries to make an agreement, but the agreement cannot be made until the original lease agreement is terminated due to the lessor’s unreasonable performance by applying the case law, such as in Julian v. Christopher. The landlord’s motive can be important factor to decide the landlord’s reasonable performance based on the case laws related to the implied covenant of good faith and fair dealing in franchise agreements, provided that the period within which the tenant can claim the premium after the termination of the agreement is deemed as reasonable by the act for legal stability. In addition, the tenant’s substantial investments into and expansion of the premises can be also an important factor to

decide reasonableness; the landlord's obstruction of the tenant's premium receipt would be impossible if the tenant invested into or expanded the property.

CHAPTER 5. CONCLUSION

The security of tenure is one of the most important aspects of the residential lease agreement for individual and social life. In the U.S., the subprime mortgage crisis that occurred from 2007 to 2010 resulted in a large number of home owners to be driven into rental market. Therefore many home owners were changed to the tenants after they lost their home because of the subprime mortgage crisis and they needed to get a rental house.As per the law of supply and demand, the rental fee increased and the availability of affordable rental premises drastically decreased. In such a situation, the tenants were the vulnerable party while making a contract, and the landlord would abuse and exploit the lease agreement.[431]

The economic condition during the subprime mortgage crisis was the same as the economic condition when the URLTA was revised. When the URLTA was revised, the courts and scholars had to recognize the necessity to protect tenants.[432] The necessity to protect tenants' right to remain that had been recognized 40 years prior was brought up. In this regard, legislations to enable the tenants to rent safe and affordable premises with steady and sufficient supply was required. However, there were several problems, including the tenant not being guaranteed to renew or make a successive lease agreement when the original lease agreement was terminated. This meant that the landlord could arbitrarily decide to renew or quit the lease agreement

[431] Melissa T. Lonegrass, supra note 361 at 972-3.
[432] *Id.*

when the term ended. Therefore, the tenant could not enjoy the security of tenure and society paid a high price due to family disruption and foster care placements.

To solve this problem, attempts were made by the courts to develop doctrines and promulgate uniform acts to protect the tenants in the U.S, but it was not enough to effectively solve this problem. Therefore, a comparative study was proposed as a useful tool for law reform, which can accelerate the progress of the U.S. system.[433] The mandatory minimum lease terms in France and South Korea as well as some of the specific reasons required when a landlord refuses to renew an agreement in France would be good references for law reforms made by legislators or good standards for holdings made by courts.

In Korea, the necessity of establishing the defaults of acts to protect tenants has been brought up as well. Korea has a high population and limited land space. In addition, most of the people live around Seoul, which is the capital city, and it makes the population density of Korea severe. According to the Population and Housing Census of 2017, a survey conducted by Statistics Korea, the population of Korea is 51,422,507. Of the total population, 9,741,871 people live in Seoul and 12,851,601 people live in the Gyeong-gi province, which neighbors Seoul.[434] This means that 43% of the population lives in and around Seoul. This population density causes the rental fee and *Chonseguem* to rapidly increase and the availability of affordable rentals to decrease. A landlord would prefer to terminate a lease agreement when its duration

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[433] *Id.*

[434] *Population and Housing Census of 2017,* STATISTICS KOREA, http://kosis.kr/statHtml/statHtml.do?orgId=101&tblId=DT_1IN1502&conn_path=I2

ends and raise the rental fee or *Chonsegeum* by making a new lease agreement. Therefore, security of tenure for tenants of residential houses and commercial buildings has constantly been an important issue. To protect the tenants' right to remain, several articles in the Civil Act and special acts such as the Korean Housing Lease Protection Act and Korean Commercial Building Lease Protection Act were promulgated.

However, developing new policies to improve the protection of the tenant's right to remain under a residential lease agreement is the most important issue for the current government and ruling party. To this end, the government and ruling party need to consider revising the related laws, including revisions to ensure that 1) tenant with residential lease agreements have the right to request for a renewal of the agreement and 2) the mandatory minimum lease term is increased from two years to four years, including the term during which the right to request for a renewal is guaranteed.[435] A tenant of a residential lease agreement does not have the right to request for a renewal of the lease under the current acts. The revisions are aimed at protecting the tenant's right to remain. However, the revisions cannot prohibit the landlord from refusing to renew the agreement after the mandated minimum term or the term within which the right to request for a renewal is guaranteed. The Rent Control Act of the U.S. would act as a good resolution to this problem. The landlord

[435] Digital Times, Will the right to request for renewal of residential tenant take effect within the year?, http://www.dt.co.kr/contents.html?article_no=2020012002109932036009&ref=naver (last visited Jan. 31, 2020)

cannot raise the rent fee above some rate which is regulated in the act and the tenant is protected from the eviction under the certain conditions.

In the context of the commercial lease agreement, the tenant's right to collect the amount invested into the demise needs to be discussed. This is an issue in both Korea and the U.S. but the problem takes different forms.

First, here is a case that occurred in Korea. It regarded an issue with a commercial lease agreement in June 2018 and was called the "Case of *Gungjung Jokbal.*"[436] A tenant had operated up a restaurant of *Jokbal,* which is food made by a trotter for seven years at the same place since 2009. After the owner of the building changed in 2015, the new owner raised the rental fee from 2,970,000 KRW per month to 12,000,000 KRW per month once the lease agreement was renewed. The tenant had entered into a typical lease agreement for a commercial building and was protected by the Korean Commercial Building Lease Protection Act. Article 10 of the Korean Commercial Building Lease Protection Act provides a tenant with the right to request for a renewal of a contract. However, this right may be exercised within the extent that the entire period of lease, including the period of the initial lease, does not exceed five years under the act that was effective at the time. Therefore, the tenant would have been evicted unless he agreed to the raised rental fee. He didn't agree to the raised rental fee, however, and the landlord was authorized by the court to retake possession of the premises. In the process of executing the retaking of possession,

[436]Pressian, Did the owner of Gungjung Jokbal try to murder the building owener?(Sep. 5, 2018), http://www.pressian.com/news/article/?no=209598&utm_source=naver&utm_medium=search(visited Feb, 1. 2020)

there were many disputes between the tenant and landlord. The tenant ended up striking the landlord with a hammer and hitting him with a car in 2018. The tenant was sentenced to two years to life in prison. This incident took place because the tenant had invested a large amount of time and money into the demise, but he could not collect the investment amount unless the lease term was long enough to collect the investment and could not make a premium agreement with a new tenant before the commercial lease agreement was terminated. In this case, the landlord had intended to not renew the commercial lease agreement and sharply increased the rental fee. Consequently, the tenant lost the opportunity to make a premium agreement with a new tenant while the agreement was effective. Therefore, a tenant's right to collect the invested amount was discussed once again, even though there was a provision to protect this right, and with this case as the momentum, the argument for the necessity to protect a tenant was refueled. Finally, the National Assembly decided to revise the Korean Commercial Building Lease Protection Act to protect the tenants with greater efficiency on Oct. 16, 2018.[437]

The main revisions can be explained with an overview of two articles. First, the entire lease period during which a tenant can request a renewal of the contract was extended from five years to 10 years after making the initial lease agreement. A tenant protected by the Korean Commercial Building Lease Protection Act can enjoy the security of tenure unless the tenant acts against the contract, as enumerated in Article 10(1). Second, the period within which the act protects the tenant's collection of the

[437] Jong Duk Lee, *The Termination of Lease Agreement and Necessity of Protection for Vulnerable Tenants*, 26(3) SEOUL LAW REVIEW 149, 152 (2018).

premium from a new tenant, as given in Article 10-4, was extended from three months prior to the expiry of the lease period until the end of the lease to 6 months prior to the expiry of the lease agreement until the end. The tenants could find new tenants and make arrangements for a new lease agreement between the landlord and new tenant earlier, which enabled the first tenants to collect premiums from the new tenants.

Despite this revision, a gap in the acts that protect tenants in Korea still remained. A tenant of a commercial building still faces problems in collecting the premium if the lease agreement ends before a new lease agreement is made, even though the assembly revised the Korean Commercial Building Lease Protection Act. To solve this problem, a study on the doctrines of the common law for justice can be a useful tool for the courts to apply statutes to cases as well as provide good guidelines for the flexibility of law applications in the Korean system. By referring to the common law doctrines, it would be meaningful to adopt guidelines that enable a tenant of a Korean commercial lease agreement to collect the premium after the lease agreement gets terminated as follows. If the tenant has made a substantial investment into the premises or committed to an expansion of the premises, the tenant can collect the invested amount by making a premium agreement with a new tenant even after the original tenant's lease agreement is terminated. If the lessor's motive is to enjoy the tenant's investment, the tenant can claim the premium amount from the lessor instead of the new tenant, similar to being compensated for damages, even after the agreement is terminated.

Regarding the tenant's right to collect the amount invested into premises in the U.S., it would be meaningful to adopt the Korean system of the premium. Korean acts

guarantee the tenant's right to collect the investment amount by making a premium agreement with a new tenant. The acts also prohibit the landlord from obstructing the tenant's receipt of the premium. In addition, this thesis proposes establishing the right to request a renewal of a contract for 10 years, which is a Korean statute of protection, in the U.S. legal system. This would serve as a guideline for the U.S., where there are no protections in place for the tenant's right to collect the investment.

Based on these researches and proposals, this thesis presents solutions to the unfair terms in the residential and commercial lease agreements of both Korea and U.S. by proposing specific resolutions and samples of law revisions to the legal systems of both countries. Particularly, it is meaningful to propose solutions for the Korean residential lease system since establishing a policy to protect the tenant's right to remain and make the rent more stable is one of the most important issues faced by the current Korean government. In addition, the solution presented for the tenant's right to collect the amount invested into the demise in the U.S. is also meaningful, since there is no way for a tenant to collect his investment at present even though it is unfair if the landlord enjoys the valued-up demise.

The meaning of this thesis is not only to propose the solution as mentioned above. This thesis also proposes solutions to the problems in Korea, wherein the civil law system is adopted with the use of doctrines of the common law system. On the other hand, it refers to other civil counties' articles to propose solutions to the problems in the U.S., which adopts a common law system. Even though the common law system and civil law system are fundamentally different, both Korea and the U.S. face similar problems in their legal systems; i.e., the existing acts and doctrines are

insufficient to guarantee the security of tenure and protect the tenant's right to collect the invested amount. Hence, the merits of each law system were used to solve the problems that other legal system has.

The process of globalization has rapidly developed, and many have lawyers realized that "generalized legal acculturation" has become highly important.[438] The two legal systems are mutually influential, and there is interrelationship between common law and civil law, resulting in legal globalization.[439] Therefore, this thesis presented methods to interplay, supplement, and develop each other of the two legal systems by referring to the other legal system's theories and articles. By conducting a research on the interrelationship, the doctrines of common law can be used by the Korean court as a guideline to make decisions, and the Congress can refer to the doctrines and rent control acts to make a legal revision that protects tenants. In addition, if the administrative agency plays an active role in guiding the courts and parties involved in an agreement in the U.S. in a manner similar to the Korean legal system, it could result in a resolution to make the tenant's status stable and the commercial lease agreement fair with regard to how the tenant collects the investment.

This method of using a mixed model of common law and civil law can inspire us to solve other problems as well, since using interrelationship "combines best elements from both cultures, in the respect of everyone's cultural identity."[440]

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[438] Guy Canivet, *The Interrelationship Between Common Law and Civil Law,* 63 LA. L. REV. 937, 937–8 (2003).
[439] *Id*.
[440] *Id* at 944.

BIOGRAPHY

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Dan Bie passed a Korea bar exam in 2004 and had trained at Judicial Research and Training Institute operated by Supreme Court until 2006. She had worked at HMP P.C. as a corporate layer from 2007 to February of 2013. She moved to the Wonkwang University on March of 2013 and has worked so far as a law professor. She published several articles in Korea and most of the articles are focused on the contract law.

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