Drafting Process of Article 415 (Compensation for Damages in Case of Non-Performance)

"Non-performance" is one of the most important part of law on obligations. Just in this field, the civil law science in Germany ("*Pandects Science*") had developed a quite unique concept in 19th century. The commission for the revision of "*Old Civil Code*" of Japan, however, refrained its adoption and stayed rather in the French tradition. In this field, Art. 415 on *debtor's liability for compensation* and Art. 416 on *scope of compensation* play a major role.

1. Draft by Prof. *Boissonade* (1888)

Art. 403 The creditor may demand compensation for damages if the debtor refuses to effect performance or it becomes impossible for a cause for which the debtor is responsible, or if the performance cannot be enforced in case of delay.

2. Old Civil Code (1890)

Art. 383 In cases where the debtor refuses to effect performance, the creditor may demand compensation for damages if he fails to claim for enforcement, or if the performance cannot be enforced due to its nature; the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible.

The creditor may demand compensation for damages also in case of simple delay.

[...]

* Prof. *Boissonade's* draft of 1888 and "*Old Civil Code*" distinguish three types of Non-performance, namely "*refusal*", "*impossibility*", and "*delay*" of performance, while *French Civil Code* uses only two categories ("*Non-performance*" and "*Delay*");

Art. 1147, CC

A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part.

* The legal effect of "*Impossibility* of performance" is provided in the next article, namely Art. 1148. In the French tradition, however, this issue has been always discussed in relation to "*force majeure*" or "*fortuitous event*" (เหตุสุดวิสัย in Thai), and such an unavoidable impossibility, in other words, impossibility for everybody has "exemption from obligation" as its legal effect;

Art. 1148, CC

There is no occasion for any damages where a debtor was prevented from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of force majeure or of a fortuitous event.

* Regarding his Art. 383 of *Old Civil Code*, Prof. *Boissonade* also commented that the debtor would not be liable for damages if the performance became impossible due to "*force majeure*" or a "*fortuitous accident*" just like in *French Civil Code*. So, we can summarize his concept for Art. 383 as follows; Prof. *Boissonade* integrated Art. 1147 (simple non-performance and delay) and 1148 (impossibility) in CC into a single article. At the same time, he clearly declared the principle "*Enforcement at first*" in this article ("the creditor may demand compensation ... *if he fails to claim for enforcement*"). On the other hand, however, another postulate had to retreat from the foreground, namely the principle "*Debtor takes no liability if he is not responsible for damage*", or simply "*No liability without no responsibility*" which was definitely proclaimed for all the types of damages in Art. 1147 CC ("A debtor shall be ordered to pay damages ... *whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him* ..."). Consequently, this change made an outward appearance that the responsibility of the debtor would be required only in the case of impossibility but not in the case of refusal or delay of performance.

3. First Draft of Prof. *Hozumi* (1894 ~ 95)

Art. ??? The creditor may demand compensation for damages if the debtor *fails to effect performance* or falls into default, unless the debtor is not responsible for the cause of *non-performance* or delay.

* In his first draft for the revision of *Old Civil Code*, Prof. *Hozumi* put "*refusal"* and "*impossibility"* of performance together into a single category "*Non-performance*" again and returned to the original *French* style of Art. 1147 CC, and he deleted the wording in Art. 383 *Old Civil Code* which declared the principle "*Enforcement at first*". This decision of Prof. *Hozumi* would be understandable if we remember that he had studied in England at first. According to the "*Common Law*" tradition, the creditor has a general right to demand compensation in case of non-performance but not the right to claim enforcement. The latter type of remedy was established in the "*Equity*" tradition, and enforcement may be allowed only in particular cases. With this draft, Prof. *Hozumi* proposed to combine this Common Law tradition with the principle "*Enforcement at first*" in the Continental tradition together. According to his new concept, the debtor has a right to choose one type of these two remedies "*Enforcement or Compensation*".
* The second sentence was also changed to clearly proclaim the principle "*No liability without responsibility*" and to require the responsibility of the debtor for all the types of damages once again.

4. Second draft of Prof. *Hozumi* (1895)

Art. 409 The creditor may demand compensation for damages if the debtor fails to effect performance *in the proper way of the obligation*, unless the debtor is not responsible for a cause of the *non-performance*.

* This article does not contain the word "*delay*" at all. Prof. *Hozumi* decided not to distinguish different types of non-performance any more. Instead, he tried to cover all the types of non-performance with a new phrase "*fail to effect performance in the proper way of the obligation*". Fortunately, this first sentence obtained a broader meaning and scope of effect than the original Art. 1147 CC due to this new phrase, and it could cover also cases of so-called "*Bad-Performance*" or "*Active Violence of Claim*".
* In the meeting of the commission, Prof. *Hizikata* asked Prof. *Hozumi* if other separated articles were planed especially for the liability in case of *impossibility* from "*force majeure*"or "*fortuitous accidents*". Prof. *Hozumi* answered: "Yes. '*Impossibility* of performance' shall be separately treated in another article". Upon this answer, Prof. H*izikata* criticized the second sentence and said: "The second sentence is not necessary if it means merely cases of impossibility from '*force majeure*' or an '*fortuitous accidents'*". Against this critical opinion, Prof. *Hozumi* tried to defend his proposal and said that this sentence should stay here in order to clearly declare the general principle of "*No liability without responsibility*". According to his concept, the debtor should be exempt from the liability for non-performance not only in case of impossibility from "*force majeure*"or "*fortuitous accidents*", but further cases should be covered with this sentence, for example, if the creditor himself is collectively responsible or if another person is responsible for non-performance.
* After all, it is quite clear that the members of the commission apparently discussed still on the basis of *the French Approach of Non-performance and Impossibility*. In the German civil law, "Impossibility of performance" plays a more fundamental role in the system of law of non-performance.
* As mentioned above, Prof. *Hozumi* had planed to dedicate an article to the issue "*Impossibility from force majeure or fortuitous accidents"* as reason for exemption from obligation" like Art. 1148 of CC. However, the planed article was finally omitted from the Civil Code of 1896. The reason is unknown. Probably, the members of the commission thought that articles simply for declaration of self-evident principles and those merely for educational purposes should be refrained. Indeed, it may be obviously clear for everyone that the obligation is null and void if its performance became impossible from such causes.
* At the end of the discussion on this issue, another member of the commission gave notice to the point

that "*Impossibility of Performance*" was not mentioned at all in the proposed draft of 1895. According to the opinion of this member, it should be more clearly indicated that cases of impossibility were also implied in the first sentence of Art. 415. The commission accepted this opinion and decided to mention "*Impossibility*" in the second sentence. Finally, the second sentence of Art. 383 *Old Civil Code* was adopted again.

Due to this unexpected return to the the *Old Civil Code*, that unclear point regarding the principle "*No liability without no responsibility*" was taken over, too. Among Japanese lawyers, there is a group which insists that Art. 415 requires the responsibility of the debtor only in case of impossibility, but not in case of other types of non-performance. They are especially lawyers of Common Law school.

* As a result, there are only few articles which mention "I*mpossibility of performance*", namely Art. 410 [Impossibility of performance in case of a selective claim], Art. 415 [Compensation due to non-performance], and Art. 543 [Rescission due to impossibility].

* In regard to the phrase "if the debtor fails to effect *performance in the proper way of the obligation*" in the first sentence, Prof. *Hozumi* did not clearly explain where this expression came from. However, he provably borrowed it from Art. 381 of *Old Civil Code*:

Art. 381, *Old Civil Code* of 1890

On the claim of the creditor for immediate enforcement of performance *in the proper way of the obligation*, the Court has to order the enforcement if it is possible without any physical restraint of the debtor. [...]

* The original French expression was *"suivant sa forme et teneur" ― "following to its shape and content" in English.* Also in the German Civil Code, a quite similar phrase could be seen, namely Art. 339† :

Art. 339†, BGB of 1900

If the debtor promises the creditor the payment of a certain amount of money as a fine in case that the debtor does not perform his duty at all or does not *perform it properly*, the fine shall be charged as soon as the debtor falls in default. [...]

* For reference, another comparable sample may be mentioned here; we can find a following article in the Law on Obligations of Swiss (1911):

Art. 79, OR of 1911

If the obligation was not performed at all, or *it was performed, but not so properly as it should be*, the debtor has to pay compensation for damages arising from this circumstance insofar as the debtor can not prove that he were not responsible for the non-performance. [...]

* In other words, Prof. *Hozumi* probably decided for such a composition of the article on the basis of comparative study of the German and French approach.

5. Current Civil Code (1896)

Art. 415 The creditor may demand compensation for damages if the debtor fails to effect performance *in the proper way of the obligation*; the same shall apply in cases where performance becomes impossible for any cause for which the debtor is responsible.

* Meanwhile, it seems to be an established manner to translate the phrase "*in proper way of the obligation*" into English with the wording "*in accordance with the true intent and purpose of the obligation*", or "*in accordance with tenor and purport of the obligation*".

\# Art. 215 [Compensation due to Non-performance] of "*Civil and Commercial Code of Thailand*", is obviously based on Art. 415 of Japanese Civil Code. However, Thai legislators carefully omitted the second sentence of the Japanese article. Regarding to the impossibility of performance, they adopted rather German articles. Art. 217 [Severe responsibility of debtor in delay] was based on **§287† BGB**, Art. 218 [Impossibility of performance caused by debtor] based on **§280† BGB**, and Art. 219 [Impossibility of performance not caused by debtor] based on **§275† BGB**.

Drafting Process of Article 416 (Scope of Compensation for Damages)

1. Old Civil Code of Japan (1890)

Art. 385 (1) The compensation for damages covers the *loss* which the creditor has suffered from as well as the *profit* which he has been deprived of.
(2) However, if the non-performance or delay of the performance is *due merely to the debtor's negligence* without any malicious intention, then the debtor is liable only for damages which the parties have *foreseen* or could have foreseen at the time of the agreement.
(3) In the case of *the debtor's malicious intention*, he is liable even for unforeseeable damages which were caused as *inevitable consequence* from the non-performance.

* *Civil Code of France (1804)*

Art. 1149 Damages due to a creditor are, as a rule, for the *loss* which he has suffered and the *profit* which he has been deprived of, subject to the exceptions and modifications below.

Art. 1150 A debtor is liable only for damages which were *foreseen* or which could have been foreseen at the time of the contract, where it is *not through his own intentional breach* that the obligation is not fulfilled.

Art. 1151 Even in the case where the non-performance of the agreement is *due to the debtor's intentional breach*, damages may include, with respect to the loss suffered by the creditor and the profit which he has been deprived of, only what is *an immediate and direct consequence* of the non-performance of the agreement.

* Article 385 of *Old Civil Code* of 1890 was obviously based on Article 1149 – 51 of French Civil Code.
* In Art. 1149, French Civil Code defines *the meaning of the term "**damages**"* which should be compensated for by a debtor, and *the scope of compensation* is separately determined in Art. 1150 (for the case of ***negligence***; ประมาทเลินเล่อ) and in Art. 1151 (for the case of ***malicious intention***; จงใจ). In Art. 1150, French lawyers reasoned as follows; even if there was not any clear agreement about the scope of compensation between the parties, they would have agreed that the liable party should compensate the other party for damages which were *foreseeable* for the both of them at the time of conclusion of the contract. But in case of malicious intention, Art. 1151 intensifies the debtor's liability; if the debtor intentionally refuses the performance, then he should compensate the creditor "*only* for damages" which arose immediately and directly from the non-performance. It is unclear if the liable person in such a case should compensate for immediate damages *additionally to* or *instead of* foreseeable ones. In any case, French Civil Code applies a different criterion according to the subjective sate of the liable person, namely "*Foreseeability Test*" in case of negligence and "*Direct Causality Test*" in case of intentional non-performance.
* Prof. *Boissonade* found, however, this "*Direct Causality Test*" impractical because it is often quite difficult to distinguish "*immediate* and *direct*" causality from "*indirect*" one. Moreover, this French approach may lead to unreasonable consequences because there may be certain damages which were foreseeable but not caused immediately and directly. A negligent debtor in such a case would have to compensate for those indirect, but foreseeable damages, on the other hand, a debtor with malicious intention would not be liable for them. Ii would be possible that the liability of the former could be heavier than that of the latter. Prof. *Boissonade*, therefore, decided to apply the "*Inevitability Test*" instead of "Direct Causality Test". This test should fulfil two tasks, firstly *to clearly declare the intensified liability* in case of malicious intention, and secondly *to exclude quite accidental and unusual damages* from the scope of compensation for the sake of fairness: "The liable person with malicious intention should compensate the other party not only for *foreseeable damages* but also for all the *inevitable ones even though they would be unforeseeable*".
* Regarding to the compensation for damages caused from an unlawful act (tort liability), the *Old Civil Code* of Japan prescribed to apply the same scope and limitation *mutatis mutandis* (Article 370 Paragraph 3).

2. The proposal of Prof. *Hozumi* to the Commission (1895)

Art. 410 (1) The claim of compensation shall be approved for such damages as would arise from the non-performance *in usual circumstances*.
(2) The creditor may demand compensation even for damages which have arisen *due to particular circumstances* insofar as the parties have *foreseen* or could have foreseen such damages at the time of the contract.

« Reference »

**** Civil Code of Germany (1900)***

Art. 249† A person who is liable to compensate shall be bound to *restore such a condition* as would exist if the circumstance which makes him liable would not have arisen. In case of liability due to injury of a person or to destruction of a thing, the creditor may demand the payment of an amount of money which is required for the restoration of the condition.

Art. 250† The creditor may set a time for the restoration of the condition and declare to the person liable for it that he will not accept the restoration later than the time. If the liable person has not effected the restoration on time, then the creditor may demand monetary compensation instead; in this case, any other claim of the restoration is not permissible.

Art. 251† (1) In so far as the restoration of the condition is impossible or not enough to recover all damages which the creditor has suffered from, the creditor may demand monetary compensation.
(2) The person liable for the restoration may effect his duty in money if the restoration is possible only with a disproportionally high expenditure. Medical expenses for an injured animal are still not deemed disproportionally high even if the expenses amount remarkably over the value of the animal.

Art. 252† Damages to be compensated include also a missed profit. A profit shall be deemed missed if the creditor could expect to gain it *with probability according to the usual course of matters* or *according to particular circumstances*, especially arrangements or precautions which the creditor had already taken.

* With his proposal cited above, Prof. *Hozumi* probably attempted to synthesize three different legal traditions, namely the *French* and *English* approach on the one side, and the *German* concept on the other side. Nevertheless, quite faithfully to his duty ("*Revision of the Old Civil Code*"), he started his work on the basis of Art. 385 written by Prof. *Boissonade*.

* At first, Prof. *Hozumi* decided not to distinguish "simple negligence" from "malicious intention". He defended his decision with the argument that the goal of this legal institution "*Non-performance*" did not consist in any "moral accusation of the liable person", but in the "*restoration of the original condition*". In this argument, Prof. *Hozumi* was apparently inspired by German concept shown in § 249† in *German Civil Code* of 1900 (to be exact, in an equivalent article of *its draft*) or § 687 of *Saxony Civil Code* of 1865. *The scope of compensation should be quite objectively determined* and not varied depending on the debtor's mental state ("*negligently*" or "*intentionally*"). Contrary to the French approach, he was convinced that the compensation in case of non-performance of obligation should be separately regulated from the compensation in case of tort. According to this vision, it was not necessary to take the subjective aspect of the liable person into account. Such an objective determination as in the German concept was just appropriate for his vision ─ even though the German Civil Code itself possessed a single article for both of non-performance and tort cases.

* Secondly, he also decided not to distinguish "immediate and direct causality" from "indirect causality". Prof. *Hozumi* said "I decided not to distinguish them because the debtor have, *regardless of the difference between direct or indirect causality*, *to do everything in order to restore the original condition*". Also at this point,

Prof. Hozumi decided in favour of the German concept.

* However, Prof. *Hozumi* did not adopt the formulation in German style (like an article "The debtor shall restore the condition in its natural state"). Instead, he stayed with the style of Art. 385 proposed by Prof. *Boissonade*. From the reason mentioned above, he deleted Art. 385(2). Consequently, a single rule remained in his hand, namely "The debtor should *ALWAYS* compensate the creditor for all the foreseeable damages *AND* also for any such unforeseeable ones arising *inevitably* from the non-performance". So, he had two criteria for the scope of compensation – "*Foreseeability-Test*" and "*Inevitability-Test*".

* The next question was *the order of priority* between these two criteria. In the French tradition, the "*Foreseeability-Test*" enjoyed the priority as to the determination of the basic scope of compensation while "*Direct-Causality-Test*" (CC) or "*Inevitable-Causality-Test*" (*Boissonade*) was applied as a secondary criterion for the weighted liability in case of malicious intention. However, for Prof. *Hozumi*, who was seeking an objective determination for the scope of compensation, "*Inevitable-Causality-Test*" should be rather prior to "*Foreseeability-Test*" because the latter was related merely to a mental aspect of recognition. Probably according to such a consideration, Prof. *Hozumi* said later, regarding to Art. 410(1) of his own proposal, "The debtor should compensate the creditor, *regardless of foreseeability* [in their particular persons], for all the damages arising from usual circumstances". This is a quite *objective* criterion for damages which will *always and inevitably* arise in a certain situation. Such damages, of course, would be surely foreseeable for "any reasonable person". But Prof. *Hozumi* consciously refrained from using this term in order *not to cause a misunderstanding*: "It is not a matter if the particular persons – these debtor and creditor – have foreseen such damages, or not." After all, Prof. *Hozumi*, starting from Prof. *Boissonade's* proposal in the French tradition, was inspired in this step implicitly also by the spirit of the German concept.

* At that moment, however, Prof. *Hozumi* had to confront just the same problem as the German lawyers had to solve after the enactment of German Civil Code (1900), namely *unreasonably heavy liability of debtor* . The German legal scholars and Judiciary developed its so-called "*Adequate Causality Theory*" in order to delimit the scope of compensation to a reasonable one. Also in case of Prof. *Hozumi* with "*Inevitable-Causality-Test*" alone, it would be very difficult to exclude quite accidental and unexpected damages, namely such ones which arose quite inevitably in particular circumstances but were not possible for the parties to foresee. It would be quite unfair if the creditor would shift the responsibility for all such damages onto the debtor, even though they would not have arisen if the debtor would have properly performed his obligation.

  In confrontation with this difficulty, he decided to follow ***the English approach*** in order to delimit the scope of compensation to a reasonable one. Relying on a famous judgement in England (*Hadley vs. Baxendale*, 1854), he divided the scope of "damages [inevitably] arisen from non-performance" into two categories, namely, "damages which would [always and inevitably] *arise in usual circumstances*" and "damages which [always inevitably] *arose due to particular circumstances*". The original English judgement did not concern the whole scope of compensation, but set a rule particularly for "*lost (or missed) profits*" only. Therefore, the German Civil Code has accepted this English approach in its Art. 252†. It was Prof. *Hozumi's* idea to generalize this rule and apply to the whole scope of compensation, namely both of *damages* and *lost profits*. According to his new concept, the scope of compensation should be *basically* reduced to such damages as would *always and inevitably* arise *in usual circumstances*. After all, his solution would lead to a quite similar result as the German theory of "*Adequate Causality*".

* On the other hand, Prof. *Hozumi* confirmed, in accordance with the English judgement in *Hadley vs. Baxendale* case (1854), also the importance of "*Foreseeability*" as a fundamental requisite for the contractual liability, and he proposed to require the forseeability just for the liability for damages which [always and inevitably] arise from *unusual and particular circumstances*; in other words, such circumstances which the particular parties have to especially take in mind.

* From such a complexed consideration described above, Prof. *Hozumi*, rejecting the two-steps structure of the French concept ("Art. 1150 *OR* Art. 1151"), arrived at an "single-step solution", namely, "The debtor shall *ALWAYS* compensate for all the usual damages *AND* foreseeable special damages".
* Generally speaking, it is quite assumable that Prof. *Hozumi* found Art. 385(2) of Prof. *Boissonade's* proposal too mild for the debtor. He probably thought "The scope of compensation should not be limited to damages which the creditor and debtor have really foreseen or could have foreseen".
* The phrase "*always and inevitability*" is not used in Prof. *Hozumi's* proposal. However, this word is implicitly embedded in his fundamental concept of this article. We would be able to read it as follows:

Art. 410 (1) The claim of compensation shall be approved for such damages as would [*always and inevitably*] arise from the non-performance in usual circumstances.

(2) The creditor may demand compensation even for damages which have [*always and inevitably*] arisen due to particular circumstances insofar as the parties have foreseen or could have foreseen such damages at the time of the contract.

3. Discussion in the Commission

* In the discussion, Prof. *Hizikata* said: "These two paragraphs can be integrated into a single sentence if the foreseeability is required also in the first paragraph", and proposed the following sentence:

Art. 410 The claim of compensation shall be approved for such damages as the parties have foreseen or could have foreseen at the time of the contract.

* Upon this new proposal, another member of the commission, Prof. *Hasegawa*, said: "The first paragraph aims to let the debtor compensate for all the damages which would arise in usual circumstances *regardless of their forseeability*", and opposed Prof. *Hizikata's* counterproposal. Other members, including Prof. *Hozumi*, supported Prof. *Hasegawa's* opinion.
* Furthermore, two points were criticised by other members. Firstly, Prof. *Isobe* proposed to delete the phrase "at the time of the contract" in the second paragraph. He argued that there was no reason to exclude damages which become foreseeable after the time of the contract. Secondly, Prof. *Tabe* proposed to change the target of the forseeability in the second paragraph from "*damages*" to "*particular circumstances*". He said: "The foreseeability of damages themselves is not necessary, it is enough *if such particular circumstances are foreseeable for the parties*".
- Prof. *Hozumi* opposed these two modifications on the grounds that the liability of the debtor would become too heavy. Despite of his opposition, the commission finally approved these two modifications. The final draft of the commission is the current article on the scope of compensation.

4. The current article in the Civil Code of Japan (1896)

Art. 416 (1) The claim of compensation shall be approved for such damages as would arise from non-performance in usual circumstances.

(2) The creditor may demand compensation even for damages which have arisen due to particular circumstances insofar as the parties have foreseen or could have foreseen such circumstances.

* * * * * * * * * *

5. Additional comment

As is already suggested in the discussion above, the commission for the revision of *Old Civil Code* decided to separate the question of *contractual liability due to non-performance* and the question of *liability due to tort (unlawful acts)*. Prof. *Hozumi*, however, refrained to define a clear scope of compensation in case of unlawful acts. He argued: "In case of unlawful act, any "*forseeability*" may not be required – neither in aspect of "damages" nor in aspect of "circumstances – because damages due to an unlawful act normally *arise unexpected*." He decided to let judges find a just adequate scope of compensation in each particular case in accordance with the spirit of the fairness.

Art. 709† A person who violates intentionally or negligently the rights of another person shall be bound to make compensation for damages arising therefrom.

Art. 710 A person who is liable in compensation for damages in accordance with the provisions of the preceding Article shall make compensation therefor even in respect of a non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights.

Contrary to the vision of Prof. *Hozumi*, however, the Japanese courts usually apply Art. 416 also to tort cases analogically. In this point, therefore, there is no difference between French and German law on the one hand and Japanese law on the other hand.

In the revision of Civil Code of 2004, Art. 709 was slightly amended:

Art. 709 A person who violates intentionally or negligently the rights or *legally protected interests* of another person shall be bound to make compensation for damages arising therefrom.

For Information and Reference

German Approach to Non-Performance

A contract is void if its aim or content is illegal or immoral. A contract is also void if its fulfillment is extremely difficult or absolutely impossible at the time of its conclusion. This is a widely acknowledged general rule. In the French approach to Non-performance, however, "Impossibility of performance" plays only a marginal role. Illegal, immoral, or impossible contracts are rather exceptional cases in the whole scope of Non-performance. On the contrary, "Impossibility of performance" played a quite fundamental role in the German civil law. For the German legal scholars in the 19. century who stood in the Roman law tradition (Law of "Pandects"), the principle of "Impossiblium nulla obligatio" (it means "No obligation may be agreed if it is impossible.") is a starting point, that is to say, a contract is null and void, and the debtor does not have any duty at all if the object of the contract (obligation) is absolutely impossible at the time of conclusion of the contract (so-called "***Preceding or Primary Impossibility***"). In case of Non-performance, therefore, the first task for German lawyers would consist in the test "Is it a case of Primary Impossibility, or not?"

A) Once a contract is correctly concluded, then the debtor is obliged to perform his obligation. The creditor may demand the promised performance from the debtor if the debtor does not willingly perform his obligation, and the creditor may demand *only the performance or its enforcement so long as the performance is still possible and meaningful for the creditor*. In such a case, the creditor is still not entitled to demand compensation ("*restitution*" according to the German wording) or rescission of contract (in case of a bilateral contract) yet. It is so-called the "***Principle of Natural Fulfillment***". The duty of performance must be fulfilled in so far as it is possible and meaningful. In other words, a valid contract binds not only the debtor but also the creditor to its fulfillment in the same way. According to such a strict concept of contract, the creditor may not enjoy the freedom to switch his claim from the fulfillment of the contract to the compensation instead even if the debtor does not willingly perform his duty. His demand of compensation may be justified only if the natural fulfillment of the obligation is already impossible. In such a way, the binding force of a valid contract should be kept in life as long as possible. The contractual relationship between creditor and debtor was "*moralized*" in a certain sense .

B) In this strict concept of contract, what should be done against "*delay* of performance"? The only remedy against it can be simply "enforcement". In other words, "*delay of performance*" may not be any unique type of Non-performance in the sight of the German legal scholars of the 19th century. Indeed, they had looked at the issue of "*delay of performance*" from an unique viewpoint.

   Generally speaking, the time of performance is not always an essential part ("*element*") of the obligation. An obligation is quite legal and valid even if it does not specify any particular time of performance in the contract. The time of performance is often rather a secondary circumstance for the destiny of the contract. However, this issue suddenly becomes quite serious if the performance of the obligation *becomes impossible during its delay*:

   a If the debtor can not justify his delay of performance, then he is "*in default*" and responsible for "*negligence*". At this stage, the creditor is entitled only to claim the enforcement of the obligation. But if the performance becomes impossible (due to an certain reason) during this delay for which the debtor is responsible, then he is always liable for the impossibility, *regardless he is responsible for it or not*. Now, the creditor is entitled to demand compensation due to Non-performance. In this way, the crucial point of Non-performance was, always and above all, ***the question of possibility*** in the sight of the German legal scholars.

      Of course, if the creditor suffers a certain damage from the delay of performance itself, then he may be entitled to claim compensation for the damage – aside from a proper claim for performance. In this case, the compensation for damage arising from delay will not release the

debtor from his proper duty of performance.

b Especially in such cases where the time of performance is an essential part of the obligation, its natural fulfillment becomes impossible just at the moment when the debtor falls into *delay* (default). In the German view, however, this is also one type of impossibility (*impossibility of time*).

C) Consequently, the German legal scholars mainly discussed "***Afterwards-effected Impossibility of Performance***" in the field of Non-performance. In such cases, the creditor is entitled to demand compensation for Non-performance if the debtor can not bring up any reason to excuse the impossibility. So, the concept of "*impossibility*" was synonym for "*Non-performance*" and should cover all the cases which would be called "*Breach of Contract*" in the English law.

D) In other words, they treated only the problems which may occur during the period between the conclusion of contract and its performance (or enforcement). Unfortunately, other problems which may occur either *before the conclusion* or *during and after the performance* were not treated carefully enough:

a Therefore, the problems before the conclusion had to be separately solved through the theory of "***Liability during the Negotiation*** (culpa in contrahendo)". According to this theory, both parties of negotiation are already bound by *a fundamental, quasi-contractual relationship of mutual trust*. They are obliged to take care that each party meets expectations of other party on the base of this mutual relationship. If one party breaches this "*Duty of Care*" during negotiation, then he is liable for damage arising to the other party despite no contact has been concluded yet.

b Regarding the central problem of "***bad performance***" or "***imperfect performance***", the BGB of 1900 did not provide any directly applicable article. This issue is called also "***Positive Breach of Contract***". Many German lawyers spoke of a "*lack of law*". At the beginning of the 20th century, this problem had to be solved through "*judge-made law*" and academic theories; some German scholars insisted that this issue could be covered also in the traditional German approach to Non-performance, namely as "*impossibility of quality*". Once the obligation was badly performed, then it is impossible to perform in its proper way and in the promised quality again if the situation is irreparable at all.

Furthermore, the legal scholars and the Judiciary have developed detailed theories about debtor's duties during performance relying on the principle of "*Duty of Performance in Good Faith*" (§ 242, BGB) or based on the fundamental principle of "*Relationship of Mutual Trust*" mentioned above. In such away, they widened the scope of responsibility of the debtor ("*negligence*") in § 276†. If the debtor has breached such a duty during performance, then any "*performance in its proper way*" is already impossible at all, and the debtor is responsible for the impossibility (§ 280†, 325†). In such a way (analogical application of law), the German civil law extended the application range of the concept of "*impossibility*".

c Another problem of "extreme difficulty of performance" was later discussed as a problem of "***Downfall of the Basis for the Contract***".

In 20th century, Japanese civil law adopted many of these German theories on the contractual liability and interpreted the articles in the Japanese Civil Code in accordance with them. This so-called "*Theory Reception*" significantly contributed to the development of civil law in Japan. Hence, a sort of "mythology" or "legend" was born; many legal scholars have once insisted that the Japanese Civil Code was mainly based on the German tradition. They had forgotten the contribution of Prof. *Boissonade* and his heritage in the Japanese Civil Code. Since 1960s, many Japanese legal scholars have tried to rehabilitate the French tradition in the Japanese Civil Code. Today, this mythology was almost dispeled.

The Scheme of the Articles on "Non-performance" in the BGB of 1900

I. **"Preceding or Primary Impossibility" ;** ..... **[§ 306†]**

A. The contract is valid if the performance is quite possible at the time of its conclusion.

B. The contract is void if the performance is impossible at all at the time of its conclusion.

II. The performance is possible and the debtor willingly effects it (**Performance**).

◊ *Just in this stage, the issue of "Positive Breach of Contract" or "Bad Performance" would have been discussed!*

III. The debtor does not effect the primarily possible performance (**Non-performance**): ..... **[§ 271]**

A. The performance is still ***possible***, so the creditor brings a suit to the court ; ..... [ZPO etc.]

i. If the time of performance is not essential for the obligation, then the creditor may immediately demand ***enforcement*** of the performance.

ii. If the time of performance is essential for the obligation, then ;

a) if the obligation is due, the creditor may immediately demand ***enforcement*** of the performance.

b) If the obligation is still not due yet, then the creditor may not do anything yet.

B. The performance becomes ***impossible*** after the conclusion of the contract ;

i. If the time of performance is not essential for the obligation, then ;
the debtor has only to bear ***the normal liability for the impossibility*** ;

1. If the debtor is not responsible for the impossibility, then he is not liable for damages. ..... **[§ 275†]**
2. If the debtor is responsible for the impossibility, then he is liable for damages. ..... **[§ 280†]**

ii. If the time of performance is essential for the obligation, then ;

a. If the obligation is *still not due yet* when the performance has become impossible, then the debtor is *not in default* (delay) and has only to bear ***the normal liability***;

1. If the debtor is not responsible for the impossibility, then he is not liable for damages. ..... [§ 275†]
2. If the debtor is responsible for the impossibility, then he is liable for damages. ..... [§ 280†]

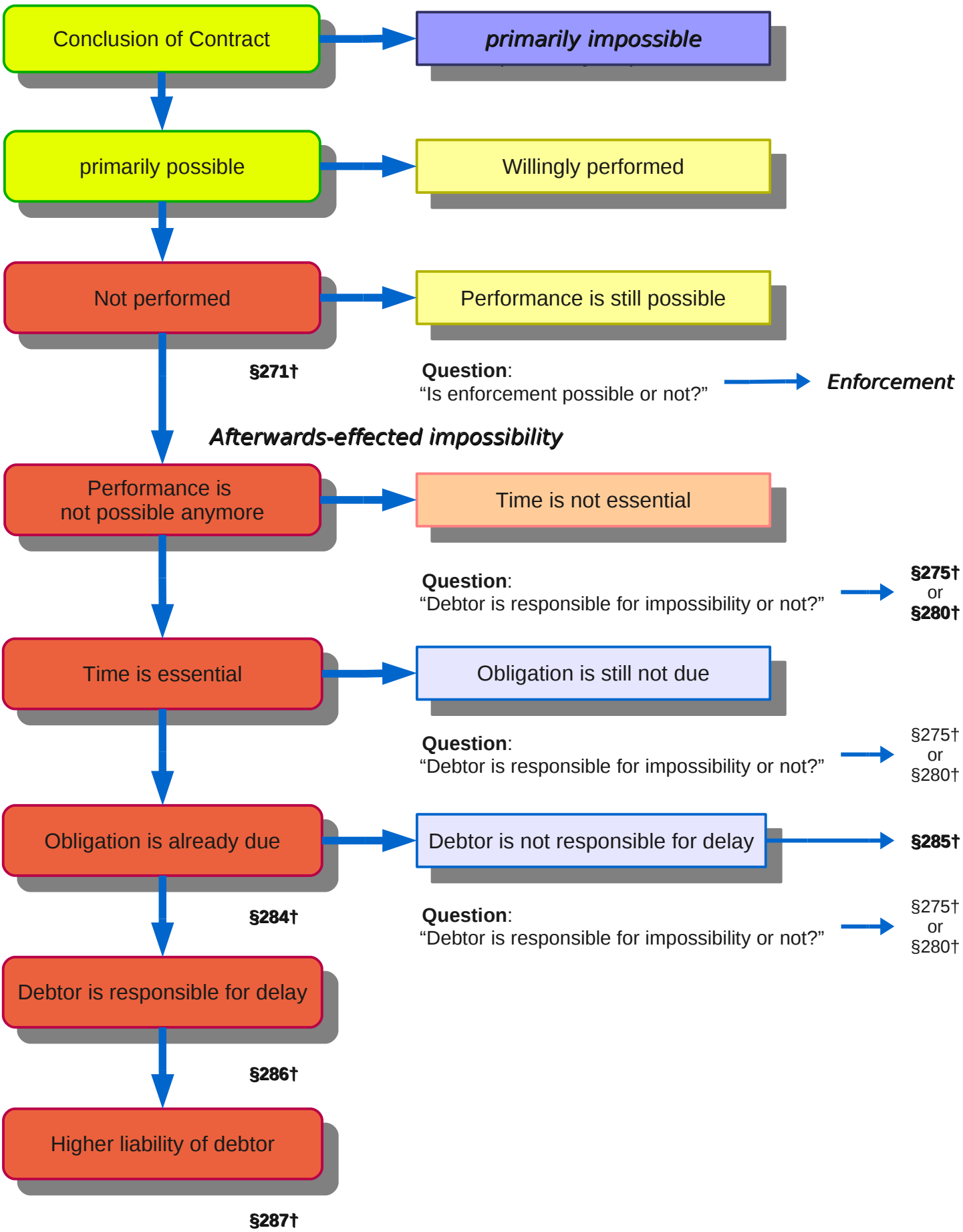
b. If the obligation is *already due* when the performance has become impossible, then the debtor may be ***in default*** and has to bear ***the higher liability***; ..... **[§ 284†]**
If the debtor is *not responsible for the delay*, then he is *not in default*. ..... **[§ 285†]**

1. If the debtor is not responsible for the impossibility, then he is not liable for damages. ..... [§ 275†]
2. If the debtor is responsible for the impossibility, then he is liable for damages. ..... [§ 280†]

If the debtor is *responsible for the delay*, then he is *in default* and *highly liable* for damages;

1. He is liable for damages arisen from his default (delay). ..... **[§ 286†]**
2. Even if the debtor is not responsible for the impossibility, he is always liable for damages. . **[§ 287†]**

IV. **Delay of acceptance**; ..... **[§§ 293, 298]**
So-called "Delay of acceptance" or "Default of creditor" is not any unique type of Non-performance. It is rather a secondary point related to the liability of the debtor. If the creditor himself is ***in delay of acceptance,*** then ***the liability of the debtor for the impossibility of the performance*** may be reduced, or he may be even exempt from it. ..... **[§ 300]**


Conclusion of Contract
primarily impossible
primarily possible
Willingly performed
Not performed
Performance is still possible
§271†
Question:
"Is enforcement possible or not?"
Enforcement
Afterwards-effected impossibility
Performance is not possible anymore
Time is not essential
Question:
"Debtor is responsible for impossibility or not?"
§275† or §280†
Time is essential
Obligation is still not due
Question:
"Debtor is responsible for impossibility or not?"
§275† or §280†
Obligation is already due
Debtor is not responsible for delay
§285†
§284†
Question:
"Debtor is responsible for impossibility or not?"
§275† or §280†
Debtor is responsible for delay
§286†
Higher liability of debtor
§287†