Law of Obligations – Its Various Concepts

Prologue – Primary Effect of Obligations and Remedies for Non-performance

In the 18. century, the establishment of the modern civil law in European countries was one of the political achievements of the democracy movement and civilian revolutions.

In the course towards a "Nation State", all the feudalistic restrictions were abolished, and the whole spheres of private life of citizens were freed from political interventions. These fields are just the target of the law of obligations in the modern sense. This law determines the basic rules of economic activities in our civil society. In this sense, "***Civil Autonomy***" and "***Freedom of Contract***" are the fundamental principles for the law of obligations.

However, the declaration of such fundamental principles is only the beginning for the law of obligations in modern sense. Its main task would be to set up effective methods to solve conflicts or disorders among citizens. In this sense, "***Remedies for Non-performance***" would be the central subject in the law of obligations; in other words, it should be clearly determined what the creditor may demand from the debtor if the latter does not perform his obligations properly. There have been different answers to this question in the history.

A. Common law solution – Damages

Firstly, the Common law maintains the most traditional solution for civil conflicts; namely payment of compensation for damages (normally simply called "***Damages***"). Principally, the Common law court will not acknowledge any law suit for "***Specific performance***". A demand of specific performance could be accepted only in exceptional cases as one of the several "***Equitable remedies***". Besides specific performance, "***Rescission***" and "***Injunction***" are counted as equitable remedies.

Since the medieval age, the conflicts among "Commons" were not just important matters for the public authority. The Court adjudicated cases, but did not offer any system of enforcement (there was only "***Debtors' Prison***"). For this reason, payment of damages was only remedy for non-performance in normal civil cases.

On the other hand, the creditor may sue the debtor for damages soon after the time of performance has already arrived. It means, the debtor "defaults" immediately with the arrival of the time for performance, and he is liable for damages. The creditor therefore has no duty to request the performance from the debtor in advance, nor has he to prove any "***fault*** (responsibility)" on the side of the debtor for non-performance. It means, the debtor has no excuse for his non-performance and no opportunity for defense.

This Common law solution, however, results in a paradoxical situation that the creditor has no choice but *the debtor may choose* between performance of his obligations or payment of damages. Above all, this question – whether an obligation should be properly performed or rather damages may be payed instead – is not considered as a moral question, but a pure business matter.

B. French solution – Specific performance or Damages

For the European countries under the strong influence of the Roman law tradition, any obligation, especially an agreement between the parties must be properly performed – "Pacta sunt servanda". In order to protect the effectiveness and reliability of contracts, obligations must be performed as properly as possible. Therefore, the creditor should not demand compensation for damages at first, and the debtor may not offer damages in stead of performance. When the time for performance has arrived and the obligation is due, the creditor must demand "Specific performance" at first.

On the other side, however, enforcement of obligations could infringe the basic freedom and dignity of individuals. For this reason, the French Civil Code clearly distinguishes two kinds of obligations; namely "***Obligations to give something***" and "***Obligations to do or not to do something***". In the first cases, the enforcement of specific performance would seldom cause infringement of the human rights of the debtor. Therefore, it is a primary step for the creditor to ***demand for specific performance***.

Upon the demand from the creditor, however, the debtor maybe fails to perform his obligations – it means, he will not or can not fulfill his duties. In such a case, the creditor may sue the debtor for specific performance and even its enforcement.

Alternatively, the creditor may also ***demand for damages in lieu of performance*** if the obligation can not be performed or may not be enforced, or if he prefers payment of damages to specific performance, provided that *the debtor is responsible for his non-performance*. Principally, the debtor is ***assumed to be responsible*** for his non-performance if he has not performed his obligations on the demand from the creditor. However, the French law still give the debtor an ***opportunity of defense***; he can prove that he is not responsible for the non-performance. In other words, the debtor bears ***the burden of proof***.

In this manner, *the creditor has a choice*; namely, he may primarily sue the debtor for specific performance if the debtor fails to perform his obligations, he may alternatively demand also for compensation of damages in lieu of performance if the debtor is responsible for his non-performance.

In the second cases (obligations to do or not to do something), however, enforcement of the obligation means to force the debtor to perform or forbear a particular action against his own intention, and it would infringe his freedom and dignity. For this reason, the creditor principally may demand only for compensation of damages if *the debtor is responsible for his non-performance*. However, it is still allowed for the creditor to demand for *specific performance by an agent* at the debtor's expense so long as the obligation does not need to be performed in the debtor's own person. As a result, *the creditor could still have a choice* in certain cases; the creditor may demand primarily for compensation of damages, he may alternatively demand for specific performance by an agent so log as it would not spoil the purpose of the obligation.

In any case, the debtor may not have any choice, he does not have a right to offer payment of damages instead of specific performance. In this sense, the right to demand for specific performance must be always reserved for the creditor as primary effect of obligations.

Moreover, the French Civil Code understands payment of damages for non-performance as "***accusation***" or "***punishment***" against breach of duties, and the intensity of punishment may vary with the severity of the breach. For this reason, the scope of damages could be different according to the modes of fault, namely intentional breach or simple negligence.

C. German solution – Natural Fulfillment only, then Damages in case of Impossibility

The German civil law shares the basic stance of the French civil law – "Pacta sunt servanda". However, the German law *denies the creditor's choice between specific performance or damages*; he may demand ***only specific performance*** from the debtor so long as it is possible for the debtor and meaningful for the creditor to perform the obligation properly. It is called the principle of "***Natural Fulfillment***". Under this principle, the effectiveness and reliability of contracts could be maximized.

Moreover, the German civil law *rejects the distinction between "obligations to give" and "obligations to do or not to do"* in the French Civil Code, and requires application of the principle of "*Natural Fulfillment*" to any kind of obligations. As a result, the creditor may demand compensation for damages in lieu of performance mainly only in two cases; namely if specific performance may not be enforced, or if it might be enforced but has subsequently become impossible ("***subsequent impossibility***"), provided that the debtor is responsible for his non-performance or for the impossibility of performance.

In the German solution, the concept of "***impossibility***" is almost synonymous with the concept of "***non-performance***" in general. Other modes of non-performance, for example "imperfect performance" are treated as "***partial impossibility***".

As mentioned above, the German civil law also requires the debtor's fault (responsibility) as a condition for his liability. However, payment of damages is not "accusation" or "punishment", but it aims to restore the initially intended state. In this sense, the scope of damages does not vary with different modes of fault; it should be quite objectively determined regardless of how severe the subjective aspect of the debtor's fault might be.

These three solutions are summarized as follows. Which concept is to select would be a pure political matter:

Three Concepts of Remedies for Non-performance

	Condition for Default	Remedies for Non-performance	Fault (Responsibility)	Choice	Damages
C/L	Arrival of time	Damages only	–	Debtor	Business option
Fr.	Arrival of time & Demand	Specific perform or Damages	Required	Creditor	Punishment against non-performance
Gr.	Arrival of time & Demand	Specific perform only then Damages	Required	Nobody	Recovery from damages

D. "Liability for Damages": Its Subjective and Objective Aspects

Generally speaking, the issue of "***Liability for non-performance***" has different two aspects, namely ***subjective and objective aspects***. On the objective aspect, the debtor is "*liable*" for damages ***because he caused them***. In other words, he has a duty to recover damages insofar as a "***Causation***" may be proved between his conduct (non-performance) and them. The question of the causation is not any matter of moral, but simply a matter of facts. Accordingly, the liability in this sense has no implication for moral accusation. The Common law considers the liability exclusively in this meaning. Consequently, for the Common law, the question of "***Scope of damages***"; namely the question "***How much should the debtor pay to the creditor for the compensation of damages?***", is purely the matter of objective causation. Accordingly, the compensation of damages has no implication as a moral penalty or sanction against non-performance, but simply an alternative performance of the obligation.

Above all, the "***Causation***" would be the primary and substantial ground for the liability. For this reason, the French law takes it into consideration, too. For the assessment of the liability, however, the French law goes one more step further and looks into the reason for the causation; namely a question "***Why did the debtor cause these damages?***" Asking this question, the French law pays a special attention to the subjective aspect of liability. On the subjective aspect, the debtor is "*liable*" for damages ***because he has willingly or negligently caused damages*** or ***because he has failed to prevent them***. His misconduct or failure would be the reason for the causation of damages. Accordingly, the French law requires the debtor's responsibility ("***Fault***"; intention or negligence) to establish his liability for damages. On the other side, the debtor is completely free from any liability so long as his conduct is neither faithless nor careless; for example, in case of impossibility due to "***force majeure***". In such a case, the debtor may enjoy the opportunity to defend himself against the claim for compensation from the creditor.

Contrary to the Common law, the French law assesses the "***Scope of damages***" primarily in accordance with this subjective criterion. The amount of the compensation varies depending upon the intensity and severeness of the debtor's fault (intentional non-performance or negligence). Accordingly, the compensation of damages means a moral accusation and sanction against the debtor's faithless or careless conduct (non-performance or breach of duties).

Regarding the primary meaning of the liability, the German law stays on the side of the French law. Considering the "***Causation***" quite objectively, the German law pays a special attention also to the subjective aspect of the liability and requires "***Fault***" to establish the debtor's liability for damages. With regard to the question of "***Scope of damages***", however, the German law *rejects the French approach* and *shares the pure objective approach with the Common law*. The purpose of the compensation of damages is not any sanction against the debtor's non-performance, but just "***Recovery from damages***", and its range and scope would not vary according to modes of the debtor's fault.

Historical Development of the System of Law of Obligations

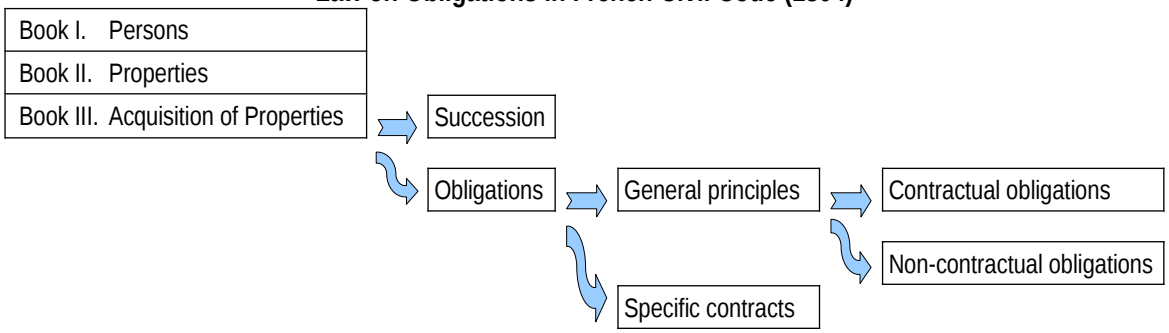
The first comprehensive civil code, the ***French Civil Code*** of 1804, was a symbol of the French Revolution in 1789. In accordance with the modern ideal of "***Natural Law***" ("Social Contract" as a state founding act of the sovereign people), this code declared "***Agreement***" as a most important principle of a civil society.

A. Structure of Law of Obligations in French Civil Code

This code was compiled based on the "***Institutiones***" of the "***Corpus Iuris Civilis***" and has three books; namely "***Law on Persons***", "***Low on Properties***" and "***Various Modes of Acquisition of Properties***". The top part of the first book "Law on Persons" contains several provisions on the French nationality as source of civil rights. This shows that the legal concept of "***civil law***" had been still not clearly separated from the concept of "***public law***".

The law of obligations is located in the last book together with the law of succession. It has roughly two parts; namely [I] ***General principles of obligations*** and [II] ***Specific types of contracts***, and the first part is further separated into two sections; [1] ***obligations arising from contracts*** and [2] ***obligations arising without contract*** (management without mandate, unjust enrichment and unlawful acts).

Law on Obligations in French Civil Code (1804)



A-1. Contents of "Obligations arising from contracts"

The distinction between contractual and non-contractual obligations is based on the different types of ***causes of obligations,*** and all the general principles of obligations are contained in the part of contractual obligations. Indeed, this part is the core of the whole law of obligations and treats following subjects:

1. **Essential conditions for a valid agreement**;
   the French Civil Code still had not known the concept of "Judicial Acts", which was developed in the German civil law theory in the 19. century. In this sense, the principles of "***Agreement***" declare the essential conditions for legal acts in civil law. Also, the provisions on "***Capacity***" are included in this part.

2. **Effects of obligations**;
   the French Civil Code distinguishes two kinds of obligations; namely "***Obligations to give***" and "***Obligations to do or not to do***". This part defines rights and duties of the parties (creditor and debtor). First of all, provisions on the "***Remedies for non-performance***" are of the highest importance. They determine what the creditor may demand from the debtor in the court if the latter does not perform his obligations; namely "***Specific performance***" or "***Damages***".

3. **Particular kinds of obligations**;
   certain special provisions are provided for obligations with conditions, obligations with more than one creditor or debtor, divisible or indivisible obligations and so on.

4. **Extinction of obligations**:
   as to causes for extinction of obligations, the French Civil Code counts not only "***Payment***" or "***Performance***", "***Novation***", "***Release***", "***Set-off***" and "***Confusion***", but it lists also "***Loss of***

the object", "***Nullity or rescission of agreement***".

5. **Proof of obligations**:
   At the end of the part for contractual obligations, certain procedural provisions are located. They covers following subjects; namely, ***proof with documents or testaments***, ***presumptions***, ***acknowledgment***, ***oath*** so on.

A-2. Several Types of Obligations arising without Contract

The French Civil Code distinguishes these obligations roughly into two groups; namely "***Quasi-contracts***" and "***Crimes and Quasi-crimes***":

1. **Quasi-contracts** :
   a) Firstly, there are cases where the debtor voluntarily perform legal businesses of others without any formal mandate of the beneficiary ("***management without mandate***").
   b) Secondly, there are cases where the debtor has received the performance of others without any legal titles. He is obliged to return the interest to the other party and to restore the original state ("***unjust enrichment***").
2. **Crimes and Quasi-crimes** :
   a) The second large group of the obligations arise from infringement of rights and interests of others ("***delict***" or "***tort***"). The ground of this liability is the duty of care for others, and this liability requires violator's fault. Contrary to cases of the contractual liability, the victim bears the burden of proof for all the requisites; namely breach of duty, fault (responsibility or culpability), damages and causality between breach of duty and damages.
   b) In certain exceptional cases, the liability for damages could be acknowledged even if the offender (debtor) does not commit any fault. Such a strict liability is often called "quasi-crime".

A-3. Specific Types of Contracts

1. **Marriage as contract** :
   After the general provisions about contractual and non-contractual obligations, the French Civil Code provides special rules for different kinds of contracts. First of all, a "Marriage" is treated hear as one of bilateral contracts, which shows the political role of this code.
2. **Other standard contracts** :
   Sales, Exchange (barter), Hiring, Partnership in civil law, Loans, Deposit, Play and Gaming, Mandate
3. **Security contracts** :
   Personal security, Pledge, Mortgages (hypothecs),
4. **Procedural provisions** :
   Compounding (settlement), personal arrest, privileges (statutory lien) , Prescriptions

B. General Civil Code for Austrian Monarchy (1811)

During the Napoleonic Wars (1803 – 1813), nationalistic movements arose also in the German states, and there was a strong desire for codification of unified civil code for all the German states as a countermeasure against the French imperialism. In 1811, the Austrian Kingdom has enacted its own civil code as the first one among the German states. It was the "***General Civil Code for the whole hereditary lands of the Austrian Monarchy***" of 1811.

This civil code has three parts; namely "Law on Persons", "Law on Real Rights" and "Determination of Rights on Persons and Real Rights". Principally, this code followed the model of "Institutiones" just like the French Civil Code.

Regarding the remedies for non-performance, its §919 provided as follows:

§ 919	If one party does not fulfill the contract at all, or fulfills it but not in a proper time, or not at a proper place, or not in a stipulated manner, then the other party may *demand a proper fulfillment of the contract and compensation [for damages]* but may not demand cancellation [of the contract] except cases determined by law".

This provisions seems to allow the creditor to choose between a proper fulfillment or damages. If so, it is a solution still based on the French concept.

C. General State Laws for the Prussian States (1794)

Soon after the outbreak of the French Revolution, the German approach put its initial phase in the "***General State Laws for the Prussian States***" (1794), which was not a civil code in the modern sense but a systematic legitimization of the absolutism based on the feudalistic class structure. Its first part covered almost the same subjects as the French Civil Code while the second part regulated statuses and class structure of the feudalistic society.

The fifth Title of the first part provided the basic principles of the obligations and contained following provisions:

	Title V. Contracts **II. Subject Matters in Contracts**
	about Impossible Acts
§ 51	Contracts which obligate someone to absolutely *impossible acts or performances* are *null and void*.
	Title VII. Fulfillment of Contracts
§ 270	Principally, contracts *must be fulfilled* in accordance with their whole contents.
§ 271	The party who demands the fulfillment of the contract must prove that he has already exercised his own duties defined in the contract, or that he is obligated to exercise his duty after the other party has performed the obligation.
	Fault
§ 277	Someone who commits *severe fault in fulfillment* of a contract is in all cases obligated to *compensation for damages*.
	Interests
§ 285	Someone who *intentionally or faultily violates his duty* in conclusion or fulfillment of a contract must compensate the other party for whole of the interest of the other party.

§51 declares the principle of the Roman law; namely "Impossibilium nulla obligatio est", which will play a very important role in the German concept of obligations.

The law entitles the creditor to demand the fulfillment of the obligation from the debtor so long as it is possible (§ 270). It means, the *primary* effect of obligations consists in the entitlement to demand fulfillment of obligation (performance).

The creditor is entitled to claim for damages when the debtor intentionally or faultily fail to fulfill his obligations (§§ 277, 285). In other words, damages as a remedy for non-performance is the *second* effect of obligations.

In this way, the main subjects of the German concept of obligations were already determined in this feudalistic code:

1) Possibility and impossibility of fulfillment
2) Claim for fulfillment (specific performance)
3) Failure in fulfillment (non-performance)
4) Fault of the debtor (responsibility)

5) Claim for damages (liability)

D. Historical School of Law and the Theory of Impossibility

Traditionally, the German civil law put a special weight on the issue "Possibility of performance" because it could work as a decisive criterion for validity or nullity of obligations. In the 19. Century, the "***Historical School of Law***" developed the general theory of "***Impossibility of Performance***" based on the Roman law principle of "Impossibilium nulla obligatio est"; especially *Friedrich Carl von Savigny* (1779 – 1864) and *Friedrich Mommsen* (1818 – 1892). They made a distinction between different types of impossibility and determined their influence on the effects of obligations – "*What may the creditor demand from the debtor?*" ; namely *natural or juristic*, *absolute or relative*, *objective or subjective*, *permanent or provisional*, *whole or partial* impossibility. Above all, the essential distinction was made between *initial* or *subsequent* impossibility.

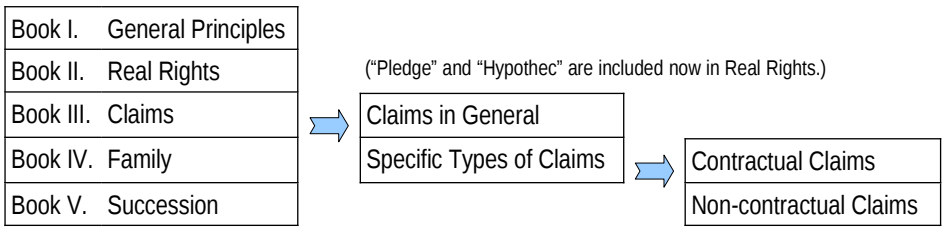
They applied the same criterion "*Impossibility = Nullity*" also to *subsequent impossibility* which occurs to a valid and effective contract. It means; *if its fulfillment becomes subsequently impossible, then the debtor should be relieved from his duty of fulfillment.* However, *the debtor may not be discharged from his obligations if the impossibility is his fault*. In this case, *the creditor's claim for specific performance is transformed into the claim for damages in lieu of performance*.

However, the theory of "***Impossibility of performance***" can not cover all the possible damages arising from non-performance; especially, "***Delay in performance***" or "***Default***" may cause damages to the creditor even though fulfillment of the obligation is still not completely impossible (so-called "delayed damages"). Therefore, "***Default***" is, clearly separated from "***Impossibility of performance***", treated as the secondary cause of liability.

E. Civil Code for the Kingdom of Saxony (1863)

Shortly before the foundation of the German Empire in 1871, the Kingdom of Saxony enacted its original civil code called the "***Civil Code for the Kingdom of Saxony***" (1863). It was the achievement of the German civil law theory in the 19th century led by the "***Historical School of Law***".

This code was compiled according to the new concept called "***Pandects system***" as follows:



E-1. Contents of "Claims in General"

Besides the definition and other basic provisions of claims, this part treats following subjects; "***Fulfillment*** (Effect)", "***Formation***", "***Assignment*** (Transfer)" and "***Extinction***" of claims. Such procedural provisions as "*Proof of obligations*" in the French Civil Code are not included any more.

The section of "Formation" distinguishes two main grounds of claims; namely "***Judicial acts***" and "***Unlawful acts***", and it contains also general provisions on "***Contracts***".

E-2. Contents of "Specific Types of Claims"

a) Firstly, this part lists 30 different types of standard contracts.
On the other hand, "Marriage" is not included in this list, and real security contracts ("***Pledge***" and "***Hyphotec***") are moved to Book II. Real Rights.

b) Secondly, "Unlawful acts" and "Undue enrichment" are treated as grounds for non-contractual claims.

E-3. Primary Effects of Claims and Remedies for Non-performance

The Saxony Civil Code (1863) declares the traditional principle of "***Natural Fulfillment***" more clearly

than the "General State Laws for the Prussian States" (1794) as follows:

Title 1. about Claims in General

Chapter 1. Essence of Claims, Persons at Claims and Subject Matter of Claims

§ 662 Claims are legal relations which *entitles a person, namely creditor, to a performance* with property value, acts or forbearance of acts by another person, namely debtor. […]

Title 2. Fulfillment of Claims

Chapter V. Influence of Fault

§ 721 If the fulfillment of a claim becomes *wholly or partially impossible* owing to the debtor's fault, nevertheless, his obligations persists, and the creditor may claim for compensation instead. […]

Chapter VI. Default of the Debtor

§ 733 After the claim has become due, the debtor is *in default* if he does not fulfill his obligations in spite of *warning made by the creditor*. […]

§ 745 From the time of default, the debtor is liable for all the kinds of fault even in cases where the responsibility of the debtor is reduced. He is liable also for accidentally caused impossibility of the fulfillment, and liable for destruction or deterioration of the subject matter unless the accident would have affected the subject matter also in case of fulfillment at the right time. […]

Chapter VIII. Lawsuit for Fulfillment

§ 761 *A lawsuit for fulfillment of a claim* pursues *the original contents of the claim* as its subject matter even in cases of personal acts. A lawsuit for damages may be brought into the Court only under the conditions which the law particularly prescribes.

In these provisions, we can easily recognize the quite clear scheme of the German theory of "***Impossibility of performance***":

a) The primary effect of claims (obligations) consists in the entitlement of the creditor to the demand of fulfillment even in the lawsuit (§§ 662, 761).

b) However, the creditor is entitled to demand compensation for damages if the fulfillment becomes impossible due to the debtor's fault (§ 721).

c) When the debtor is in default (§ 733), then he is liable for all kinds of damages (§ 745).

F. Civil Code of Germany (1898)

Principally, the "***Civil Code of Germany***" (1898) followed the basic idea of the "***Civil Code for the Kingdom of Saxony***" (1863). However, the order of Book II and III was turned over in accordance with the "***Abstraction Principle***"; the second book is now "***Obligations***", and the third book is "***Real Rights***".

The German concept and scheme of "***Impossibility of performance***" was further developed and sophisticated in the Civil Code of Germany (1898) as follows:

F-1. Principle of Natural Fulfillment

§ 241 By virtue of an obligation the creditor is *entitled to claim performance* from the debtor. The performance may consist in a forbearance.

§ 242 The debtor is *bound to effect the performance* according to the requirements of good faith, ordinary usage being taken into consideration.

F-2. Scope of damages

§ 249 A person who is bound to make compensation shall bring about the condition which would exist if the circumstance making him liable to compensate had not occurred. If compensation required to be made for injury to a person or damage to a thing, the creditor may demand, instead of restitution in kind, the sum of money necessary to effect such restitution.

F-3. Time for Performance

§ 271	(1) If a time for performance is neither fixed nor to be inferred from the circumstances the creditor may demand the performance forthwith, and the debtor may perform his part forthwith […]

F-4. Impossibility of Performance and Responsibility (fault)

§ 275	(1) The debtor is relieved from his obligations to perform if the performance becomes *impossible in consequence of a circumstance for which he is not responsible* occurring after the creation of the obligation […]
§ 276	(1) A debtor is responsible, unless it is otherwise provided, for *intention and negligence*. A person acts negligently when he does not exercise ordinary care […]
§ 280	(1) Where the performance becomes *impossible in consequence of a circumstance for which the debtor is responsible*, the debtor shall compensate the creditor for any damage arising from the non-performance […]
§ 282	If it is disputed whether the impossibility of performance is the result of a circumstance for which the debtor is responsible, the burden of proof is upon the debtor.

F-5. Default of the Debtor

§ 284	(1) If the debtor does not perform after warning given by the creditor after maturity, he is *in default through the warning* […]
§ 285	The debtor is not in default so long as the performance is not effected in consequence of a circumstance for which he is not responsible.
§ 286	(1) The debtor shall compensate the creditor for *any damage arising from his default*. (2) If the creditor has no interest in the performance in consequence of the default, he may, by refusing the performance, *demand compensation for non-performance* […]
§ 287	A debtor is responsible for all negligence during his default. He is also responsible for impossibility of performance arising accidentally during the default, unless the injury would have arisen even if he had performed in due time.

F-6. Prerequisite for Valid Contracts

§ 306	A contract for *an impossible performance* is null and void.

F-7. Impossibility of Performance in case of Reciprocal Contracts

§ 323	(1) If the performance imposed on one party under a reciprocal contract becomes *impossible in consequence of a circumstance for which neither he nor the other party is responsible*, he loses the claim for counter-performance […]
§ 324	(1) If the performance imposed on one party under a reciprocal contract becomes *impossible in consequence of a circumstance for which the other party is responsible*, he retains his claim for counter-performance […]
§ 325	(1) If the performance imposed on one party under a reciprocal contract becomes *impossible in consequence of a circumstance for which he is responsible*, the other party may *demand compensation for non-performance, or rescind the contract* […]

F-8. Effect of Contracts – Default in case of Reciprocal Contracts

§ 326	(1) If one party is in default in respect of the performance imposed on him under a reciprocal contract, the other party may allot him *a fixed reasonable period* for performing his duty with a declaration that *he will reject the performance after the expiration of the period*. After the expiration of the period, he is entitled to *demand compensation for non-performance, or rescind the contract*, if the performance has not been effected in due time; the claim for performance is barred […]

G. Inflexibility of the German Scheme

This specially German theory of Non-performance was well-considered and quite consistent. It offered a sharp counterpart to the Common law principle.

On the other hand, however, this tightly constructed logical scheme was too rigid and inflexible, and its view was quite narrowed. As a result, several aspects of the problems had dropped out from the perspective of the theory.

G-1. Three Dichotomies

The reason for this hindrance could be seen in the tight logical connection of the three dichotomies; namely "***possible or impossible***" – "***valid or void***" – "***fulfillment or damages***".

a) If the performance is ***possible***, then the obligation is ***valid***, and the creditor may claim only for its ***fulfillment*** so long as it is possible.

b) If the performance becomes ***impossible***, then the obligation is ***void***, and the creditor may claim for ***damages*** if it is the debtor's fault.

G-2. "Gap in the law" and the Development in the 20th Century

Soon after the Code was put into effect, a hard controversy arose among German legal scholars. Some of them complained about "***Gaps in the law***" and insisted on the necessity to fill these gaps with new theories and doctrines. This circumstance seriously damaged the international applicability of the German law of Non-performance.

In the 20. Century, the German civil law science developed a variety of general theories on the subject "Non-performance of obligations" and applied them to resolve the inflexibility of the German Civil Code:

a) Theory of "***Positive Breach of Contracts***" or "***Imperfect performance***"

b) Theory of "***Additional Duties"*** or ***"Duty of care***" in contractual relationship

c) Theory of "**Culpa in Contrahendo**" (liability before contract conclusion)

d) Theory of "***Loss of Basic Conditions for Contract***" (unreasonableness of contract)

e) Theory of "***Sphere of Risks***" (risks to bear instead fault)

etc.

H. "Civil Code of Japan" (1890)

We return to the story of the Japanese law. In 1890, the first Japanese Civil Code was enacted. The person in charge to supervise this project, Prof. *Boissonade*, complied this code based on the French Civil Code. In the "Law on Properties" however, we recognize considerable differences from the original French concept:

H-1. "Putting in default"

Art. 336 The debtor or any other obligor shall be put in default in the following cases:

1. when there is a *claim [brought by the creditor] before the Court*, or delivery of a letter of demand or a writ of enforcement in a good and due form after the arrival of the fixed time for performance;
2. when the fixed time for performance has arrived in cases where it is prescribed by law or by mutual consent that [the debtor bears] such a responsibility simply on the arrival of the time;
3. when the debtor failed to perform in due time even though he knew that any delayed performance would be useless for the creditor.

H-2. Primary Effect of Obligations

Art. 381 (1) The effect of obligation *primarily* consists in entitling the creditor to take a legal action for *direct performance [=specific performance]*, and *alternatively* in cases of non-performance a legal action for

compensation for damages according to the distinctions provided in Title I, II, and III of this Chapter [...]

Art. 382 (1) *The Court is bound to order direct performance [=specific performance]* in accordance with its proper form and content upon the claim of the creditor *whenever it is possible to enforce it without any physical restraint of the debtor.*

(2) If the tangible object to be delivered to the creditor is located in the properties of the debtor, then the Court has to seize it and deliver it to the creditor.

(3) In case of *obligation for an act*, the Court may allow the creditor to cause a third person to perform such act at the expense of the debtor.

(4) In case of *obligation for a forbearance*, the Court may allow the creditor to cause a third person to remove the outcome of such act performed by the debtor at the expense of the latter, and to take appropriate arrangements to prevent any such act in future.

(5) In the cases mentioned above, furthermore, the creditor may also demand compensation for damages if he suffers any.

(6) The enforcement of direct performance [=specific performance] takes place according to the provisions in the Code of Civil Procedure.

H-3. Secondary Effect of Obligations

Art. 383 (1) In cases where the debtor refuses to perform his obligations, the creditor may demand *compensation for damages* if he missed an opportunity to claim for enforcement of direct performance [=specific performance], or where the nature of the obligation does not allow such an enforcement; the same shall apply if *the performance becomes impossible* for any cause for which the debtor is responsible.

(2) The creditor may demand compensation for damages also in a case of delay in performance.

(3) The amount of compensation should be, so long as the parties have reached no agreement on it, determined by the Court according to the distinctions and conditions provided in following articles unless a certain amount of compensation is prescribed by law.

Art. 384 (1) The duty to pay compensation is not due until the debtor has been put in default according to Art. 336.

(2) In cases where the obligation consists in duty of inaction, however, the debtor always and inevitably bears the responsibility for delay in performance [whenever he breached his duty].

(3) The same shall apply to the cases where someone has duty to return money or other valuable things which he deprived others of through criminal offenses.

Art. 381 clearly prescribes the priority of "***claim for specific performance***" as "Primary Effect of Obligations" while a "claim for compensation of damages" is merely "***alternative remedy for non-performance***". The Court has also duty to enforce specific performance so long as it is possible, and a "performance by a third person" is prior to "damages" also in case of "obligations to do or not to do" (Art. 382). The creditor may demand compensation for damages if the enforcement of specific performance is impossible (Art. 383).

According to Prof. *Boissonade's* vision, the creditor should officially sue the debtor for specific performance if the latter does not willingly perform his obligations (Art. 336 "***putting in default***"). The Court is bound to order specific performance so long as the performance is possible (Art. 382). The creditor may demand for damages only when no more probability or possibility exists for specific performance (Art. 383). This vision is closely similar to the German "***Principle of Natural Fulfillment of Obligations***". Apparently, Prof. *Boissonade* tried to introduce several German concepts into the French system of obligations. In this context, Prof. *Boissonade* introduced the term "***Impossibility of performance***" from the German law. In the French law, this concept did not play any important role because the creditor has no need to wait for the impossibility in order to switch from "specific performance" to "damages" for the target of his claim. Instead, the French law discusses cases of

"*force majeure*" or "*fortuitous events*" (for example, Art. 1148 in the French Civil Code).

However, Prof. *Boissonade's* vision suffers almost same problem as the German scheme mentioned above; namely the narrowed perspective of the theory. Art. 383 lists five cases where the claim for compensation of damages should be allowed to the creditor:

1) Refusal of performance by the debtor,
2) Failure by the creditor to claim for performance,
3) Inadequate nature of performance,
4) Impossibility of performance and
5) Delay of performance.

As a result, it would be quite unclear whether other types of troubles regarding obligations – "***Imperfect performance***", "***Breach of duty of care***" in performance, "***Cupla in contrahendo***" etc. – could be properly covered by this concept or not.

Moreover, there was another problem; namely the responsibility of the debtor. Art. 1147 of the French Civil Code requires the debtor's responsibility as a prerequisite for his liability ("***No liability without responsibility***"). However, Art. 383 drafted by Prof. *Boissonade* mentions this issue only in case of impossibility of performance. It would be quite unclear whether this issue should be required also in other cases of non-performance or not.

H-4. Scope of Damages

Art. 385 (1) The compensation for damages covers the loss which the creditor has suffered 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.

However, regarding the subject "***Scope of Damages***", Art. 385 clearly distinguishes between cases due to the debtor's ***intention*** and cases due to simple ***negligence*** and acknowledges certain difference in amount of monetary compensation according to state of responsibility:

a) In Paragraph (2) of this article, Prof. *Boissonade* followed Art. 1150 of the French Civil Code and applied the standard of "***Foreseeability***" to the cases of non-performance due to the debtor's negligence in order to delimit the otherwise unlimited chain of causation;

b) In Paragraph (3), however, Prof. *Boissonade* applied his original standard of "***Inevitability***" to the cases of intentional non-performance instead of "***Immediate and direct***" in Art. 1151 of the French Civil Code.

In other words, this provision considers the compensation for damages as "***Sanction against non-performance***". In this aspect, Prof. *Boissonade* remained in the French tradition.

I. Revised Civil Code of Japan (1896)

Principally, the members of the "***Code Investigatory Commission***" which was in charge of the revision of the "Civil Code of Japan" (1890) intended to follow Prof. *Boissonade's* concept in regard to "***Effects of performance***" and "***Remedies for non-performance***". However, they tried to revise the whole scheme of effects of obligations in following points:

a) Firstly, they decided to delete Arts. 336 and 384 regarding "***Putting in default***". They found quite bothersome and inadequate if the creditor would have to bring the case before the court each time when he intended to exercise his right. *The parties should have opportunity to directly and rapidly solve their troubles by themselves* even without any involvement of the judicial authority. In principle, the creditor should be able to enjoy a opportunity to claim for

compensation of damages immediately and directly from the debtor. It means the adoption of *the Common law concept regarding "Default"*.

b) Secondly, they tried to *remove the German-style scheme* of effects which would rigidly require the priority of "***Natural fulfillment***". Apparently, they intended to bring the whole concept of effects of obligations *back to a French-style scheme* which would allow the creditor's choice between specific performance or damages. For this reason, Arts. 381 and 382 must be completely rewritten.

c) On the other hand, however, it would be inadequate if the debtor could enjoy any privilege to choose between specific performance or payment of damages like in the Common law. In order to definitely deny such a privilege for the debtor, the creditor's *right to claim for enforcement of specific performance* must be clearly provided for.

d) The liability of the debtor to compensation for damages should not be rigidly formulated for certain types of non-performance, but it should be *a general clause in order to cover all the possible forms of troubles* in regard to obligations.

e) In the end, the responsibility of the debtor should be required in any types of troubles. So, the principle of "*No liability without responsibility*" should be generally required.

I-1. First Proposal (Jan. 1895)

In January 18th, 1895, the Commission proposed the following provisions to fulfill these requirements:

Art. 406 **[Time for performance]** **(comparable to the current Art. 412)**
The creditor may at any time demand performance of the obligation from the debtor in cases where no fixed time for the performance is determined.

Art. 408 **[Claim for enforcement]** **(comparable to the current Art. 414)**
(1) If the debtor does not voluntarily perform his obligations, then the creditor may bring *a claim for enforcement of direct performance* before the court, unless the nature of the obligation does not allow it.

(2) In cases where the nature of the obligation does not allow the enforcement of direct performance, if the obligation has performance of an action for its subject matter, then the creditor may demand the court to cause a third person to do this act at the expense of the debtor.

(3) With regard to the obligation for a forbearance, the creditor may demand removal of the outcome of the action at the expense of the debtor as well as adequate measures adopted for the future.

(4) The provisions of the preceding three Paragraphs do not affect a claim for compensation for damages.

Art. 409 **[Compensation for damages]** **(comparable to the current Art. 415)**
If the debtor fails to perform his obligations *in accordance with its proper form and content*, then the creditor may demand compensation for damages arising therefrom, unless the debtor is not *responsible for a cause of his non-performance*.

For the formulation of Art. 409, the Commission used Art. 110 of the "***Federal Code of Obligations***" of Swiss (1881) as a model:

Art. 110 Where the creditor can not obtain performance of the obligation or may obtain it only imperfectly, the debtor is liable for damages unless he proves that no fault is attributable to him.

The Commission improved the formulation "the creditor can not obtain performance […] or may obtain it only imperfectly" with the phrase "***in accordance with its proper form and content***" from Art. 382 of the "***Civil Code of Japan***" (1890).

I-2. Second Proposal (Dec. 1895) and "Delay in Performance"

However, this first proposal had serious problems. Firstly, the "*Putting in default*" was removed, but *the creditor's right to claim for damages immediately and directly from the debtor* is still not clearly declared. Secondly, the provisions were so drastically simplified that certain basic technical terms like

"***Delay in performance***" or "***Impossibility of performance***" suddenly disappeared.

For this reason, Art. 406 on "***Time for performance***" cited above had to be replaced with a provision on "***Delay in performance***". In such a manner, Art. 336 of the "***Civil Code of Japan***" (1890) could be rehabilitated. However, neither direct claim for performance nor any lawsuit should not be required. The new provision was formulated as followed:

Art. 409	**[Delay in performance]**	**(same as the current Art. 412)**
	(1) In cases where a definite due time is determined for the performance of the obligation, then the debtor shall be *liable for the delay in performance [=in default] on and after such a due time arrived*.	
	(2) In cases where only an indefinite due time is decided for the performance of the obligation, then the debtor shall be *liable for the delay in performance [=in default] on and after he is noticed of the arrival of the due time*.	
	(3) In cases where there is no fixed due time determined for the performance of the obligation, then he shall be *liable for the delay in performance [=in default] on and after the debtor received the demand for performance from the creditor*.	

This provision shows exactly the same concept as the idea of "***Default***" in the Common law; namely, it is allowed for the creditor to claim for compensation of damages already on the arrival of due time *even without any claim for specific performance or lawsuit in advance*. Just like in the Common law, the debtor shall be liable for all possible damages which would occur after the arrival of the time for performance. In this sense, his liability is "***strict***".

On the other side, the debtor's responsibility for non-performance would be required if the French or German principle of "***No liability without responsibility***" should apply. For this reason, Art. 409 cited above uses the wordings that the debtor shall be "***responsible***" on and after the arrival of a due time. However, such a responsibility could not be the same responsibility as required in the French or German concept; namely "***Intention***" or "***Negligence***".

In this way, this provision causes a serious conceptual conflict and confusion. As a result, it is quite unclear whether the liability of the debtor for "***Delay in performance***" is strict like in the Common law, or his fault (intention or negligence) is required like in the French or German law.

I-3. "Impossibility of performance"

Besides the problem of "*Delay in performance*", there was another conceptual problem, namely the uncertainty in regard to "***Impossibility of performance***". Initially, the drafters had planned to follow the model of the "***Civil Code of Japan***" (1890) and to dedicate several articles to provide basic principles regarding this issue. In the discussion of the Commission on Apr. 5, 1895, however, the drafters proposed to delete all the planned articles regarding "*Impossibility of performance*". They justified this proposal with the argument that it would be self-evident for everybody that the debtor would be released from his obligations and from any responsibility for non-performance if the natural fulfillment of his obligations became impossible due to "***force majeure***" for example. The proposal was approved in the Commission. On the other hand, however, the drafters found a certain necessity to change the wordings in the article on the "Compensation for damages" (at this time point, Art. 414). The original version had provided that the creditor may demand compensation for damages if the debtor *fails to perform his obligations in accordance with its proper form and contents*. Suddenly, it became quite uncertain if the wording "*fail to perform the obligation*" would cover also cases where the debtor "*can not perform the obligation*". For this reason, they proposed to replace the second sentence of the article "unless the debtor is not responsible for a cause of his non- performance" with the second sentence of Paragraph 1 in Art. 383 of the "***Civil Code of Japan***" in order to clearly signify that "*Failure to perform*" includes also "*Impossibility to perform*". The modified article was formulated as follows:

Art. 410	**[Compensation for damages]**	**(same as the current Art. 415)**
	If the debtor fails to perform his obligations in accordance with its proper form and content, then the creditor may demand compensation for damages arising therefrom; *the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible.*	

This change in the composition of the provision, however, could suggest such an understanding that the creditor is entitled to claim for damages also in cases of impossibility but only if the impossibility of performance was caused by any reason for which the debtor was responsible. Consequently, it would be even legitimate to limit the application of the principle of "***No liability without responsibility***" exclusively to cases of impossibility, but not to apply to any other types of non-performance (?!)

In an extremely narrow understanding of the provisions on "***Delay in performance***" and "***Impossibility of performance***", the debtor's liability for delay in performance would be "*strict*" while the debtor's *fault* (intention or negligence) would be required in case of impossibility of performance. However, such a combination of the Common law principle and the French concepts would not work properly because the debtor would be in any case *strictly liable* on the arrival of the due time. The creditor would have no need to prove the debtor's fault for impossibility at all. Moreover, how about other types of non-performance, for example in case of "***Imperfect performance***"? Is there any reason for distinction of the debtor's liability according to types of non-performance?

I-4. "Delay in Acceptance"

Later in May, 1895, the Commission decided to adopt an additional provision on the issue "***Delay in acceptance***". It should be located just next to the article on "***Delay in performance***" and provide as follows:

Art. 412	**[Delay in acceptance]**	**(same as the current Art. 413)**
	If the creditor refuses to accept the tender of the performance, or is prevented from such an acceptance, then he shall be responsible for the delay on and after the time of the tender of the performance.	

According to the explanation by the drafter, "*Acceptance of performance*" is not any genuine legal duty of the creditor. For this reason, his "Responsibility for delay in acceptance" does not require any fault (intention or negligence). He must simply bear any risk during his delay in acceptance even if he may be prevented from acceptance in due time by other persons or "*force majeure*". This concept is based on the same idea as the provision on the issue "***Passage of risk***":

Art. 534 (1) When a reciprocal contract has for its object the creation of transfer of a real right in a specific thing, if such thing has been lost or damaged by a cause not attributable to the debtor, such loss or damage falls on the creditor [...]

On the other side, the debtor's responsibility may be reduced during the creditor's delay in acceptance. Unfortunately, there is no clear provision on reducing the debtor's responsibility because there is even no clear definition of the debtor's standard responsibility like the German provision § 276.

I-5. Final Formulation: Selective Scheme of Remedies for Non-performance

In the end, the simple scheme of the Japanese concept for "Remedies for non-performance" was born, which could be summarized as follows;

1) Art. 412 "Delay in performance [=default]"
2) Art. 413 "Delay in acceptance"
3) Art. 414 "Enforcement of specific performance"
4) Art. 415 "Compensation for damages"

As mentioned above, the initial plan of the Commission had been to follow the basic scheme proposed by Prof. *Boissonade*. So, they provided "Enforcement of specific performance" as a primary remedy for non-performance in Art. 414. Indeed, the debtor may not enjoy any free choice between specific performance of his obligations or compensation of damages. Contrary to Prof. *Boissonade's* concept,

however, it should be openly allowed for the creditor to spring from Art. 412 directly upon to Art. 415 skipping Art. 414 because it is not clearly required that the creditor would have to claim for specific performance in advance. In this way, the consideration of the Commission resulted in a ***selective scheme of remedies for non-performance***, which could be clearer than the original French scheme.

I-6. "Rescission of Contract"

Besides "***Claim for specific performance***" and "***Claim for damages***", the Commission decided to adopt the German concept of "***Recession of contract***" as a third remedy, the primary effect of which consists in "***Restoration to the original state***". On the other hand, however, the Commission clearly rejected the selective scheme between "Recession of contract" or "Claim for damages" in the German concept (see §§ 325, 326). The discussion resulted in the following final formulation:

> Art. 541 [Rescission after notification]
> If one party fails to perform his obligations, then the other party may fix a reasonable period of time and demand performance within such period; and if the contract is not performed within that period of time, then the other party may rescind it.
>
> […]
>
> Art. 545 [Effects of rescission]
> (1) When one of the parties has exercised his right of rescission, each party is bound to *restore the other party to his original state*; but the rights of third persons may not be injured.
>
> (2) In the case described in the preceding paragraph, the amount of money received must be restored with interest from the day of receipt.
>
> (3) *The exercise of the right of rescission does not affect a claim for compensation for damages*.

I-7. "Scope of Damages"

Prof. *Boissonade* had followed the French concept in his Art. 385 of the Law on Properties and differentiated intensity and severness of the liability according to the modes of the debtor's responsibility (intentional non-performance or negligence). For the Commission, however, it would be not necessary to take such a subjective aspect into consideration because the purpose of the compensation of damages is not any "***Moral accusation***" or "***Punishment***" against the debtor's non-performance, but it consists in just "***Recovery from damages***". The intensity and scope of damages itself would not vary according to the debtor's mental state. It should be *objectively* determined.

For this reason, the scope of damages should be determined exclusively in accordance with the objective criterion of "***Causation***". The debtor should compensate the creditor for damages so long as a causal relationship could be proved between his non-performance and particular damages. In this sense, the Commission preferred the German approach to the French one. § 249 of the German Civil Code determines the scope of damages as follows:

> § 249 A person who is bound to make compensation shall bring about the condition which would exist *if the circumstance making him liable to compensate had not occurred*. If compensation required to be made for injury to a person or damage to a thing, the creditor may demand, instead of restitution in kind, the sum of money necessary to effect such restitution […]

This provision follows the "***Equivalence Theory***" in the criminal law – "**conditio sine qua non**" in Latin – to establish the causation between two events, for example, between a criminal offense and the death of a victim. The causation could be established if it is true that the death of the victim *would not* happen if the offender *would not* have committed the crime.

According to the German concept, the same principle should apply to both of contractual cases and tortuous cases. In contractual cases, "***the circumstance making him liable to compensate***" means "***Non-performance***", and in tortuous cases "***Tort***" (unlawful act). In the former cases, the debtor should restore the condition to ***an expected state*** which would exist if he would not have failed to properly perform his obligations. In other words, he should recover all the damages which *would not* occur if he *would not* have failed to properly perform his obligations.

However, such a liability would be quite heavy for the debtor because he would have to recover almost every kind of damages except such ones as would occur even if the debtor would have properly performed his obligations. Only with the "conditio sine qua non"-Test, it would be very difficult to exclude accidental and unexpected damages from the scope of the debtor's liability.

For this reason, the Commission decided to follow ***the English approach*** in order to delimit the scope of the debtor's liability to a reasonable one. Relying on a famous judgment in England (***Hadley vs. Baxendale***, 1854), the drafter proposed the following formulation:

> 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 special circumstances insofar as the parties have foreseen or could have foreseen such damages at the time of the formation of the obligation.

The Paragraph (1) gives the creditor an award of compensation for ***usual damages*** which (everybody know) *would always and inevitably occur* in consequence of the non-performance *in usual circumstances*. However, it does *not require* the creditor to prove that the debtor in his person had really foreseen these damages. In this sense, the causation of these damages is quite "***objective***". This paragraph aims to reduce the basic scope of liability just to the minimal range. In return, the creditor has *no special burden of proof* in regard to the causation of these damages.

For the compensation of other ***non-usual damages*** which arise from special circumstances, the creditor bears *the burden to prove that the debtor has really foreseen or could have foreseen these particular damages*. The concept of "Foreseeability" in this context means "***foreseeable causation***".

Compared with the German concept, the liability of the debtor would be essentially light. Just in this point, this proposal was criticized by some members of the Commission. They strongly asserted the improvement in two points:

a) Firstly, it would be enough for the creditor to prove that the debtor has foreseen or could have foreseen the special *circumstances*.

b) Secondly, the condition "*at the time of the formation of the obligation*" should be deleted. The "Foreseeability" for the debtor should be acknowledged regardless if he has been informed about the special circumstances at the time of the formation of the obligation or after it.

In the end, the Commission approved this proposal and changed Paragraph (2) according it. Its final formulation was as follows:

> Art. 416 (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 special circumstances insofar as the parties have foreseen or could have foreseen such *circumstances*.

Moreover, the Commission decided to separate the question of ***contractual liability*** due to non-performance and the question of ***tortuous liability*** due to unlawful acts. The drafter, however, refrained to define a clear scope of compensation in case of tortuous liability. He argued: "In case of unlawful act, any "forseeability" may not be required – neither in aspect of "damages" nor in aspect of "circumstances – because an unlawful act and damages 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.

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

Above all, the severity of liability based on the pure objective causation in § 249 of the German Civil

Code was intensively discussed also in Germany. In order to reduce the scope of damages to a reasonable extent, the German legal scholars and the court developed the "***Adequacy Theory***", which requires "***Objective foreseeability***" besides objective "***Causation***". This additional criterion aims to limit the liability exclusively to such damages as would be *foreseeable for a reasonable and careful person in normal circumstances*. However, the debtor would have to bear the burden of proof to show that such damages would not be foreseeable for such a person in normal circumstances. In this sense, the debtor's liability in German civil law would be essentially harder than in the Common law and the Japanese civil law.

I-8. Final Formulation of the Provisions on Remedies for Non-performance

Art. 412 [Delay in performance]
(1) In cases where a definite due time is determined for the performance of the obligation, then the debtor shall be liable for the delay in performance [=in default] on and after such a due time arrived.

(2) In cases where only an indefinite due time is decided for the performance of the obligation, then the debtor shall be liable for the delay in performance [=in default] on and after he is noticed of the arrival of the due time.

(3) In cases where there is no fixed due time determined for the performance of the obligation, then he shall be liable for the delay in performance [=in default] on and after the debtor received the demand of the performance from the creditor.

Art. 413 [Delay in acceptance]
If the creditor refuses to accept the tender of the performance, or is prevented from such an acceptance, then he shall be liable for the delay on and after the time of the tender of the performance.

Art. 414 [Claim for enforcement of direct performance]
(1) If the debtor does not voluntarily perform his obligations, then the creditor may bring a claim for enforcement of direct performance before the court, unless the nature of the obligation does not allow it.

(2) In cases where the nature of the obligation does not allow an enforcement of specific performance, if the obligation has performance of an action for its subject matter, then the creditor may demand the court to cause a third person to do this act at the expense of the debtor; but with regard to an obligation which has a juristic act for its subject, a judgment may be substituted for an expression of intention by the debtor.

(3) With regard to the obligation which has a forbearance for its subject matter, the creditor may demand removal of what has been done at the expense of the debtor as well as adequate measures adopted for the future.

(4) The provisions of the preceding three paragraphs shall do not affect a demand for compensation for damages.

Art. 415 [Compensation for damages]
If the debtor fails to perform his obligations in accordance with its proper form and content, then the creditor may demand compensation for damages arising therefrom; the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible.

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 special circumstances insofar as the parties have foreseen or could have foreseen such circumstances.

Art. 541 [Rescission after notification]
If one party fails to perform his obligations, then the other party may fix a reasonable period of time and demand performance within such period; and if the contract is not performed within that period of time, then the other party may rescind it.

Art. 542 [Rescission without notification]

If one party does not perform his obligations at a fixed time or within a fixed period of time, then the other party may just upon the arrival of such time or on the passage of such period of time rescind the contract without making the notification prescribed in the preceding article in cases where the purpose for which the contract has been concluded, according to the nature of the contract or to the intention expressed by the parties, cannot be attained unless it has been performed just in such due time or within such period of time.

Art. 543 [Rescission in case of impossibility]
If the performance has become totally or partially impossible due to a cause for which the debtor is responsible, then the creditor may rescind the contract.

Art. 545 [Effects of rescission]
(1) When one of the parties has exercised his right of rescission, each party is bound to restore the other party to his original state; but the rights of third persons may not be injured.

(2) In the case described in the preceding paragraph, the amount of money received must restored with interest from the day of receipt.

(3) The exercise of the right of rescission does not affect a claim for compensation for damages.

Short Story of the Civil and Commercial Code of Thailand

A. Codification of the Civil and Commercial Code

Soon after the enactment of the Penal Code of the Kingdom of Siam in 1908, the Siamese government started a project for codification of a civil code and created a Commission of Codification.

In this project, the French legal advisers were commissioned to the drafting members, and the Legislation Adviser, ***Monsieur Georges Padoux*** (1867 – ?), took a leadership role until 1914.

The French advisers proposed to unify the civil and commercial law to a single code and compose it according an original concept which followed neither the French Civil Code ("Justinian system") nor the German Civil Code ("Pandectist system"):

1. **Book on Obligations**
2. **Book on Things**
3. **Book on Capacity of Persons**
4. **Book on Family**
5. **Book on Inheritance**

B. Draft Civil and Commercial Code in 1919

The Commission started the drafting work with the ***Law on obligations***, and its first version was accomplished in 1912.

As the second task, they began to draft the ***Law on family***. However, a hard controversy arose on this issue between the French advisers and the Japanese legal adviser, ***Mr. Dr. Masao Tokichi*** (1871 – 1921), who was a member of the Revising Committee. Due to this conflict, the drafting work of law on family and inheritance was suspended.

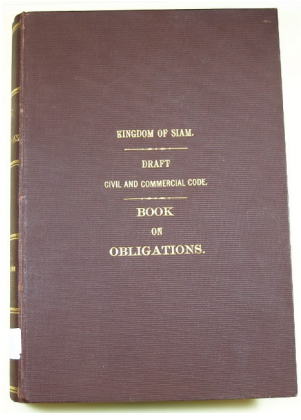
Since 1916, ***Monsieur René Guyon*** (1876 – 1963) took control of the drafting work, and the final draft was submitted to the Siamese government in 1919:

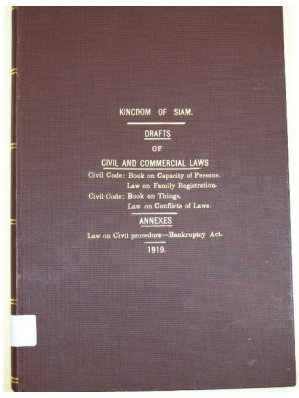
1. **Book on Obligations** (1463 sections)
2. **Book on Things** (168 sections)
3. **Book on Capacity of Persons** (120 sections)

This draft did not include law on family and inheritance. Instead, drafts for two supplementary enactments was added:

Law on Family Registration (52 sections)

Law on Conflict of Laws (27 sections)





B-1. The Contents of Book on Obligations

(General Part)

(Specific Part)

B-2. The Contents of Book on Capacity of Persons

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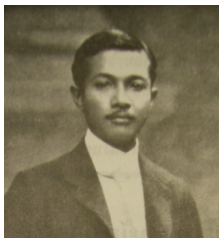
Title I. Different Kind of Things	
Title II. Domain of the State	
Division I. Ownership	Secs. 19 – 94
Title I. Acquisition of Ownership	
Chapter I. General Provisions	
Chapter II. Acquisition by the Effect of the Law	
Chapter III. Acquisition by Way of Occupation	
Chapter IV. Acquisition by Way of Usucaption	
Chapter V. Acquisition by Way of Inheritance or by the Effect of Obligations	
Title II. Extent and Exercise of Ownership	
Title III. Joint Ownership	
Title IV. Surrender and Abandonment	
Title V. Expropriation	
Division II. Possession	Secs. 95 – 125
Title I General Provisions	
Title II. Usucaption	
Title II. Recovery of Possession	
Division III. Servitudes	Secs. 126 – 168
Title I. General Provisions	
Title II. Real Servitudes Criated by Law	
Title III. Servitudes Created by Contract or Will	
Title IV. Other Servitudes	
Chapter I. Habitation	
Chapter II. Superficies	
Chapter III. Charges on Land	

C. Civil and Commercial Code (1923 and 1925)

C-1. Prince Raphi's Instructions

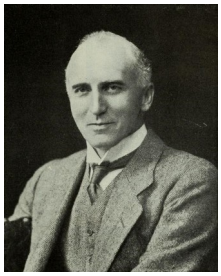


The Draft of 1919 eventually could not be enacted in its original arrangement mainly due to the intervention by a young Thai legal officer, ***Phraya Manava Rajasevi*** (พระยามานวราชเสวี, 1890 – 1984).

His first commitment to the codification project goes back to 1909 when he was, in his age of 18, assigned to the regular interpreter of the Commission of Codification.

The Minister of Justice, ***Prince Raphi Phatthanasak*** (พระเจ้าบรมวงศ์เธอ กรมหลวงราชบุรีดิเรกฤทธิ์), discovered his remarkable talents and promoted him. He was enrolled in the Law School of the Ministry of Justice and certified as a Siamese Barrister at Law in 1911. Subsequently, he received the scholarship of the government and studied the English law at the Inner Temple in London.

Before his departure to London, *Prince Raphi* gave him two secret instructions; firstly, he should go to Heidelberg and study the German civil law after the completion of the English law study. Following this instruction, he gathered and studied the English literature for the German civil law besides the English law study at the Inner Temple in London.



Secondly, *Prince Raphi* requested him to visit a British government member at the time, Attorney General ***Sir John Simon*** (1873 – 1954)**,** and ask for opinion and advice about the draft Civil and Commercial Code prepared by the French advisers.

Sir Simon checked the draft and saw high risk of discredit by the Western countries in its unusual arrangement("เขาต้องการที่จะทำให้มันวิเศษเกินไป แต่มือไม่ถึง"). Moreover, he pointed out certain inconsistencies in its logical construction ("ไม่กินเกลียวกัน"). He strongly recommended to follow the model of the Japanese Civil Code which was widely acknowledged as a successful adoption of the German Civil Code. Following *Sir Simon's* advice, *Phraya Manava Rajasevi* gathered and studied also literature for the Japanese law in London.

C-2. Promulgation of the Code in 1923 – 25

In 1916, *Phraya Manava Rajasevi* was certified as a British Barrister at Law and returned to the Kingdom of Siam due to the outbreak of the 1st World War.

In 1919, the Siamese government sent him back to the Commission of Codification and commissioned him to translate the Draft of 1919 into Thai language. In the revising procedure of his translation, he insistently complained about the inconsistency of the draft and loudly appealed the need for reconsideration of the whole draft. Following *Sir Simon's* advice, he strongly recommended the adoption of the ***Japanese method*** (วิธีญี่ปุ่น).

His claim and proposal eventually motivated the Siamese government to the revision of the Draft of 1919. However, the government decided to initiate the changing procedure with the promulgation of the Draft of 1919 in order to maintain a harmonious relationship with the French government.

In 1923, the Civil and Commercial Code, Book I (General Principles) and Book II (Obligations) were promulgated. In January 1925, Book III (Specific Contracts) followed. Apparently, the basic concept was changed. Book I was urgently composed mainly with the provisions from the "Book on Obligations" (Preliminary) and those from the "Book on Capacity of Persons" of the Draft of 1919.

C-3. Contents of the Code of 1923 and 1925

บรรพ ๑ บทเบ็ดเสร็จทั่วไป (มาตรา ๑ – ๑๐๕)	
ลักษณ ๑	บทวิเคราะห์
ลักษณ ๒	ปรับบทกฎหมาย
ลักษณ ๓	วิธีตีความในเอกสาร
ลักษณ ๔	ระยะเวลา
ลักษณ ๕	บุคคลธรรมดา
ลักษณ ๖	บุคคลนิติสมมต
ลักษณ ๗	ทรัพย์

(Main sources)
Book on Obligations, Preliminary
Book on Capacity of Persons

บรรพ ๒ ว่าด้วยหนี้ (มาตรา ๑๐๖ – ๔๕๒)	
ภาค ๑	มูลแห่งหนี้
ภาค ๒	หนี้ต่างประเภท
ภาค ๓	โอนหนี้
ภาค ๔	ผลแห่งหนี้
ภาค ๕	สิทธิของเจ้าหนี้เหนือทรัพย์สินของลูกหนี้
ภาค ๖	ความระงับหนี้

(Main sources)
Book on Obligations, Division I – VI

บรรพ ๓ เอกเทศสัญญา
(มาตรา ๔๕๓ – ๑๒๙๗)

ลักษณ ๑	ซื้อขาย	ลักษณ ๑๓	จำนำ
ลักษณ ๒	แลกเปลี่ยน	ลักษณ ๑๔	เก็บของในคลังสินค้า
ลักษณ ๓	ให้	ลักษณ ๑๕	ตัวแทน
ลักษณ ๔	เช่าทรัพย์	ลักษณ ๑๖	นายหน้า
ลักษณ ๕	เช่าซื้อ	ลักษณ ๑๗	ประนีประนอมยอมความ
ลักษณ ๖	จ้างแรงงาน	ลักษณ ๑๘	การพนันและขันต่อ
ลักษณ ๗	จ้างทำของ	ลักษณ ๑๙	บัญชีเดินสะพัด
ลักษณ ๘	รับขน	ลักษณ ๒๐	ประกันภัย
ลักษณ ๙	ยืม	ลักษณ ๒๑	ตั๋วเงิน
ลักษณ ๑๐	ฝากทรัพย์	ลักษณ ๒๒	หุ้นส่วนและบริษัท
ลักษณ ๑๑	ค้ำประกัน	ลักษณ ๒๓	สมาคม
ลักษณ ๑๒	จำนอง		

(Main sources)
Book on Obligations, Division VII

D. Civil and Commercial Code (1925 and 1928)

The Code of 1923 – 25 was a preparation stage for its revision. Its implementation was postponed until January 1926. During this period, Book I and II were radically revised according to the proposal of *Phraya Manava Rajasevi*. In November 1925, Book I and II of 1923 were repealed, and Book I and II of the revised Code were promulgated. The Japanese Civil Code of 1896 played a fundamental role in the revision work of these two books. Later in 1928, the revised Book III was also promulgated. In this case, the basic concepts and features of the old version remained almost unchanged.

D-1. Contents of Book I (1925), General Principles

Regarding the ***overall framework of Book I***, the Siamese drafters maintained the initial part of the old version (***Preliminary***, ***General Provisions***) while they followed the six-titles construction of the Japanese Code in the other parts (1. ***Persons***, 2. ***Juristic Persons***, 3. ***Things***, 4. ***Juristic Acts***, 5. ***Period of Time***, 6. ***Prescription***). They slightly modified it in following points:

a) Title "Persons" and Title "Juristic Persons" were combined to a single title with two chapters, and Chapter "Associations" in Title "Juristic Persons" was omitted.

b) Chapter "Representation" in Title "Juristic Acts" was also omitted.

The Siamese drafters filled this framework with the provisions mainly from the Japanese, German, Swiss and French codes as well as those from the Code of 1923.

Unexpectedly many provisions *from the Code of 1923 (77 articles)* survived the revising work especially in the titles on "Preliminary", "General Provisions", "Persons", "Things" and "Periods of Time" as well as in "Prescription".

The second large group of the provisions *(55 articles)* were adopted *from the Civil Code of Japan*. It is a multiple of the number of the provisions adopted directly *from the German Civil Code (26 articles)*. Among these Japanese provisions, however, there are 24 articles which have their origin probably in the German civil law. The other provisions belong to the "*Boissonade's* Heritage".

The revising work of Book I did not aim to replace the old provisions with new ones from foreign laws, but the drafters tried to save the core provisions of the old Book I, added new subjects (especially in Title "Juristic Acts") and complemented them mainly with the provisions from the Japanese and German civil codes.

Code of 1925, Book I : Its Contents and Origin of the Provisions

ประหมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. ๒๔๖๘	1923	Jp. (Gr.orig)	Gr.	Sw.	Fr.	Oth.	Total
ข้อความเบื้องต้น	3	-	-	-	-	-	3
บรรพ ๑ หลักทั่วไป							
ลักษณะ ๑ บทเบ็ดเสร็จทั่วไป	7	-	-	2	2	-	11
ลักษณะ ๒ บุคคล							
หมวด ๑ บุคคลธรรมดา	23	17 (4)	3	1	2	7	53
หมวด ๒ นีติบุคคล	16	11 (5)	-	1	-	2	30
ลักษณะ ๓ ทรัพย์	4	-	3	2	-	5	14
ลักษณะ ๔ นีติกรรม							
หมวด ๑ บทเบ็ดเสร็จทั่วไป	1	1 (-)	1	1	-	1	5
หมวด ๒ การแสดงเจตนา	2	3 (2)	5	-	-	6	16
หมวด ๓ โมฆะกรรมและโมฆียะกรรม	3	5 (2)	3	-	-	-	11
หมวด ๔ เงื่อนไขและเงื่อนเวลาเริ่มต้นหรือเวลาสิ้นสุด	1	9 (3)	1	-	-	1	12
ลักษณะ ๕ ระยะเวลา	3	3 (3)	-	-	-	1	7
ลักษณะ ๖ อายุความ	14	6 (5)	10	-	-	1	31
Total	**77**	**55 (24)**	**26**	**7**	**4**	**24**	**193**

D-2. Contents of Book II (1925), Obligations

In the case of Book II, it would be just correct to speak of “replacement”. Indeed, the six-divisions construction of Book II (1923) was replaced with the overall framework of the Japanese Civil Code (1896). The Japanese drafters in 1890s had adopted the concept to clearly divide three parts (1. General provisions, 2. Contractual obligations, 3. Non-contractual obligations) from the Civil Code for the Kingdom of Saxony (1863). The Saxony legacy was then introduced also in to the Kingdom of Siam. The contents of Book II were ordered as follows:

Code of 1925, Book II : Its Contents and Origin of the Provisions

บรรพ ๒ หนี้	1923	Jp. (Gr.orig)	Gr.	Sw.	Fr.	Oth.	Total
ลักษณะ ๑ บทเบ็ดเสร็จทั่วไป							
หมวด ๑ วัตถุแห่งหนี้	1	2 (2)	6	-	-	-	9
หมวด ๒ ผลแห่งหนี้							
ส่วนที่ ๑ การไม่ชำระหนี้	3	3 (-)	17	-	-	-	23
ส่วนที่ ๒ รับช่วงสิทธิ	1	1 (1)	2	-	1	2	7
ส่วนที่ ๓ การใช้สิทธิเรียกร้องของลูกหนี้	4	-	-	-	-	-	4
ส่วนที่ ๔ เพิกถอนการฉ้อฉล	2	1 (-)	-	-	-	1	4
ส่วนที่ ๕ สิทธิยึดหน่วง	-	8 (1)	-	2	-	-	10
ส่วนที่ ๖ บุริมสิทธิ	1	34 (-)	-	-	-	4	39
หมวด ๓ ลูกหนี้และเจ้าหนี้หลายคน	-	1 (-)	12	-	-	-	13
หมวด ๔ โอนสิทธิเรียกร้อง	2	7 (1)	2	-	-	-	11
หมวด ๕ ความระงับหนี้							
ส่วนที่ ๑ การชำระหนี้	2	12 (3)	9	2	1	-	26
ส่วนที่ ๒ ปลดหนี้	-	1 (1)	-	-	-	-	1
ส่วนที่ ๓ หักกลบลบหนี้	1	5 (4)	2	-	-	-	8
ส่วนที่ ๔ แปลงหนี้ใหม่	-	4 (-)	-	-	-	-	4
ส่วนที่ ๕ หนี้เกลื่อนกลืนกัน	-	1 (-)	-	-	-	-	1
ลักษณะ ๒ สัญญา							
หมวด ๑ ก่อให้เกิดสัญญา	2	4 (3)	9	-	-	-	15
หมวด ๒ ผลแห่งสัญญา	-	5 (3)	2	1	-	-	8
หมวด ๓ มัดจำและกำหนดเบี้ยผรับ	-	-	9	-	-	-	9
หมวด ๔ เลิกสัญญา	-	7 (7)	2	-	-	-	9
ลักษณะ ๓ จัดการงานนอกสั่ง	1	1 (1)	9	-	-	-	11
ลักษณะ ๔ ลาภมิควรได้	5	4 (2)	3	1	-	1	14
ลักษณะ ๕ ละเมิด							
หมวด ๑ ความรับผิดเพื่อละเมิด	5	2 (-)	4	2	-	5	18
หมวด ๒ ค่าสินไหมทดแทนเพื่อละเมิด	-	1 (-)	6	4	-	-	11
หมวด ๓ นิรโทษกรรม	3	-	-	1	-	-	4
Total	**33**	**104 (29)**	**94**	**13**	**2**	**13**	**259**

However, the Siamese drafters slightly modified this construction in following points:

a) Chapter 2 “***Effects of Obligations***” in Title I “***General Provisions***” was clearly divided into four parts (1. ***Non-performance***, 2. ***Subrogation***, 3. ***Exercising of Debtor's Claims***, 4. ***Cancellation of Fraudulent Acts***) and extended with further two parts (5. ***Right of Retention***, 6. ***Preferential Rights***), which were adopted from Book II on “Real Rights” of the Japanese

Civil Code. These extended parts belong to the "***Boissonade's Heritage***" in Book II.

b) The provisions on "***Suretyship***" in Chapter 3 "***Plurality of Debtors and Creditors***" of Title I "***General Provisions***" and the *whole chapters on specific contracts* in Title II "***Contracts***" were removed. These issues should be separately provided for in Book III.

c) Consequently, Title 2 "***Contracts***" contains only general provisions (1. ***Formation***, 2. ***Effects***, 4. ***Rescission***). Additionally, the provisions on "3. ***Earnest and Stipulated Penalty***" were introduced from the German Civil Code (1898).

d) The provision on the subject "***Release***" in Chapter "***Extinction of Obligations***" in Title I "***General Provisions***" was placed at the second position in the same chapter next to the subject "Performance".

Unlike in Book I, the Siamese drafters preserved here in Book II only few provisions of the ***Code of 1923*** (33 of totally 259 articles). It is the case for example in the part on "***Exercising of Debtor's Claims***" in Chapter "Effects of Obligations" of Title I "General Provisions" and in Title VI "***Undue Enrichment***" as well as in Title V "***Wrongful Acts***".

In the other parts of Book II, the Japanese and German provisions are quite dominant (respectively 104 and 94 of 259 articles). Roughly speaking, the ***Japanese*** provisions are dominant in Title I "***General Provisions***" (except in the part on "*Non-performance*" in Chapter 2 "Effects of Obligations" and Chapter 3 "Plurality of Debtors and Creditors"). On the other side, the ***German*** provisions are relatively dominant especially in Title II "***Contracts***" and Title V "***Wrongful Acts***".

E. Inconsistency Question in Draft 1919 and Remedies for Non-performance

E-1. Non-performance in Draft 1919

Besides the unusual construction of the Draft prepared by the French advisers, ***Sir John Simon*** had pointed out also its certain logical inconsistencies. What was inconsistent in it? Could be this problem overcome in the Code of 1925?

A possible problem could be found in the provisions of Chapter II "***Non-performance***" in Title II "***Rights of the Creditors***" of Division IV "***Effects of Obligations***":

Part I. – Default of the Debtor

Sec. 257	If the obligation is not performed the debtor is said to be in default.
Sec. 258	(1) If the obligation is to be performed at a definite time, that is to say on a date which was known beforehand, the debtor is *in default from such date*.
	(2) If the obligation is to be performed at a time which is not definite, the debtor is *in default from the moment* when he knows that such time has arrived, or when he would have known of it if he had exercised such care as may be expected from a person of ordinary prudence.
	(3) If the performance of the obligation by the debtor depends on an act to be done by the creditor or by another person, the debtor is not in default until such act is done.
Sec. 259	If no time, definite or otherwise, has been fixed for the performance of the obligation, the debtor is in default after a demand for performance is made to him.

According to Sec. 258, the debtor is in default when the time for performance has arrived. Principally, *neither* ***fault*** or responsibility of the debtor is required, *nor* has the creditor to ***demand for specific performance***. This concept follows rather the principle in ***Common law*** and breaks away from the ***French law tradition*** where the debtor may be put in default through a formal demand for performance.

According to Sec. 262, after the arrival of the time for performance, the creditor may bring a claim into the Court. Contrary to the Common law principle, however, the creditor may claim either ***specific performance*** or ***cancellation (=rescission) of contract*** or even ***compensation for damages***:

Part II. – Remedies of the Creditor

Sec. 262 (1) From the time when the debtor is in default, the creditor may *claim specific performance* of the obligation.

(2) If the obligation arose out of a contract, the creditor may *claim cancellation of the contract*, except when the law provides that his remedy is to determine the contract.

(3) The creditor is also *entitled to compensation for any injury* caused to him by the non-performance, except in the cases provided by Part IV of this Chapter.

[…]

Part III. – Specific Performance

Sec. 265 The Court may *in its discretion* order specific performance of an obligation whenever such performance is possible and desirable.

In the end, not the creditor, but the Court has the final word over the art of the remedies (Sec. 265). In other words, specific performance may not be always mandatory even if it is still possible. In this point, this concept breaks away also from ***German law tradition.***

Part IV. – Compensation

Sec. 270 If performance has been delayed or made impossible by *force majeure*, the creditor is not entitled to compensation for the consequences of such delay or impossibility.

Sec. 271 If after the debtor is in default performance of the obligation becomes impossible owing to f*orce majeure*, the debtor is bound to make compensation to the creditor, unless he prove that his default was not *caused by his fault*.

Sec.272 As between the creditor and the debtor, non-performance caused by persons for whom the debtor the creditor are not responsible is deemed to be caused by force majeure.

As mentioned above, Sec. 258 provides that the debtor is already in default on and after the arrival of the time for performance. The fault (responsibility) of the debtor is not required just like in the Common law. The creditor may immediately claim for either specific performance or rescission of contract or compensation of damages (Sec. 262). Principally, the debtor has no opportunity to defend himself. Exceptionally, in cases where the performance becomes impossible by "*force majeure*" after the debtor has been already in default, it is allowed for him to defend himself (Sec. 271). However, it is quite unclear what is a ground to require "***fault***" of the debtor only in such exceptional cases.

Part V. – Assessment Compensation for Non-performance

Sec. 273 Compensation shall be for the injury actually suffered by the plaintiff and for the loss of the benefits which the parties, at the time when the obligation arose, foresaw or could have foreseen would result from performance of the obligation.

For the issue "***Scope of damages***", Draft 1919 adopts the ***objective approach***. Regarding "*Injury actually suffered*", however, Sec. 273 does not distinguish between "*usual*" and "*non-usual*" damages. The debtor would have to compensate the creditor for all the actual damages. It would mean a similar understanding as in the German concept. On the other side, the creditor would bear the burden to prove the foreseeablity of "*loss of the benefits*" like in the Common law.

As a whole, the concept of the Draft 1919 in regard to the issue "Remedies for Non-performance" has quite similar features as the ***Revised Civil Code*** of ***Japan*** (1896); namely Arts. 412 – 415. Probably, Sec. 258 was formulated after Art. 412 of the Japanese code. Just like in the Japanese Civil Code, this draft tried to combine the Common law principle in regard to the "***Default***" and the French principle of the "***Selectivity of the remedies for non-performance***". Also in a quite similar way as the Japanese concept, this Draft suffers the conceptual conflict between the *strict liability* in case of "*Default*" and the requirement of "*Fault*" in certain other cases. Furthermore, this Draft would allow a wide range of discretion to the Court; neither the creditor nor the debtor, but *the Court would enjoy the choice* of remedies for non-performance. This would cause a serious uncertainty regarding outcomes of the lawsuit.

E-2. Provisions in the Code of 1923

ลักษณ ๓ การไม่ชำระหนี้

หมวด ๑ ลูกหนี้ผิดนัด

มาตรา ๓๒๓

อันว่าหนี้ถ้าไม่ชำระไซร้ ลูกหนี้ได้ชื่อว่าอยู่ในฐานผิดนัด

มาตรา ๓๒๔

ถ้าหนี้จะต้องชำระณเวลามีกำหนดแน่ คือว่าในวันอันรู้กันอยู่ก่อนแล้ว นับว่าลูกหนี้ผิดนัดแต่วันนั้นไป

ถ้าหนี้มีกำหนดชำระแต่มิได้นัดวันกันแน่ ท่านว่าลูกหนี้ผิดนัดตั้งแต่ขณะเมื่อตนรู้ว่าถึงกำหนดชำระ ฤๅในขณะอันควรจะรู้เช่นนั้น ถ้าหากใช้ความระมัดระวังอันจะพึงคาดหมายได้แต่วิญญูชน

ถ้าการที่ลูกหนี้จะชำระหนี้อาศัยต่อการอันหนึ่งอันใดซึ่งเจ้าหนี้หรือบุคคลอื่นจะได้กระทำลงก่อนไซร้ ท่านว่าลูกหนี้ยังไม่ผิดนัดจนกว่าการวันนั้นจะได้กระทำแล้ว

มาตรา ๓๒๕

ถ้ามิได้มีเวลากำหนดไว้เป็นแน่ ฤๅมิได้กำหนดไว้ด้วยประการอื่น เพื่อให้ชำระหนี้ ท่านว่าลูกหนี้ย่อมผิดนัด จำเดิมแต่เมื่อได้ถูกทวงถามให้ชำระหนี้

หมวด ๒ ทางแก้ของเจ้าหนี้

มาตรา ๓๒๘

ตั้งแต่เวลาลูกหนี้ผิดนัด เจ้าหนี้จะเรียกให้ชำระหนี้โดยเฉภาะเจาะจงก็ได้

ถ้าหนี้นั้นเกิดแต่มูลสัญญาไซร้ เจ้าหนี้จะเรียกให้เพิกถอนสัญญาได้ เวนแต่ในคดีที่กฎหมายบัญญัติว่าทางแก้ของเจ้าหนี้นั้นจะพึงเลิกสัญญาเสียเอง

เจ้าหนี้ยังชอบที่ได้ค่าสินไหมทดแทนที่ต้องเสียหายอย่างใดๆ อันเกิดขึ้นแก่ตนด้วยการไม่ชำระหนนี้ เว้นแต่ในบทที่บัญญัติไว้ในหมวด ๔ แห่งลักษณนี้

หมวด ๓ การชำระหนี้เฉภาะเจาะจง

มาตรา ๓๓๑

เมื่อใดการชำระหนี้โดยเฉภาะเจาะจงเป็นวิสัยจะทำได้และเป็นที่พึงปรารถนาไซร้ ศาลจะสั่งบังคับให้ชำระหนี้นั้นโดยเฉภาะเจาะจงก็ได้ สุดแต่จะพินิจเห็นสมควร

หมวด ๔ ค่าสินไหมทดแทน

มาตรา ๓๓๖

ถ้าการชำระหนี้เนิ่นช้าไปฤๅทำไม่ได้ด้วยเหตุสุดวิสัยไซร้ เจ้าหนี้ไม่มีสิทธิจะได้ค่าสินไหมทดแทนผลแห่งการเนิ่นช้าฤๅพ้นวิสัยจะทำได้นั้น

มาตรา ๓๓๗

ถ้าภายหลังที่ลูกหนี้ผิดนัดแล้วนั้น การชำระหนี้ตกเป็นอันทำไม่ได้เพราะเหตุสุดวิสัยไซร้ ลูกหนี้จะต้องใช้ค่าสินไหมทดแทนให้แก่เจ้าหนี้ เว้นแต่ลูกหนี้จะพิศูจน์ได้ว่าการผิดนัดนั้นมิได้เกิดเพราะความผิดของตน

F. Siamese Solution: Rearrangement of the German Provisions in Accordance with the Japanese Scheme

In the revision work for the Code of 1925, the Siamese drafters were confronted with a difficult situation. On the one side, they could not directly adopt the Japanese provisions as they are because it suffers the quite similar conceptual problems as the Draft 1919. Moreover, they are extremely short and simple. The Siamese drafters were looking for more detailed provisions like the German ones. O the other side, however, they could not adopt the German concept and scheme because of its quite special logical structure and the serious weakness ("*Gaps in the law*").

The leader of the Siamese drafters, *Phraya Manava Rajasevi* (พระยามานวราชเสวี), devised a quite venturous strategy to overcome this dilemma; namely he preferred the German provisions, however, he completely rearranged them in accordance with the Japanese scheme.

F-1. Strategy for the Rearrangement

At first, the targeted provisions of the German Civil Code could be segmented into following six sequences in accordance with the Japanese provisions Arts. 412 – 419:

Segmentation of the Provisions of the German Civil Code

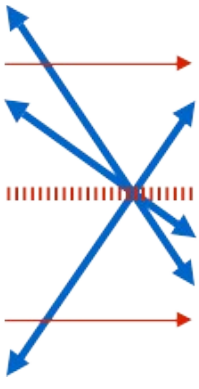
Segments		Targeted Provisions (1898 – 2001)
1. Scope of damages	§§ 249 – 254	249,[a] 254
2. Time for performance	§ 271	271
3. Impossibility	§§ 275 – 280	275, 278, 280
4. Debtor's default	§§ 284 – 287	284, 285, 286, 287
5. Delinquency charge	§§ 288 – 290	288, 289, 290
6. Creditor's default	§§ 293 – 301	293,[a] 294, 295, 296, 297, 298, 299, 301

[a] These provisions were only taken into consideration as comparable ones.

Each of these segments could be linked to a comparable Japanese article on the corresponding subject. According to this "Correspondency Structure", the whole procedure of the rearrangement could be reconstructed in following seven steps:

Overall Correspodency Structure and Rearrangement Steps

German Provisions (1898 – 2001)		Japanese Provisions	Rearrangement
Segment 1	Scope of damages		
Segment 2	Time for performance	**Art. 412**	→ **Step 2**
Segment 3	Impossibility	**Art. 413**	→ **Step 7**
		Art. 414	→ **Step 3**
Segment 4	Debtor's default	**Art. 415 Sentence 1**	→ **Step 1**
		Art. 415 Sentence 2	→ **Step 4**
		Art. 416, 417, 418	→ **Step 5**
Segment 5	Delinquency charge	**Art. 419**	→ **Step 6**
Segment 6	Creditor's default		



F-2. Procedure of the Rearrangement

Due to the essential difference between the German and French-Japanese schemes, there was no similarly composed provision in this field which could serve as a starting point for the rearrangement. Even the central provision on the subject "***Debtor's liability for non-performance***" was quite differently composed; the German Civil Code (1898 – 2001) possessed the primary provision for this subject in its §280 on "***Impossibility of performance***" and the secondary one in §286 on "***Damages***

from debtor's default" while the Revised Civil Code of Japanese has its single and general provision for the same subject in its Art. 415. Nevertheless, a slight similarity could be recognized between the German §286 Paragraph 1 and the Japanese Art. 415 Sentence 1; if we would replace the word "*default*" in the German provision with "*non-performance*", then we would have *a virtually identical provision* to the Japanese counterpart, namely "***The debtor shall compensate the creditor for any damage arising from his non-performance***". According to this recognition, the correspondency link between The German §286 and the Japanese Art. 415 could serve as a starting point for the rearrangement. The reconstructed procedure of the rearrangement could be described as follows:

1. *In the first step*, therefore, the German provisions in Segment 4 (§§ 284, 285, 286, 287) on the subject "Debtor's default" would be adopted. At the same time, however, ***the German provision §286 Paragraph 1*** was soon replaced with the Japanese Art. 415 Sentence 1. Though, §286 Paragraph 2 remained untouched. In the final arrangement of the Code of 1925, these German and Japanese provisions form Arts. 204, 205, 215, 216, 217 (see Table "**Final Arrangement**").

2. In order to put the debtor in default, of course, the ***beginning time of the effect of the obligation*** must be determined beforehand. *In the second step*, the German provision in Segment 2 (§271) was placed just before the provisions on "*Debtor's default*" (the top of them is §284). This positioning (Art. 203 in the Code of 1925) exactly corresponded with that of the Japanese Art. 412.

3. In the Revised Civil Code of Japan, the provision to entitle the creditor to the claim for ***compulsory performance*** (Art. 414) preceded the provision for damages due to non-performance (Art. 415 Sentence 1). *In the third* step of the rearrangement, the Japanese Art. 414 was adopted and located provisionally between §285 and Art. 415 Sentence 1 in accordance with the Japanese scheme (between Art. 205 and Art. 215 in the Code of 1925).

4. *Phraya Manava Rajasevi* and other Siamese drafters probably recognized the Japanese Art. 415 Sentence 2 as a provision on the subject "***Impossibility of performance***". *In the fourth step*, therefore, the German provisions in Segment 3 (§§275, 278, 280) were adopted and placed next to the German provisions adopted from Segment 4 (its last one is §287). In doing so, however, §280 was moved to the top position of the segment (Arts. 218, 219, 220 in the Code of 1925).

5. In the Revised Civil Code of Japan, the provisions on "***Scope of damages***" and "*Contributory negligence*" (Arts. 416, 418) follow the Art. 415 Sentence 2. *In the fifth step*, the German provisions in Segment 1 (§§249, 254) were adopted and placed provisionally next to the sequence of the German provisions adopted from Segment 3 (its last one is §278) in faithful accordance with the Japanese scheme. At the same time, however, the German provision §249 was soon replaced with the Japanese Art. 416 (Arts. 222, 223 in the Code of 1925).

6. The last provision in the Japanese scheme was the provision on "***Delinquency charge***" (Art. 419). *In the sixth step*, accordingly, the German provisions in Segment 5 (§§288, 289, 290) were adopted and placed next to the German provision adopted from Segment 1 (§254). These are Arts. 224 and 225 in the final arrangement of the Code of 1925.

7. *In the last step* of the rearrangement, the whole bundle of the provisions in Segment 6 on "***Creditor's default***" (§§293 – 299, 301) was adopted and placed just before the provision on "Compulsory performance". This positioning (Arts. 207 – 212 in the Code of 1925) exactly corresponded with that of the Japanese Art. 413. In doing so, however, there was fine-adjustment of several provisions. *Firstly*, the order of §§288 and 289 was turned over in order to put the provisions regarding exceptions of creditor's default together. *Secondly*, §301 was separated from the other provisions of Segment 6 and placed next to the provision on vicarious liability, which is the last position of the provisions on debtor's liability for non-performance (Art. 221 in the Code of 1925). This separation was done probably because the Siamese drafters saw it rather as a provision to reduce the debtor's liability.

F-3. Final Arrangement and Its Achievement

After the rearrangement of the German provisions, several provisions were additionally adopted from the Code of 1923; namely Art. 327 on "***Debtor's default in tort cases***" and Art. 373 on "***Objects of compulsory performance***" (Arts. 206 and 214 in the Code of 1925). At last, furthermore, Art. 355 on "***Creditor's default***" replaced the German provision §293 (Art. 207 in the Code of 1925).

Regarding the final arrangement of the whole provisions on the issue "***Remedies for non-performance***", it could be suffering from certain critical vulnerability to misunderstanding; *Phraya Manava Rajasevi's* idea to rearrange the German provisions in accordance with the Japanese scheme had lacked all the necessary theoretical prospects for its adequacy and functionality. It is quite uncertain how seriously he had considered the heterogeneity between the both concepts. Indeed, there are certain points which could cause doubts as to system consistency in the final arrangement.1 First of all, Art. 216 has remained in the original wording of the German §286 Paragraph 2 (on "default") even though its Paragraph 1 has been replaced with the Japanese Art. 415 Sentence 1 (on "non-performance"). Moreover, several essential provisions in the German scheme have not been adopted into the Code of 1925, especially §276 on "*Definition of debtor's responsibility*", §282 on "*Burden of proof*" and §300 on "*Effect of creditor's default*" probably because such provisions are missing also in the Revised Civil Code of Japan. It would be a side effect from the "Japanese method".

Final Arrangement and Origin of the Provisions on "Non-performance"

Gr.	1923	*	Civil and Commercial Code of 1925		*	Jp.
§ 271		→	Art.203	Time for performance	≈	Art.412
§ 284		→	Art.204	Debtor's default through warning		
§ 285		→	Art.205	No default without responsibility		
	Art. 327	→	Art.206	Debtor's default in tort cases		
§ 293	Art. 355	→	Art.207	Creditor's default	≈	Art.413
§§ 294,295		→	Art.208	Actual and verbal tender		
§ 296		→	Art.209	Cases where no tender is required		
§ 298		→	Art.210	Cases where creditor is not in default (1)		
§ 297		→	Art.211	Cases where creditor is not in default (2)		
§ 299		→	Art.212	No tender of counter-performance		
			Art.213	Compulsory performance	←	Art.414
	Art.373	→	Art.214	Objects of compulsory performance		
§ 286 (I)		≈	Art.215	Damages due to non-performance	←	Art.415 S.1
§ 286 (II)		→	Art.216	Damages in lieu of performance		
§ 287		→	Art.217	Strict liability during default		
§ 280		→	Art.218	Impossibility with responsibility	≈	Art.415 S.2
§ 275		→	Art.219	Impossibility without responsibility		
§ 278		→	Art.220	Vicarious liability		
§ 301		→	Art.221	No interest during creditor's default		
§ 249		≈	Art.222	Scope of damages	←	Art.416
§ 254		→	Art.223	Contributory negligence	≈	Art.418
§§ 288,289		→	Art.224	Statutory interest for money debts	≈	Art.419
§ 290		→	Art.225	Interest upon lost values		

* Relationship between provisions: Adoption (→ or ←) or Comparability (≈).

F-3. System Inconsistency and Actuality of the Rearrangement

In order to clean up such ***vulnerability and doubts***, it would have been essential to closely investigate the theoretical backgrounds of the both concepts. However, the Siamese drafters had no opportunity to such a theoretical confrontation probably because the codification of the Code of 1925 was carried out without commitment of any German or Japanese legal advisers. Eventually, such an intensive and systematic assimilation of a foreign legal theory as the so-called "*Theory Reception*" of the German civil law in Japan has never happened among legal scholars and practitioners in the Kingdom of Siam. Apparently, as Phraya Manava Rajasevi himself uttered, the language barrier was one of the reasons for such circumstances.

On the other hand, however, certain ***actuality of this venturous arrangement*** in the Code of 1925 has been suddenly revealed since promulgation of the "***Modernized Law on Obligations of Germany*** (2001)". Above all, the new German law has its core provisions on the issue "Debtor's liability for non-performance" in the modernized provisions §§280 – 283, and they stay in a sequential order which is just parallel to that of the provisions on the same issue in the Code of 1925; namely the basic principle of debtor's liability for non-performance (the modernized §280 to Art. 215), damages in lieu of performance (the modernized §§281 and 282 to Art. 216) and impossibility of performance (the modernized §283 to Arts. 218 and 219). This fact means that the conceptual difference between the German Civil Code and the Code of 1925 has been essentially reduced through the reform of the German law on obligations.

G. Outlook for the Future

In 1992, *King Bhumibol Adulyadej* (Rama IX.) issued the royal edict to promulgate the Revised Civil and Commercial Code of Thailand, Book I. In the new version, the expression and wording of every provision was purified from the language legacy from the time of the absolutism, and the whole book was rearranged. Moreover, the provisions on "Association" were removed from Book III and integrated into Book I, Title 2 "Persons", Chapter 2 "Juristic Persons". Nevertheless, the basic features and concepts of the original version were carefully maintained. The traces of the Japanese and German influence are still clearly to recognize even in this revised version. On the other side, Book II on "Obligations" has not experienced any such profound revision until today. A complete overhaul of Book II on obligations is still not in sight.

However, faced with the new development of the major two model laws – namely the implementation of the modernized German law of obligations and the advance of discussion about the reform of the law on obligations in Japan –, it would be highly desirable to critically review the conceptual commonalities and differences among the German, Thai and Japanese law of obligations from the viewpoint of comparative law. Such interactive exchange of legal theory and experience among these three systems would eventually contribute not only to clarification of identity of each law but also to achievement of common strategy for harmonization of law on obligations in the Asian region in the future.