

Compensation for non-performance (Art. 415)

Prof. *Boissonade's* Concept

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

Art. 403

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

2. Old Civil Code (1890)

Art. 383

- (1) In cases where the debtor refuses to effect performance, the creditor may demand compensation for damages if he fails to claim for enforcement, or if the performance cannot be enforced due to its nature; the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible.
- (2) The creditor may demand compensation for damages also in case of delay.

French Civil Code (CC)

Art. 1147

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

Art. 1148

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

Prof. *Hozumi's* Proposal

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

Art. ???

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

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

Art. 409

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

Simplified and integrated ...

Boissonade's Proposal

- (1) In cases where the debtor refuses to effect performance, the creditor may demand compensation for damages if he fails to claim for enforcement, or if the performance cannot be enforced due to its nature; **the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible.**
- (2) The creditor may demand compensation for damages also in case of delay.

Hozumi's Proposal

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

“The *Proper Way of Obligation*”

Art. 381, Old Civil Code of 1890

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

Art. 451, Old Civil Code of 1890

Performance means a fulfillment in the proper way of the obligation. [...]

Art. 339†, BGB of 1900

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

Art. 110, Federal Code of Obligations of 1881 (Swiss)

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.

Art. 415 (Final Composition)

5. Current Civil Code (1896)

Art. 415

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

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“Performance in the proper way of the obligation”

(債務の本旨に従った履行)

This phrase is often translated into English with such a wording as “in accordance with the true intent and purpose of the obligation”, or “in accordance with tenor and purport of the obligation”.

Revised Civil Code of Germany (2001)

§ 280 Requirements for compensation (Breach of duty, Responsibility)

- (1) If the debtor fails to fulfill a duty arising under the obligation, the creditor may claim compensation for the damage resulting from this breach. This does not apply if the debtor is not responsible for the failure. **[Breach of Duties]**
- (2) The creditor may demand compensation for delay in performance only if the additional requirement in § 286 is satisfied. **[Delay]**
- (3) The creditor may demand compensation instead of performance only if the additional requirements of § 281, § 282 or § 283 are satisfied.
[Refusal, Imperfect performance]

§ 281 Compensation instead of performance because of failure to perform or failure to perform properly

- (1) In so far as the debtor fails to perform when performance is due or fails to perform properly, the creditor may, subject to the requirements of § 280 (1), demand compensation instead of performance if he has fixed to no avail a reasonable period within which the debtor is to perform or to effect supplementary performance. If the debtor has performed only in part, the creditor may demand compensation instead of full performance only if he has no interest in performance in part. Even though the debtor has failed to perform properly, the creditor may not demand compensation instead of performance if the breach of duty is immaterial.
- (2) ...