

Scope of compensation (Art. 416)

1. Old Civil Code of Japan (1890)

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.

French Approach

– focused on *Subjective Aspect* –

Civil Code of France (1804)

Art. 1149

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

Art. 1150

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

Art. 1151

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

German Approach

– focused on *Objective Aspect* –

Civil Code of Germany (1900)

Art. 249†

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

The aim of compensation consists just in “*Restoration or Restitution* of the expected state and condition” regardless of the subjective factor of the liable person ...

(The Question “Negligence or Malicious Intention?” Is irrelevant.)

Basic Consideration of Art. 416

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

Art. 410

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

A. Priority of the Objective Criterion ("*Inevitability*")

B. Delimitation to a Reasonable and Justifiable Scope ("*Usualness*")

C. Additional Liability for Non-usual Damages ("*Foreseeability*")

– For the Sake of “Fairness” –

«Reference» German Solution

Equivalence Theory (conditio sine qua non) in Criminal Law

The accused person is liable for all the occurrences and damages which would not have arisen if he would not have committed the crime. The question “Direct or Indirect?” is not relevant.

This criterion is applied for the aim to exclude such occurrences and damages as would have arisen even if the accused person would not have committed the crime.

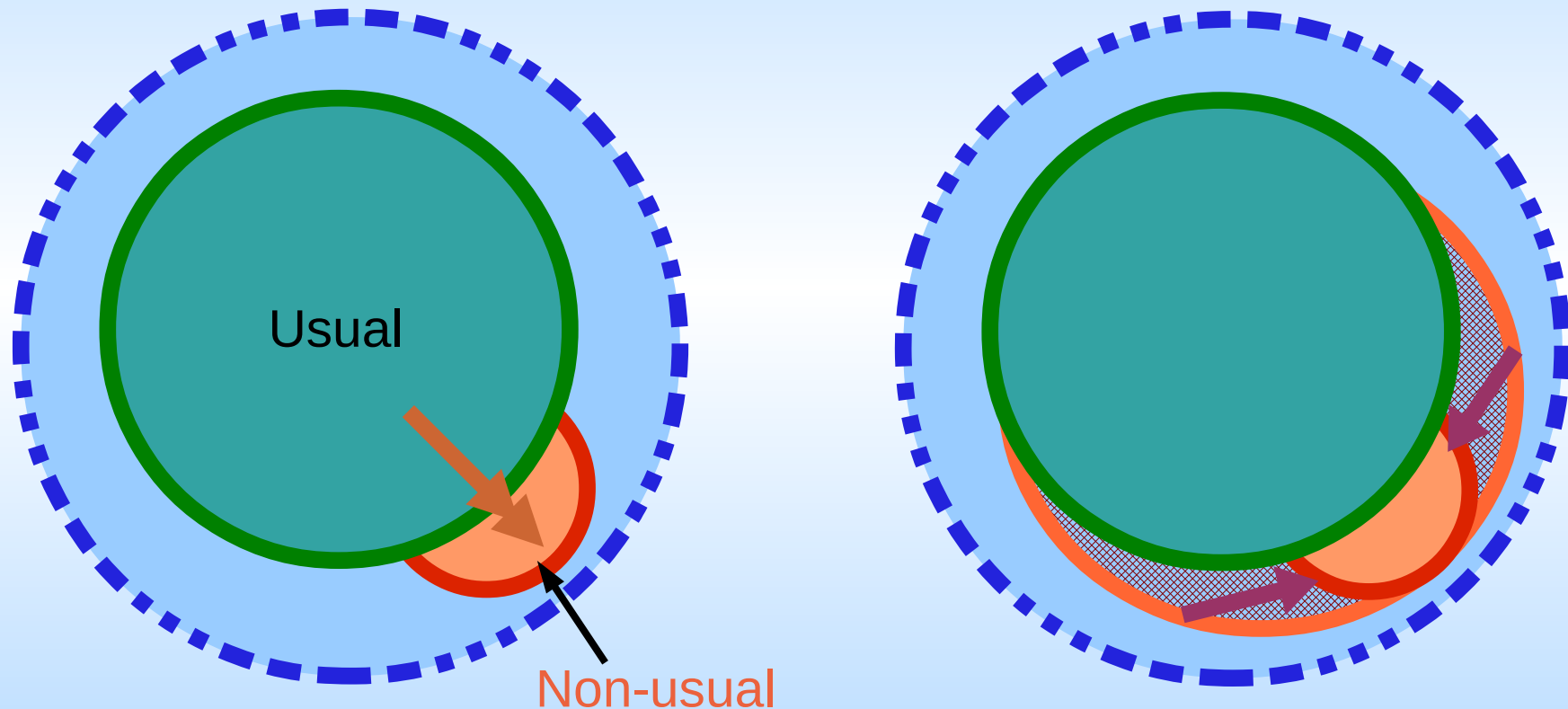
Adequacy Theory in Civil Law

The liability according to the “Equivalence Theory” goes beyond a reasonable scope of liability in civil cases. Hence, one more requirement “**Objective Foreseeability**” is additionally required to be satisfied.

This criterion is applied for the aim to exclude such damages as would not be foreseeable for a reasonable and careful person in normal circumstances.

Japanese and German Solution

Expansion or Reduction?



Possible Question: “Who should carry the burden of proof ?”
Forseeability / Unforeseeability

Final Composition of Art. 416

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A lightened burden of proof on the creditor (foreseeability)

A heavier liability of the debtor for particular damages

3. The current Art. 416 (1896)

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