The Role of the Japanese Civil Code in the Codification in the Kingdom of Siam

Especially in Case of
Civil and Commercial Code, Book I & II

Part 1
Historical Background and Overall Framework

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***, 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**

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.

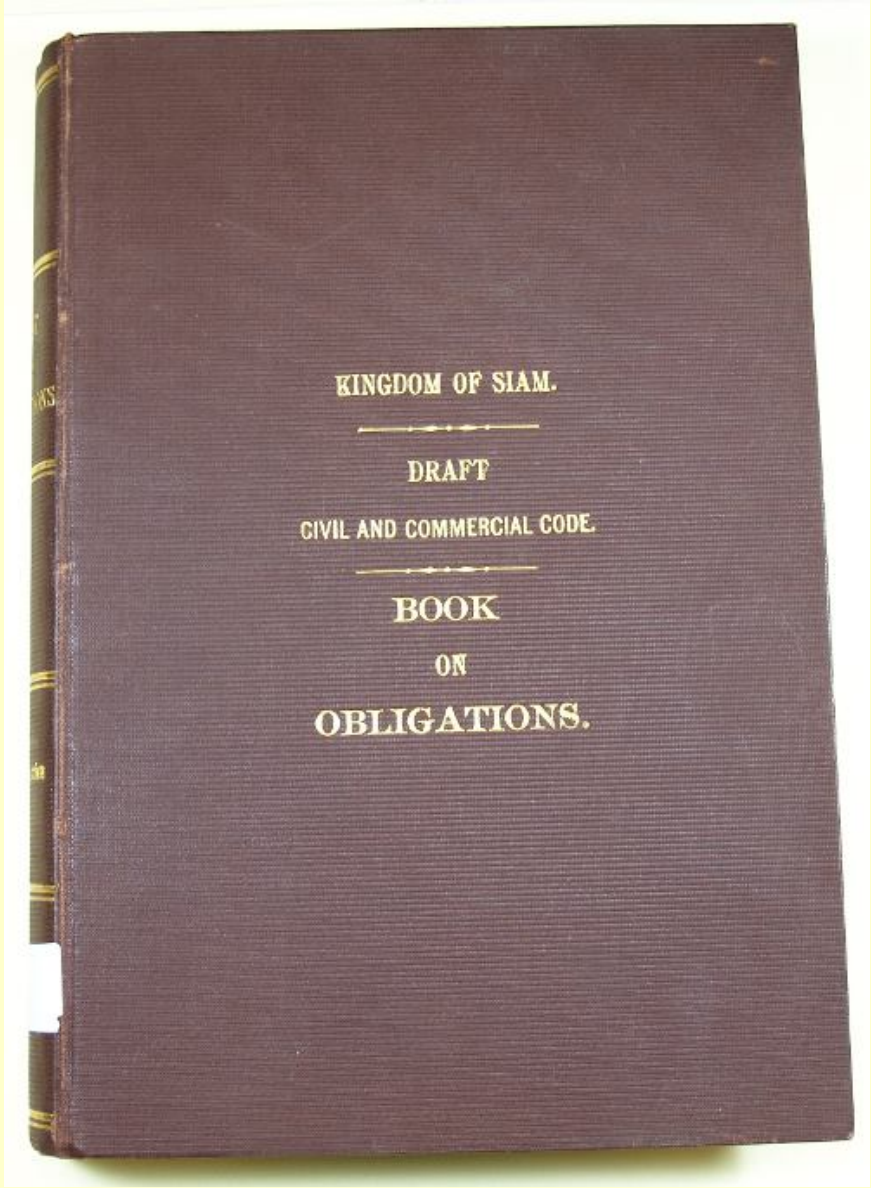
◊ As the second task, they began to draft the law on family. However, a hard controversy arose on this issue between the French advisers and the Japanese legal adviser, ***Mr. Dr. Masao Tokichi***, who was a member of the Revising Committee. Due to this conflict, the drafting work of law on family and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

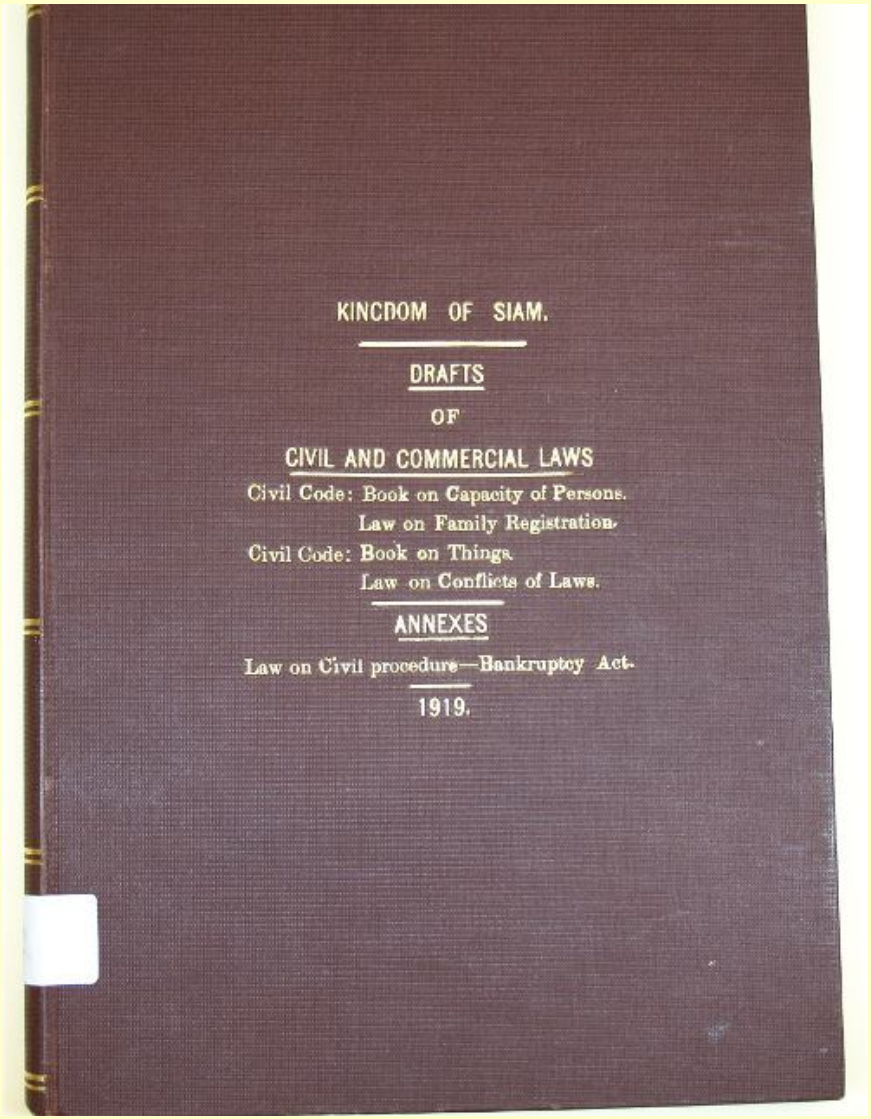
◊ Since 1916, ***Monsieur René Guyon*** took control of the drafting work, and the final draft was submitted to the Siamese government in 1919:

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, a draft for the supplementary enactment was added:

Law on Family Registration **(52 sections)**


KINGDOM OF SIAM.
DRAFT
CIVIL AND COMMERCIAL CODE.
BOOK
ON
OBLIGATIONS.


KINGDOM OF SIAM.
DRAFTS
OF
CIVIL AND COMMERCIAL LAWS
Civil Code: Book on Capacity of Persons.
Law on Family Registration.
Civil Code: Book on Things.
Law on Conflicts of Laws.
ANNEXES
Law on Civil procedure—Bankruptcy Act.
1919.

The Contents of Book on Obligations

(General Part)

The Contents of Book on Obligations

(Specific Part)

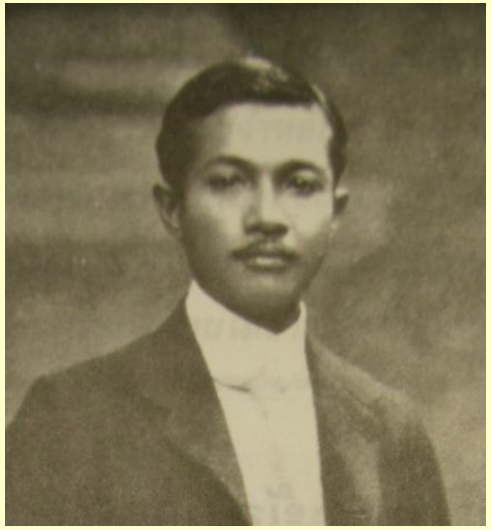
Division VII. Specific Contracts **Secs. 398 – 1463**

Title I.	Sale	Title XIII.	Warehousing
Title II.	Exchange	Title XIV.	Agency
Title III.	Gift	Title XV.	Brokerage
Title IV.	Hire of Property	Title XVI.	Compromise
Title V.	Hire of Service	Title XVII.	Gaming and Betting
Title VI.	Hire of Work	Title XVIII.	Current Account
Title VII.	Carriage	Title XIX.	Insurance against Loss
Title VIII.	Loan	Title XX.	Insurance on Life
Title IX.	Deposit	Title XXI.	Bills
Title X.	Suretyship	Title XXII.	Partnerships and Companies
Title XI.	Mortgage	Title XXIII.	Associations
Title XII.	Pledge		

☞ See ***Contents of Related Civil Codes***

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)***.



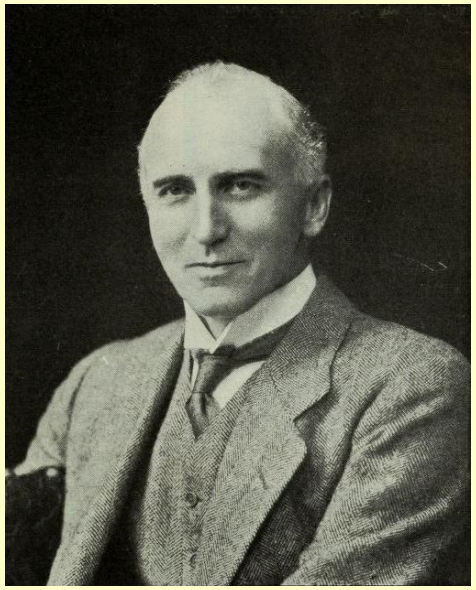
◊ His first commitment to the codification project goes back to 1909 when he was, in his age of 18, assigned to the regular interpreter of the Commission of Codification.

◊ 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***, 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.



Sir John Allsebrook Simon (1873 – 1954)

Promulgation of the Code in Nov.1923 – Jan.1925

◊ 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 Nov. 1923, the Civil and Commercial Code, Book I (General Principles) and Book II (Obligations) were promulgated. In Jan. 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.

Contents of the Code of Nov.1923 – Jan.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

☞ See ***Text of Book I in details***

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

☞ See ***Text of Book II in details***

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

Promulgation of the Revised Code in Nov.1925 – Jan.1929

◊ The Code of Nov. 1923 was a preparation stage for its revision. Its implementation was postponed until Jan. 1926. During this period, Book I and II were radically revised according to the proposal of ***Phraya Manava Rajasevi***. In Nov. 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 Jan. 1929, the revised Book III was also promulgated, and it replaced Book III of Jan. 1925. In this case, however, the basic concepts and features of the latter remained almost unchanged.

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:

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

2. 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.

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

Civil and commercial Code of 1925	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**

☞ See ***Text of Book I (1925) in details*** and ***Index***

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

1. 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.
2. 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.

3. 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).
4. 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”.

Book II, Code of 1925: 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**

☞ See ***Text of Book II (1925) in details*** and ***Index***

Part 2
Inconsistency Question and Remedies for Non-performance

(1) What was inconsistent in the Draft of 1919?

(2) How was the Japanese scheme?

(3) Could the German scheme offer a solution?

Provisions in the Draft of 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

257. – If the obligation is not performed the debtor is said to be in default.

258. – 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. […]

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 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.

Part II. – Remedies of the Creditor

262. – From the time when the debtor is in default, the creditor may claim specific performance of the obligation.

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.

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

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

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 of damages. In the end, 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

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.

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

According to Section 258, the debtor is already in default when the time for performance has arrived regardless whether he is fault for non-performance or not. 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.

◊ However, the Draft of 1919 adopted the Common law principle in the issue "Remedies for Non-performance". According to it, "default" means simply "arrival of the time for performance" and contains no condemnation in moral sense. "Fault" means rather "causation between non-performance and damages". For this reason, it would be contradictory to exclude the liability of the debtor in cases of "***force majeure***" on the ground that it is not caused by his "fault".

ลักษณ ๓ การไม่ชำระหนี้

หมวด ๑ ลูกหนี้ผิดนัด

มาตรา ๓๒๓

อันว่าหนี้ถ้าไม่ชำระไซร้ ลูกหนี้ได้ชื่อว่าอยู่ในฐานผิดนัด

มาตรา ๓๒๔

ถ้าหนี้จะต้องชำระณเวลามีกำหนดแน่ คือว่าในวันอันรู้กันอยู่ก่อนแล้ว นับว่าลูกหนี้ผิดนัดแต่วันนั้นไป [...]

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

ถ้าการชำระหนี้เนิ่นช้าไปฤทำไม่ได้ด้วยเหตุสุดวิสัยไซร้ เจ้าหนี้ไม่มีสิทธิจะได้ค่าสินไหมทดแทนผลแห่งการเนิ่นช้าฤพ้นวิสัยจะทำได้นั้น

มาตรา ๓๓๗

ถ้าภายหลังที่ลูกหนี้ผิดนัดแล้วนั้น การชำระหนี้ตกเป็นอันทำไม่ได้เพราะเหตุสุดวิสัยไซร้ ลูกหนี้จะต้องใช้ค่าสินไหมทดแทนให้แก่เจ้าหนี้ เว้นแต่ลูกหนี้จะพิศูจน์ได้ว่าการผิดนัดนั้นมิได้เกิดเพราะความผิดของตน

Remedies for Non-performance in Japanese Civil Code

◊ The next question would be how these contradictions could be overcome. The cause of the problem could be seen in the method with which the French advisers had tried to integrate the diverse concepts, especially their mixture of Common law principles and French tradition. In this sense, it would be reasonable to follow an already established model law, for example, the Japanese Civil Code.

◊ Against such an expectation, however, the Japanese Code could not offer any immediate help for the Siamese drafters because the Japanese Code was affected with almost same problems as the Draft of 1919 and the Code of 1923:

> **Art. 412** – When there is a certain (definite) term for the performance of an obligation, the debtor is responsible for delay (is in mora) from the time when the term arrives. […]
> **Art. 414** – When a debtor does not voluntarily perform the obligation, the creditor may make demand for compulsory performance to the Court, unless the nature of the obligation does not permit it. […]
> **Art. 415** – When the debtor does not perform the obligation in accordance with the true intent and purpose of the same (in forma specifica), the creditor may demand compensation for accruing damage. The same applies when performance has become impossible owing to a cause attributable to the debtor.

◊ According to Art.412, the debtor is "responsible for delay" when the time for performance arrives. To say exactly, "responsible for delay" means "in default (in mora)" and implies no accusation against "fault". Any demand of performance from the creditor is not required for the debtor's default.

◊ The Japanese drafters at the time chose this concept for the purpose to make possible for the creditor to immediately demand compensation from the debtor without any preceding claim of performance in the Court. In this aspect, the Japanese drafters followed the Common law principle.

◊ Contrary to Common law, however, they maintained Art. 414 to declare the primary right of the creditor to demand specific performance.

◊ Moreover, Art. 415 requires "a cause attributable to the debtor" in cases of impossibility of performance. It does not mean any simple "causation between non-performance and damages" like in Common law, but "cause of non-performance"; namely intention or negligence. In this sense, there is a clear contradiction between Art. 412 and Art. 415.

Specifically German Theory of Non-performance

◊ The German theory for "Remedies for Non-performance" is the extreme opposite to the Common law principles. In the specifically German law tradition, the primary effect of obligations consists in the creditor's right to claim the performance in the specified form:

General State Laws for the Prussian States (1794)

About impossible Acts

§ 51 – Contracts which obligate someone to absolutely impossible acts or performances are null and void.

Fulfillment of Contracts

§ 270 – Principally, contracts must be fulfilled in accordance with their whole contents.

§ 271 – The party who claims 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.

Interest

§ 285 – Someone who intentionally or faultily violates his duty in conclusion or fulfillment of a contract must compensate whole of the interest of the other party.

◊ The creditor may or must bring a claim for specific performance into the Court (§ 270). This claim for specific performance is not any "remedy for non-performance", but rather the primary effect of obligations. Immediate claim for damages in lieu of performance may not be allowed so long as the specific performance is still possible ("Principle of Natural Fulfillment of Obligations").

◊ The Court should guarantee the fulfillment of contracts. In return, the law requires the possibility of fulfillment as a prerequisite condition for the validity and effects of contracts (§ 51). In this context, "Impossibility of Performance" gained considerable attention in the discussion about validity and effects of obligations.

◊ Furthermore, if the debtor faultily fails to fulfill a contract, then the genuine procedure for "remedy for non-performance" begin (§§ 277, 285). In this sense, "Fault of the Debtor" is a basic requirement for a claim for compensation.

In this way, the main subjects of the German scheme were determined:

1. Possibility of Fulfillment (Performance)
2. Claim for Fulfillment
3. Failure of Fulfillment
4. Fault of the Debtor and Claim for Compensation

Pandectist Science in the 19. C. and the Theory of Impossibility of Performance

◊ In the 19. Century, the "Historical School of Law" connected the subject "Possibility of Fulfillment" with the Roman law principle "Impossibilium nulla obligatio" and developed the general theory of "Impossibility of Performance"; especially Friedrich Carl von Savigny (1779 – 1864), Friedrich Mommsen (1818 – 1892). They made a distinction between different types of impossibility and determined their influence on the effects of obligations; *natural* or *juristic*, *absolute* or *relative*, *objective* or *subjective*, *permanent* or *provisional*, *whole* or *partial*. Above all, the essential distinction was made between ***initial*** or ***subsequent*** impossibility.

◊ They applied the same criterion "*Impossibility = Nullity*" also to impossibility which occurs to a valid and effective contract after its conclusion. It means; if its fulfillment becomes subsequently impossible, then the debtor should be relieved from his obligation. However, if the impossibility is his fault, then the creditor's claim for fulfillment is transformed into the claim for compensation in lieu of performance.

◊ In this context, the discussion about "Failure of Fulfillment" (Non-performance) focused on two types; Impossibility and Delay or Default (possible but still not performed).

Civil Code for the Kingdom of Saxony (1863)

◊ The German Pandectist Science achieved its first practical application in the enactment of the "Civil Code for the Kingdom of Saxony":

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. […]

Influence of Fault

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

Default of the Debtor

§ 733 – After the claim has become due, the debtor is in default if he does not fulfill his obligation 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. […]

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.

German Civil Code (1898)

◊ The German Civil Code (1898) was mainly based on the achievement of the Civil Code for the Kingdom of Saxony (1863):

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.

§ 271 – 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 […]

Impossibility of Performance

§ 275 – The debtor is relieved from his obligation 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 […]

§ 280 – 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.

In case of partial impossibility the creditor may, by declining the still possible part of the performance, demand compensation for non-performance of the entire obligation, if he has no interest in the partial performance […]

Default of the Debtor

§ 284 – If the debtor does not perform after warning given by the creditor after maturity, he is in default through the warning. Bringing an action for the performance and the service of an order for payment in hortatory process are equivalent to 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 – The debtor shall compensate the creditor for any damage arising from his default.

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.

Prerequisite for Valid Contracts

§ 306 – A contract for an impossible performance is void.

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 had hindered the vision of the theory.

◊ The reason for this hindrance could be seen in the tight logical connection of the three dichotomies; **possible/impossible – valid/void – fulfillment/compensation** :

- If the performance is **possible**, then the obligation is **valid**, and the creditor may claim only its **fulfillment** so long as it is possible.
- If the performance becomes **impossible**, then the obligation is **void**, and the creditor may claim **compensation** if it is the debtor's fault.

◊ Soon after the implementation of the Code, 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.

Solutions

◊ 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:

1. Theory of "Positive Breach of Contracts" (imperfect performance)
2. Theory of "Additional Duties" (besides main duty of performance)
3. Theory of "Culpa in Contrahendo" (liability before contract conclusion)
4. Theory of "Loss of Basis for Contract" (unreasonableness of contract)
5. Theory of "Sphere of Risks" (risks to bear instead fault)

   etc.

◊ The Japanese civil law scholars adopted these German general theories and applied them to correct the logical inconsistencies and gaps in the Japanese Civil Code :

"Reception of Academic Theories from German Civil Law Science"

◊ The Siamese drafters in the 1920s invented their original solution :

"Rearrangement of German Provisions in accordance of Japanese Scheme"

☞ See ***Rearrangemnet of the German Provisions***