Question of the Rescission of Contract

- **The Roman law** tradition rejected acknowledgment of the right of contract parties to dissolve their contracts which they have formally established. It would be the essential task for the law to protect the efficiency and reliability of contracts. **The German civil law** has adopted and maintained this understanding since the reception of the Roman law in the 15. Century until the modern time.
- Comparatively speaking, **the French civil law** possessed a much more practical mentality and acknowledged the right of the creditor to rescind the contract under the condition of non-performance of the debtor since the 17. Century; the concept of condition subsequent (เงื่อนไขบังคับหลัง).
- However, the French law has also made consideration for the protection of efficiency and reliability of contracts. For this reason, the French law put the rescission of contract under the control by the Court.
  - **Art. 1183 C.C. (1804)** – *A condition dissolutory* is that which, when it is accomplished, operates the revocation of the obligation, and which again puts affairs in the same state as though the obligation had never existed. [...]
  - **Art. 1184** – A condition dissolutory is *always intended in synallagmatical contracts*, for the case in which *one of the two parties shall not satisfy his engagement*.

    In this case the contract is not dissolved absolutely. The party towards whom the engagement has not been performed, has his election either to compel the other to performance of the agreement where it is possible, or to *demand the dissolution thereof with damages and interest*.

    The dissolution may be demanded at law, and a delay may be granted to the defendant according to circumstances. [ ]

    – from the translation on the website about the Napoleon Code
- In the 19. Century, there was a strong requirement to adopt the French concept in the German civil law. At the same time, however, there was also a persistent counterargument against a strong competence of

the Court to intervene into civil matters. It would weaken the independence and freedom of civilian activities. Under such circumstances, the German civil law developed its own concept to allow the creditor *to dissolve the contract in his discretion (declaration of intention) in case of non-performance of the debtor*. The German Civil Code of 1896 provided for the rescission of contract as follows:

- **§ 325 BGB (1898)** – If the performance due from one party under a mutual 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*. [...]
- **§ 326** – If, in the case of mutual contract, one party is *in default* in respect of the performance due from him, the other party may allot him a fixed reasonable period for performing his part *with a declaration that he will decline the performance after the expiration of the period*. After the expiration of the period, he is entitled to *demand compensation for non-performance, or to rescind the contract*, if the performance has not been effected in due time; the claim for performance is barred. [...]
- **§ 349** – Rescission is effected *by declaration to the other party*.

– from the translation by Dr. Chung Hui Wang

- This German concept suffered several difficulties:
  1. The concept centered on *the impossibility theory*: Impossibility of performance is the main type of non-performance.
  2. The "*either-or*" relation between demand for damages and rescission: The creditor may not demand for rescission with demand for damages.
  3. The "*either-or*" relation between demand for performance and rescission: Even in case of default, the creditor may not demand for performance after the expiration of the period.

- **The Swiss civil law**, which was under the strong influence of the French law, hat adopted the German concept and attempted to combine it with the French concept to avoid the difficulties in the German law:
  - **Art. 122 Federal Code of Obligations (1881)** – When, in a reciprocal contract, one of the contracting parties is in default, the other party has the right to set him [...] a suitable period, warning him that, in case of failure to perform, the contract will be terminated at the end of the period.
  - **Art. 123** – If it results from the contract that, according to the intention of the parties, the obligation was to be performed at a specific time, neither earlier nor later, or within a fixed period and not later, the party towards whom the obligation is not effected at the agreed time or within the required period, may rescind the contract *without further formality*.
  - **Art. 124** – In the cases provided for in Articles 122 and 123, the party rescinding the contract *may demand the restitution* of what he/she has paid and, in addition, *damages* if he/she proves that the other party is at fault for them.
- **The Code Investigatory Commission in Japan** decided to leave the French concept in the Civil Code of Japan (1890) and adopted the provisions from the 1st and 2nd Drafts for the German Civil Code. However, the Commission rearranged the German provisions according to the Swiss concept to avoid the difficulties of the German concept:
  - **Art. 540 Revised Civil Code of Japan (1896)** – If one of the parties has a right to rescind the contract according to the provisions of the contract or law, the rescission shall be *effected by declaration of intention to the other party*.

    The declaration of intention under the preceding paragraph may not be revoked.
  - **Art. 541** – In cases where one of the parties does not perform his/her obligations, the other party, specifying a reasonable period, may demand for performance of the obligations, and if no performance is tendered during that period, the other party may rescind the contract.

- **Art. 542** – In cases where, due to the nature of the contract or the intention of the parties, the purpose of the contract cannot be achieved unless the performance is effected at a specific time and date or within a specific period of time, if one of the parties has failed to perform at the time or that period lapses, the other party *may immediately rescind the contract* without making the demand referred to in the preceding Article.
- **Art. 543** – If performance has become impossible wholly or partly, the creditor may rescind the contract; unless the failure to perform the obligation is due to reasons not attributable to the debtor.
- **Art. 545** – If one of the parties exercises his/her right to rescind the contract, each party shall assume an obligation to restore the other party to its original position; unless this shall prejudice the rights of a third party. [...]

  The exercise of the right to rescind the contract shall *not preclude demand for damages*.

- This strategy of rearrangement exercised by the Japanese Commission was described in an imaginable manner by *Mr J.E. de Becker* in his publication "*Principles and Practice of the Civil Code of Japan*" (1921). Presumably, this description has strongly inspired the Thai drafter to develop a special method to rearrange the German provisions of the remedies for non-performance in accordance with the Japanese concept.
- **The French advisers in the Kingdom of Siam** have also developed their own solution for this issue in the Draft of 1919. In principle, they stayed in the French concept and required the intervention by the Court for "***Cancellation***" of the contract. In the Book III on Specific Contracts, furthermore, they introduced another type of opportunities of "***Determination***" for the contracts with continual effects, which could be exercised by the declaration of intention without intervention by the Court:

  - **Sec. 262. Draft Civil and Commercial Code of 1919** – 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.

- Presumably, the French advisers introduced such provisions of "Determination" mainly for two different purposes:
  - Firstly, in cases of contractual relations with continual effects, the law should guarantee the parties to terminate their relations under certain conditions even though the parties do not commit any violation of the contract. Such an opportunity will not bring any danger to weaken the efficiency and reliability of contact. It will rather protect and ensure *the freedom of contract* (Type A). Any intervention by the Court would not be necessary for this type of determination.
  - Secondly, in cases where one party behaves in violation to the contract, *the warning of "determination"* by the other party can motivate the violating party to cease his violation. Contrary to the "cancellation", such a warning will not intend to dissolute the contractual relation, but rather aims to maintain it. In this sense, the right of determination in this type (Type B) can contribute to the efficiency and reliability of contract. Therefore, any intervention by the Court would not be necessary.
- This concept was adopted unchanged in the Civil and Commercial Code of 1923:
  - **มาตรา 328** – ตั้งแต่เวลาลูกหนี้ผิดนัด เจ้าหนี้จะเรียกให้ชำระหนี้โดยเฉภาะเจาะจงก็ได้

    ถ้าหนี้นั้นเกิดแต่มูลสัญญาไซร้ เจ้าหนี้จะ*เรียกให้เพิกถอนสัญญา*ได้ เวนแต่ในคดีที่กฎหมายบัญญัติว่าทางแก้ของเจ้าหนี้นั้นจะพึง*เลิกสัญญาเสียเอง*

เจ้าหนี้ยัง*ชอบที่ได้ค่าสินไหมทดแทน*ที่ต้องเสียหายอย่างใดๆ อันเกิดขึ้นแก่ตนด้วยการไม่ชำระหนนี้ เว้นแต่ในบทที่บัญญัติไว้ในหมวด ๔ แห่งลักษณนี้

- In the Revised Civil and Commercial Code of 1925, however, the "***Cancellation***" after the French model was replaced with the German-Japanese concept of "***Rescission***" without any requirement for the intervention by the Court (มาตรา 386 – 394). On the other hand, many sections of "***Determination***" in the Book III remained unchanged (even in the current version of 1928). This point would be one reason for possible concern of theoretical inconsistency.

The Sections on the Determination (Termination) of Contract

- **Sec. 12, Draft of 1919** ***[Agreement to determine a contract?]***

  Obligations may be created, modified or *determined by mutual consent of the parties*, as they may think fit.

- **Sec. 536, Draft of 1919** ***[Determination as protection of freedom of parties; Type A]***

  If no period is agreed upon or presumed, *either party can determine the lease* at the end of each period of payment of rent, provided that such party gives notice to the other of at least one rent period.

- **Sec. 545, Draft of 1919** ***[Determination as warning against breach of contract; Type B]***

  If a lessee sublets or transfers his rights in the whole or part of the property hired contrary to the provisions of the lease, *the lessor may determine the contract*.

- **มาตรา 566, ป.ก.พ.พ. บรรพ ๓ (พ.ศ. 2471)**

  ถ้ากำหนดเวลาเช่าไม่ปรากฏในความที่ตกลงกัน หรือไม่พึงสันนิษฐานได้ไซร้ ท่านว่า*คู่สัญญาฝ่ายใดจะบอกเลิกสัญญาเช่าในขณะเมื่อสุดระยะเวลาอันเป็นกำหนดชำระค่าเช่าก็ได้ทุกระยะ* แต่ต้องบอกกล่าวแก่อีกฝ่ายหนึ่งให้รู้ตัวก่อนชั่วกำหนดเวลาชำระค่าเช่าระยะหนึ่งเป็นอย่างน้อย แต่ไม่จำต้องบอกกล่าวล่วงหน้ากว่าสองเดือน

- **มาตรา 544, ป.ก.พ.พ. บรรพ ๓ (พ.ศ. 2471)**

  ทรัพย์สินซึ่งเช่านั้น ผู้เช่าจะให้เช่าช่วงหรือโอนสิทธิของตนอันมีในทรัพย์สินนั้น ไม่ว่าทั้งหมดหรือแต่บางส่วน ให้แก่บุคคลภายนอก ท่านว่าหาอาจทำได้ไม่ เว้นแต่จะได้ตกลงกันไว้เป็นอย่างอื่นในสัญญาเช่า

  ถ้าผู้เช่าประพฤติฝ่าฝืนบทบัญญัติอันนี้ *ผู้ให้เช่าจะบอกเลิกสัญญาเสียก็ได้*

[Table] Comparison between the Draft of 1919 and บรรพ ๓ (พ.ศ. 2471)

Type of contract	Draft of 1919	บรรพ ๓	Type of determination
Gift (ให้)	471	527	**Type A**
Hire of property (เช่าทรัพย์)	500	548	**Type A**
	501	549	**Type A**
	503	551	**Type B**
	504	– –	
	512	– –	
	520	554	**Type B**
	529	560	**Type B**
	536	566	**Type A**
	538	568	**Type B**
	541	– –	
	542	570	(Effects)
	543	571	(Effects)
	545	544	**Type B**
Hire purchase (เช่าซื้อ)	– –	573	**Type A**
	– –	574	**Type B**
Hire of services (ช้างแรงงาน)	551	578	**Type A**
	552	579	
	554	581	**Type A**
	555	582	**Type A**
	556	– –	
	559	586	(Effects)
Hire of work (ช้างทำของ)	605	605	**Type A**
	606	606	**Type A**
Loan for use (ยืมใช้คงรูป)	645	645	**Type B**

Suretysip (ค้ำประกัน)	710	699	**Type A**
Agency (ตัวแทน)	881	826	**Type A**
	882	827	**Type A**
Current account (บัญชีเดินสะพัด)	921	859	**Type A**
Insurance on life (ประกันชีวิต)	948	894	**Type A**

Purpose of Rescission or Determination (Termination)

1. **Rescission**:

   Prompt dissolution of contractual relationship in case of non-performance

2. **Determination**:

   Type A= Protection of freedom of parties

   Type B= Warning against breach of contract for *maintenance* of contractual relationship