Reformed Civil Code of Japan and its Problem

A sample: Rescission of Contract and Claim for Damages
(14 March, 2023)

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Looking back into the Lectures in 2014 and 2015 …

Civil Code Reform Project in Germany and Japan

☞ “Special Lectures”

Contents of the "Special Lecture"

- "Modernization of Law on Obligations" in ***Germany*** (1984 –)
- Main subjects of the "Modernization of the Law on Obligations" in Germany

- Reform project of the Law on Obligations in ***Japan*** (2006 –)
- Main intention of the "***Basic Plans***" for the Reform of Law on Obligations (2009)
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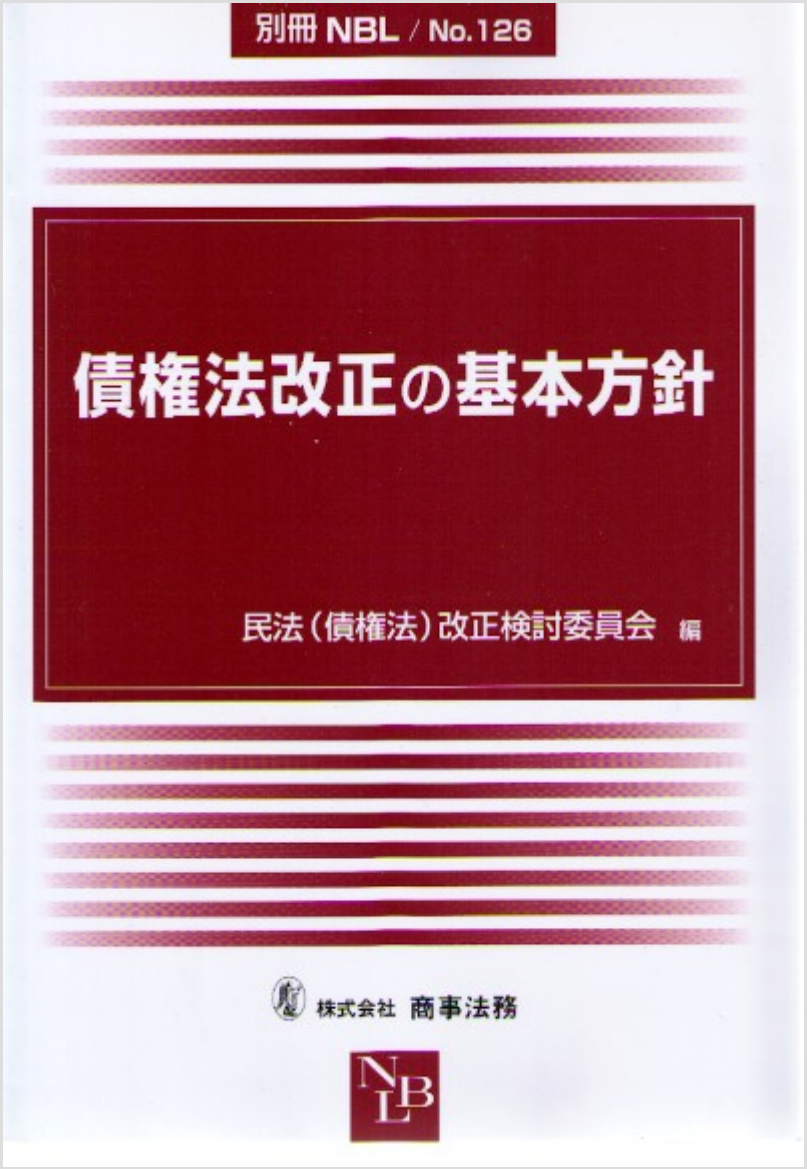
- Criticism against the proposal and the counter-proposal
- "***Provisional Draft***" for the Reform of Law on Obligations (2013)
- "***Tentative Outline***" for the Reform of the Law on Obligations (2014)

Reform Project of the Law on Obligations in Japan (2006 –)

- Ministry of Justice in Japan announced the reform project of the law on obligations in 2006.
- Under the support of the Ministry, a non-governmental group of legal scholars and lawyers —"*Japanese Civil Code (Law of Obligations) Reform Commission*"— was organized in October 2006.
- The Committee published the "***Basic Plans*（基本方針）*for the Reform of Law on Obligations with brief comments on the proposals***" in March 31, 2009.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Main Intention of the "Basic Plans for the Reform of Law on Obligations"

- The main intention of the Committee consists rather in ***Re-codification of the whole Civil Code***.

1. Reconsideration of the adequacy of "**Pandects System**" and Rehabilitation of "**Old Civil Code of 1890**"

   a. Reduction of the scope of Book I "General Principles"

   b. *Contract-centered* reworking and rearrangement of Book III "Obligations"

2. Adoption of certain basic concepts from Common Law

3. Integration of "Consumer Protection" into Civil Code

Wide Range of Subjects in the "Basic Plans"

1. Modernization of articles on "Juristic acts"
2. "General Provisions of Contract" instead of "General Provisions of Obligations"
3. Modernization of principles of contract
   a. ~~Acknowledgment of legal relationship between parties prior to agreement~~
   b. Effect of contract for an initially impossible performance
   c. Regulation of "***Standard Business Terms***"
   d. Reform of ***remedies for breach of contract (or non-performance of obligations)***
4. Improvement of securities for obligations
5. ***Simplification of prescription of obligations***
6. New regulation and new types of contract
   a. Introduction of general provisions for bills
   b. ***Abolition of strict liability for defects in Sale contract as statutory liability***
   c. Right of defense in Loan for Consumption combined with Sale contract
   d. Finance lease transaction (Hire purchase)
   e. Contract for rendering of cervices … and so on

Proposal for the basic rules of liability for damages by the Commission

- The basic intention of the Commission in this issue consists in the definition of liability for damages as "***Burden (risk) accepted in the contract***".

[3.1.1.62] (Damages due to non-performance)

The creditor may claim form the debtor compensation for damages resulting from the non-performance.

[3.1.1.63] (Exemption of liability)

1. The debtor is not liable for damages if the non-performance resulted from a circumstance *(the burden of) which he has not accepted in the contract.*
2. The debtor is not liable for damages if he is entitled to a statutory right of defense.

Criticism against the Proposal and Counter-proposal

- Independently from the reform project supported by Ministry of Justice, another non-governmental group was founded in 2005, namely "***Society for Civil Code Reform***". Its members are mainly legal academics of "Japan Association of Private Law", practicing lawyers, and representatives from business sectors and labor unions.
- This counter-project aims to modernize and clarify the basic concepts of the current Civil Code with minimal modification. In October 2009, it worked out a counter-proposal "***A Trial Proposal for Civil Code Reform presented by Voluntary Contributors from Citizens, Lawyers, and Academics***（有志案）".
- It insists on maintaining the current "***Pandects System***".

Counter-proposal for the basic rules of liability for damages by "Society for Civil Code Reform"

- Its basic intention consists in definition of liability for damages as "***statutory liability***" prior to particular agreements between parties.
- The composition of the proposed article is adopted from the original proposal which Prof. Hozumi presented in 1895.

— Main Proposal —

Art. 342 (Compensation for non-performance)

The creditor may demand compensation for damages if the debtor fails to effect performance in accordance with the true intent and purpose of the contract, *unless the cause of the non-performance is not attributable to the debtor*.

"Provisional Draft for the Reform of Law on Obligations" by the Legislative Council (2013)

- Due to hard criticism against "Basic Plans", the Legislative Council of the Ministry of Justice published "***Provisional Draft*（中間試案）*for the Reform of Law on Obligations***" in March 2013.

[No. 10] (Compensation for non-performance)

1. If the debtor does not perform his obligation, the creditor may demand compensation for damages resulting from the non-performance.
2. The debtor is not liable for damages arisen from the non-performance of his *contractual obligation* if the non-performance resulted from *a circumstance which is not attributable to the debtor* in consideration of the true intent and purpose of the contract.
3. The debtor is not liable for damages arisen from the non-performance of his *non-contractual obligation* if the non-performance resulted from *a circumstance which is not attributable to the debtor* in consideration of the reason of the obligation and other related matters.

The controversy continued …

“Tentative Outline for the Reform of the Law on Obligations” by the Legislative Council (2014)

- ***Provisional Draft for the Reform of Law on Obligations***” published in March 2013 were further discussed and improved through “Public Comment”.
- In September 2014, the “Legislative Council of the Ministry of Justice” announced “***Tentative Outline***（要綱仮案）***for the Reform of Law on Obligations***”.
- On March 31, 2015, the current Cabinet approved this “***Outline***” and decided to prepare a motion to the Parliament for drafting work of the amendments to the Civil Code in accordance with it.
- On 2 June 2017, the final bill for the reform of the Civil Code was approved in the Parliament and enacted.
- After 3 year of the get-acquainted period, the Reformed Civil Code was put into effect on 1 April 2020.

Reformed Provision Art. 415 I.

- In regard to the liability for non-performance, the new Art. 415 is rather similar to the counter-proposal by "Society for Civil Code Reform" (2009). In this sense, the principle "***No liability without responsibility***" seems to be maintained. However, the leading legal scholars of the Commission still insist that *the new "attributability" does not mean "intention or negligence"*, but it is the question whether the debtor has accepted *the burden (risk) of the cause of non-performance* in the contract or not.

Art. 415 (Compensation for damages due to non-performance)

I. If the debtor fails to perform in accordance with the purpose of the obligation, or the performance of an obligation is impossible, the creditor may claim compensation for damage arising therefrom; provided, however, that *this does not apply if the non-performance is due to grounds not attributable to the debtor in light of the contract or other grounds of obligation and the common sense in the transaction*.

New Provision Art. 415 II.

- The Reformed Civil Code introduced a few new provision:

Art. 412-2 Claim for performance and its impossibility *– new –*

I. If the performance of an obligation is impossible *in light of the contract or other sources of claims and the common sense in the transaction*, the creditor may not request the performance of the obligation.

Art. 415 (Damages in lieu of performance) *– new –*

II. If the creditor is entitled to claim compensation for damage under the provisions of the preceding paragraph, and any of the following cases applies, the creditor may claim compensation for damage in lieu of the performance of the obligation:

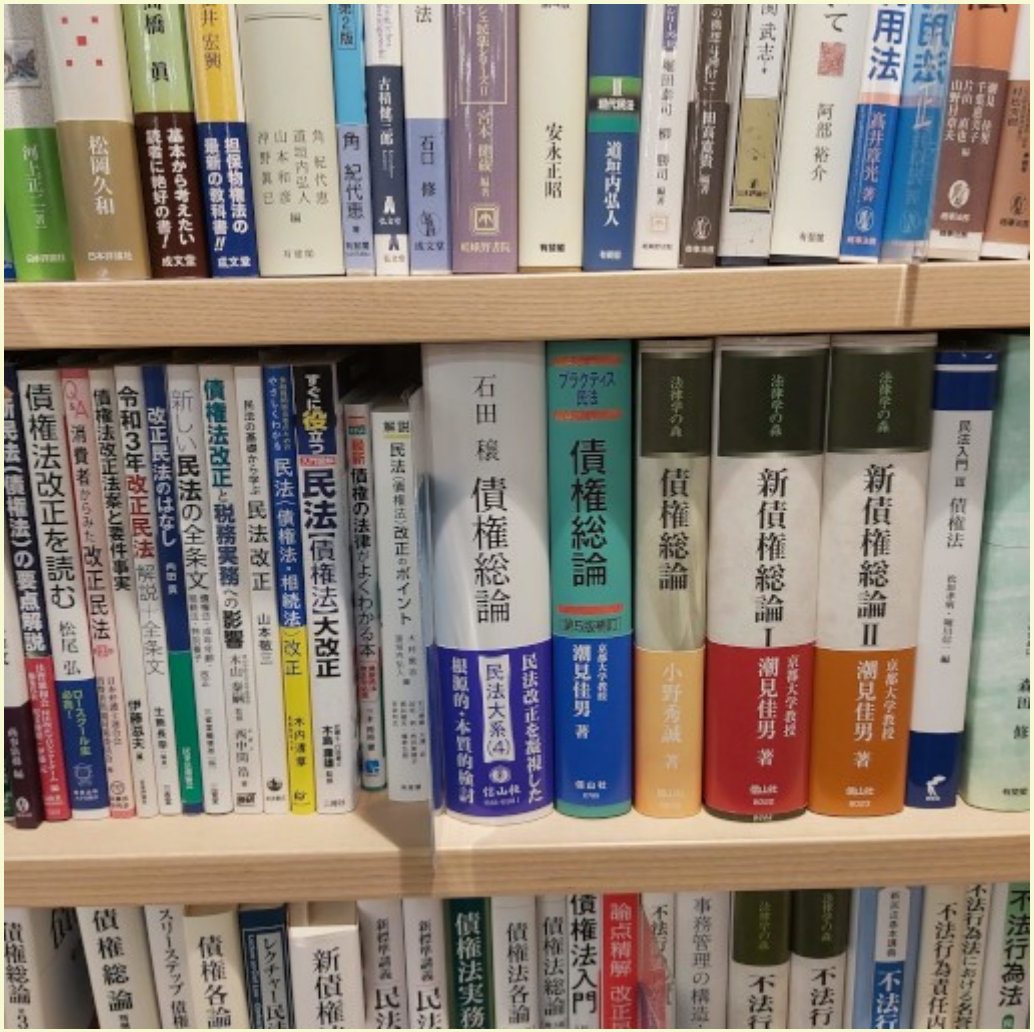
1. the performance of the obligation is impossible;
2. the debtor definitively declares the intention to refuse to perform the obligation; or
3. the obligation has arisen from a contract, and *the contract is rescinded* or *the creditor is entitled to the right to rescind the contract* on the ground of the debtor's non-performance of the obligation.

After the enactment of the Civil Code Reform …

Reformed Civil Code of Japan and its Problem

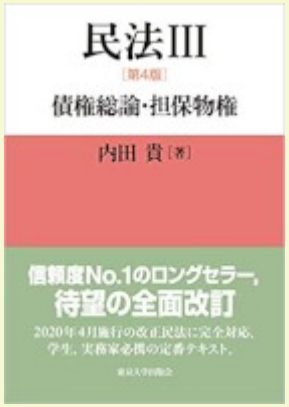
A sample: Rescission of contract and claim for damages

Publications after 5 years since the enactment …



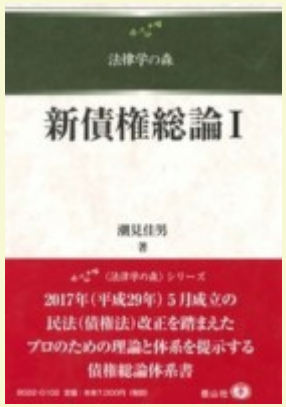
Books on the bookshelf in a bookstore …
(Dec. 2022)

Dominated by textbooks and commentaries by the leading scholars of the Commission …



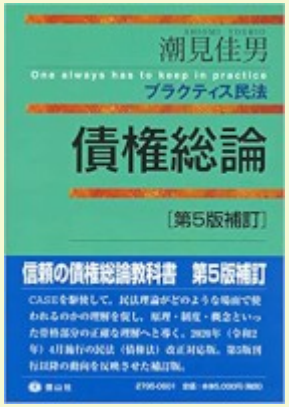
Prof. Takashi Uchida

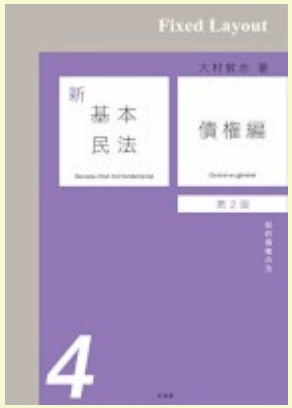
（内田貴）



Prof. Yoshio Shiomi （潮見佳男）

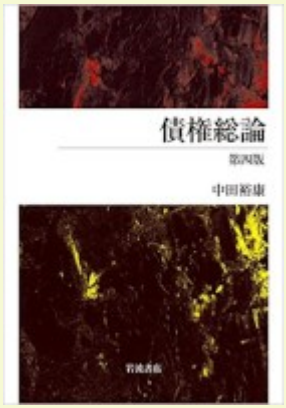
1959 – 2022





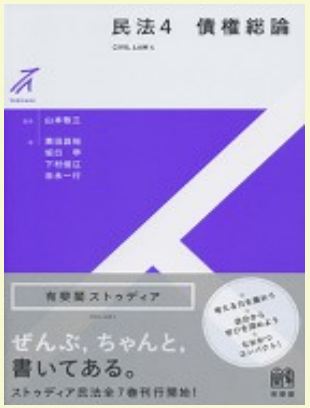
Prof. Atsushi Omura

（大村敦志）



Prof. Hiroyasu Nakata

（中田裕康）

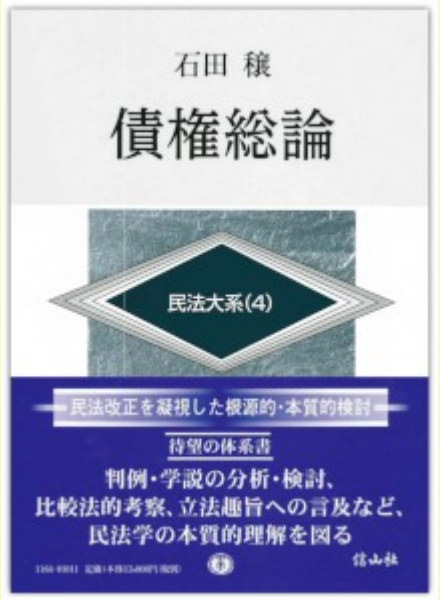


Prof. Keizo Yamamoto

（山本敬三）

Almost no publication by the opponent scholars …

- The laud controversy ceased after the enactment of the Reformed Civil Code. The opponent legal scholars seem to keep their silence. There are almost no updated version of their textbooks or new publication about the Law of Obligations.
- In November 2022, a prominent legal scholar at last published his comprehensive textbook about the Law on Obligations:



Prof. Minori Ishida
（石田穣）

Probably, this publication signifies the beginning of a new period of an "*Academic Law Science*" in Japan just like the "Pandects Law Science" in Germany, which developed a general legal theory of civil law based on the Roman law tradition, quite independently from the positive legal system.

Sharp criticism

- In this book, Prof. *Ishida* sharply criticized the Reform Project of the Civil Code:

"During the writing of this publication, the reform of the law on obligations was carried out. Under this circumstance, the main target of this book is, of course, the reformed civil law.

Undertaking a close study of the reformed law, *I had to reach a surprising conclusion that the new law suffers so many problems. These problems are not just trivial ones, but they are so serious that it is impossible to overlook them.* I must say, it is quite questionable whether the basic and fundamental researches and deliberations have been really and thoroughly undertaken enough for the reform project of the civil law" [...]

One of the critical problems: Rescission of contract and claim for damages

- Art. 415 II. lists three conditions for the claim for damages in lieu of performance; namely *impossibility* of performance, *refusal* of performance, and *rescission* of contract:

Art. 415 (Damages in lieu of performance)

II. If […] any of the following cases applies, the creditor may claim compensation for damage in lieu of the performance of the obligation:
[…]
3. the obligation has arisen from a contract, and *the contract is rescinded* or t*he creditor is entitled to the right to rescind the contract* on the ground of the debtor's non-performance of the obligation.

- However, (a) "damages in lieu of performance" and (b) "rescission of contract" are two different, independent consequences from (c) "non-performance of obligation". *(a) and (b) do not stay in any causal relation between a cause and a result*.
- ***What could be a reason for such an illogical provision?***

Three positions about the relation between "rescission" and "claim for damages"

- **French position**: The French Civil Code (1804) clearly provided that the "resolution" of contract *did not nullify its validity*. Accordingly, the creditor is still entitled to *full range of damages* even after the rescission of contract. *The Japanese law adopted this position*. The Court allowed the creditor also claim for "damages in lieu of performance" together with the declaration of rescission.
- **German position**: The German Civil Code (1898) took also the same position as the French law. The validity of contract, and the creditor's entitlement to the claim for damages stayed untouched by rescission. However, *the German law forced the creditor to choose one between rescission and damages*.
- **Swiss position**: The Swiss Code of Obligations (1911) adopted the German position. But if the creditor chooses rescission, he is still entitled to claim for damage of "*reliance interest*". In other words, the Swiss law treats a rescinded contract just same as *an invalid contract*.

☞ See Hideo Hatoyama: *Japanese Law of Obligations*, Specific Part, Vol.1 (1924) p.240.

"Rescission for claim of damages" a customary legal practice in Japan

- According the French-Japanese position, "claim for damages" and "rescission of contract" are two different consequences from non-performance.
- However, the creditor often rescinded the contract *at first* when he intended *subsequently* to claim "damages in lieu of performance". This method was gradually established as a customary practice in the civil procedure.
- Unfortunately, such a practice led to an incorrect "appearance" that *the creditor would have to rescind the contract before he might be entitled to the claim for damages in lieu of performance*.
- Nevertheless, the Reform Project since 2006 developed the idea *to adopt this customary practice into the statute law*. This was the origin of Art. 514 II. No.3.
- However, this idea fully contradicts the basic concept of the rescission.
- ***What was the real reason of this practice? What would be a correct solution?***

Missing provision in the part “non-performance”

- For the purpose to claim damages in lieu of performance, the creditor had to use the procedure in the part of “rescission” *because there is no suitable provision in the part of “Effects of obligation”*. The real reason for the customary practice was the luck of a suitable provision which would allow the creditor to directly claim such damages:

  Art. 415 α (fictive provision for damages in lieu of performance)
  If the debtor does not perform his obligation, the creditor may fix a reasonable period of time and demand performance within such period; and *if the obligation is not performed within that period of time, the creditor may demand compensation for accruing damage instead of demanding performance*.

- However, at the time of codification, the drafters of the Japanese Civil Code (1896) did not recognize the necessity of such a provision.

Idea of the Japanese drafters

- The drafters at the time presumed that *the creditor had always choice* between claim for performance and claim for damages when the debtor was in default in three steps as follows:

  1. When the due time for performance arrived, the debtor is in ***default*** (Art. 412).
  2. The creditor may claim ***enforcement*** at the Court (Art. 414) or;
  3. he may claim ***damages*** due to non-performance (Art. 415).

- It meant for the drafters that the creditor *may claim damages at any time* when the debtor does not perform his obligation.
- It could be true for the "*damages besides performance*".

- However, people still hesitated to immediately claim "*damages in lieu of performance*" in a Common law style. They felt it necessary to know that *the performance definitively failed and the debtor was responsible for it*. For this reason, they needed a suitable procedure, but found no one in the part of "Effects of obligation" of the Civil Code.
- This is the true reason for the customary practice with the rescission.

How about the French law?

- The French law clearly requires a procedure of "***putting the debtor in default (notice)***" as a condition for the debtor's liability:

Art. 1146, French Civil Code (1804)

I. Damages are owed only when the debtor has been put in default to perform his obligation, except when the thing the debtor was obligated to give or do could be given or done only within a certain time that he has allowed to elapse.

Art. 1344, Reformed Civil Code (2016)

I. A debtor is put on notice to perform by formal demand, by an act which gives sufficient warning, or, where this is provided for by the contract, by the mere fact that the obligation is enforceable.

- If the debtor is in default, then the creditor is definitely entitled to the claim for damages in lieu of performance. There is no luck of provisions.
- Moreover, the French Civil Code (1804) did not possess such a procedure of "rescission of contract" as in the German law. There was no room for such a practice as in Japan.

How about the German law?

- The German Civil Code “BGB” (1898) also required a similar procedure of “***Verzug***” (Sec. 284; origin of มาตรา 204 ป.พ.พ.). However, the BGB (1898) clearly required *a final judgment* to switch the target of the claim from “performance” to “damages”:

Sec. 280 [impossibility of performance]

I. If performance has become impossible as a result of circumstances for which the debtor is responsible, the debtor has to compensate the creditor for the damage caused by the non-performance.

Sec. 283 [other cases of non-performance]

I. *If the debtor has been held liable with a final and binding judgment*, the creditor can set a reasonable period of time for performance to be effected with the declaration that he will refuse to accept performance after the expiry of the period. After the period has expired, the creditor may claim damages for non-performance if the performance is not effected in good time; the claim for fulfillment is excluded. […]

- This concept of Secs. 280 and 283 blocked a possible introduction of a provision like our “fictive” one to a suitable position.

Ignorance of the Japanese drafters

- The first ***Civil Code of Japan (1890)*** drafted by Prof. *Boissonade* had adopted the French concept of "*Putting the debtor in default*" (Art. 336, Law on Properties). However, the Japanese drafters removed it because "it would be too bothersome". Instead, they introduced a provision in a Common law style (Art. 412).
- In the part of "Reciprocal contract", they preferred the German concept of "*rescission of contract*" to the French "*resolutory condition*" because the German law does not require the judgment by the Court. But there was another problem (the selective scheme between damages and rescission). At last, they decided for the Swiss model. In this way, Art. 541 (origin of มาตรา 387 ป.พ.พ.) was introduced.
- In the part of "Effects of obligation", the Japanese drafters referenced Sec. 247 of the 1st Draft and Sec. 242 of the 2nd Draft for the BGB (Sec. 286 in the final version). Unfortunately, there was no provision like our "fictive" one. If the German Drafts had such a provision, maybe the Japanese drafters would have considered its adoption. As a result, they never recognized the problem of a missing provision.

(A-)symmetric Structure of the German provisions

- The German Civil Code (BGB) introduced two provisions for the statutory right of rescission in the part of “Reciprocal contract”; namely *Secs. 325 and Sec. 326*, and two provisions in the part of “Obligation of performance” stay in parallel to them; namely *Secs. 280 and 286*. Sec. 326 was an important model for the Japanese Art. 541. Consequently, *Sec. 286 must be the correct position for the missing provision*:

“Obligation of performance”		“Reciprocal contract”	
§ 275	*Release from obligation*: impossibility or inability for which the debtor is not responsible.	**§ 323**	*Release from obligation & loss of claim due to* impossibility: Nobody is responsible.
		§ 324	*Release from obligation & retaining claim due to* impossibility: The creditor is responsible.
§ 280	*Damages* due to impossibility for which the debtor is responsible.	**§ 325**	*Damages or* **rescission** *due to* impossibility: The debtor is responsible.
§ 286	*Damages* due to default	**§ 326**	Damages or **rescission** due to default

- This discussion is also relevant to the Thai law; the current ป.พ.พ. adopted the German provisions in the part of การไม่ชำระหนี้ (Thai arrangement) and the Thai law suffers also the same problem of a “missing provision”.

A missing paragraph in Sec. 286, BGB (1898)

- The missing provision must be located between Sec. 286 Paragraph 1 and 2:

"Obligation of performance"	"Reciprocal contract"
Sec. 286. [damages due to default] I. The debtor has to compensate the creditor for the damage caused by his default.	
Missing sec. [damages in lieu of performance] α. If the debtor does not perform his obligation, *the creditor may fix a reasonable period of time and demand performance within such period*; and if the obligation is not performed within that period of time, *the creditor may demand compensation for accruing damage instead of demanding performance*.	**Sec. 326. [rescission or damages due to default]** I. If one party to a reciprocal contract is in default with the performance charged to him, *the creditor can set a reasonable period of time for the performance to be effected* with the declaration that he will refuse to accept performance after the expiry of the period. *After the period has expired, the creditor may claim damages for non-performance or rescind the contract* if the performance is not effected in good time; the claim for fulfillment is excluded. […]
II. If *the performance is of no interest to the creditor as a result of the default*, the creditor may, by refusing the performance, claim damages for non-performance of the obligation. […]	II. If *the fulfillment of the contract as a result of the default is of no interest to the other party*, he shall be entitled to the rights specified in paragraph 1 above without the need to set a period of time.

Corresponding location in Thai and Japanese laws

ป.พ.พ. (1925)	Civil Code of Japan (1896)
มาตรา 215 เมื่อลูกหนี้ไม่ชำระหนี้ให้ต้องตามความประสงค์อันแท้จริงแห่งมูลหนี้ไซร้ เจ้าหนี้จะเรียกเอาค่าสินไหมทดแทนเพื่อความเสียหายอันเกิดแต่การนั้นก็ได้	**Art. 415 Sentence 1** If the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may demand compensation for accruing damage.
มาตรา 215 / α ถ้าลูกหนี้ไม่ชำระหนี้ เจ้าหนี้จะกำหนดระยะเวลาพอสมควรแล้ว บอกกล่าวให้ลูกหนี้ชำระหนี้ภายในระยะเวลานั้นก็ได้ ถ้าลูกหนี้ไม่ชำระหนี้ภายในระยะเวลาที่กำหนดให้ เจ้าหนี้เรียกเอาค่าสินไหมทดแทนเพื่อความเสียหายอันเกิดแต่การไม่ชำระหนี้ก็ได้	**Art. 415 α** If the debtor does not perform his obligation, the creditor may fix a reasonable period of time and demand performance within such period; and if the obligation is not performed within that period of time, the creditor may demand compensation for accruing damage instead of demanding performance.
มาตรา 216 ถ้าโดยเหตุผิดนัด การชำระหนี้กลายเป็นอันไร้ประโยชน์แก่เจ้าหนี้ เจ้าหนี้จะบอกปัดไม่รับชำระหนี้ และจะเรียกเอาค่าสินไหมทดแทนเพื่อการไม่ชำระหนี้ก็ได้	