Reformed Civil Code of Japan and its Problem

A sample: Rescission of Contract and Claim for Damages
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Shiori Tamura

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Introduction

1. In the past, I already reported two times about the process of the reform of law on obligations in Japan; firstly on 4 February 2014, secondly on 7 April 2015. Meanwhile, the reform bill was approved in the Parliament and enacted on 2 June 2017. It put once an end to the laud and overt opposition against the reform project. However, the opponent legal scholars have not resigned their criticism. It simply became latent.

   After the get-acquainted period of 3 years, the new law was put in effect on 1 April 2020. The leading professors of the reform project published their comprehensive textbooks and commentaries of the new obligations. On the other hand, the legal scholars on the opponent side seem to keep their silence and have not updated their publications. On 25 November 2022, one of the prominent legal scholars, Prof. *Minori Ishida*, finally published his comprehensive commentary to the law on obligations. He wrote in its foreword:

   はしがき（石田穣著『債権総論』令和４年１１月２５日）

   本書の執筆中に債権法の改正が行われた。当然のことながら、本書の主たる叙述の対象は改正された民法である。
   改正民法の研究をしてみて驚いたのは、問題点があまりに多いことである。それも、些細な問題点でなく、看過することのできない問題点である。改正民法が十分な基礎的研究と検討の上に立って行われたかは大いに疑問である。

   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. […]

   What happened? I would like to describe the really alarming situation of the reformed civil law in Japan with a small sample; namely non-performance and rescission of contract.

[A] Commission for the reform of law on obligations

A-1. Commission and Basic Plans

2. In 7 October 2006, a non-governmental group of the Japanese legal scholars published their "Mission Statement" and founded "***Japanese Civil Code (Law of Obligations) Reform Commission***". Since then, the Commission lead the comprehensive discussion towards the reform of the Civil Code (Law on Obligations) in Japan under the generous support by the "*Legislative Council of the Ministry of Justice*".

   The Commission, however, pursued the goal to establish a civil law system focused on contract law and proposed even departure from the German "*Pandects system*". The target of their criti-

cism was *the overwhelming influence of the German legal theories* on the Japanese civil law in the 20th century.

3. In 31 March 2009, the Commission published the "***Basic Plans for the Reform of the Law on Obligations (with brief comments on the proposals)***". This publication aroused a bitter controversy among the Japanese legal scholars and practicing lawyers.

A-2. Proposals about the effects of non-performance

4. This proposals had following three entries under the issue effects of "Non-performance"; namely, enforcement, damages, and rescission of contract

Proposals in "Basic Plans for the Reform of the Law on Obligations" (2009)

Book III. Obligations

Division I. Contract and Obligation in general

Title I. Obligation arising from contract

Subtitle IV. Effects of contract

Part II. Non-performance

Subpart I. Enforcement
Subpart II. Damages
Subpart III. Rescission

There were following proposals under the "**Subpart II. Damages**":

[3.1.1.62] (damages due to non-performance)

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

[3.1.1.63] (grounds for exemption of liability)

I. The debtor has no liability under [3.1.1.62] if the non-performance resulted from a circumstance (the burden of) which the debtor has not accepted in the contract.

II. The debtor has no liability under [3.1.1.62] if he is entitled to the right of defense under [3.1.1.54] or [3.1.1.55].

[3.1.1.64] (damages due to default)

The creditor may claim from the debtor compensation for *damages due to default* under the entitlement of [3.1.1.62], counting from the following time points:

1. if the fixed due date is assigned to the performance, from the time when the due date arrives,
2. if an uncertain due date is assigned to the performance, from the time when the debtor becomes aware of the arrival of that due date or when the creditor notifies the debtor of the arrival of that due date, or
3. if no due date is assigned to the performance, from the time when the debtor receives the request for performance.

[3.1.1.65] (damages in lieu of performance)

I. The creditor may claim from the debtor compensation for *damages in lieu of performance* under the entitlement of [3.1.1.62], if the following occurrences arise:
   1. if the performance becomes impossible, or the performance cannot be reasonably expected from the debtor in consideration of the intent of the contract;
   2. if the debtor definitively declares the intention to refuse performance, regardless of whether he declares the intention before or after the arrival of the due date;
   3. in case the creditor requests performance from the debtor with setting a reasonable period of time because the debtor is in default, if the debtor still does not perform his obligation within the period; or
   4. if the contract as a ground for the obligation is rescinded.

II. The extinctive prescription on the entitlement of damages in lieu of performance start counting from the time [...]

5. It would be easily imaginable that such proposals aroused quite intensive criticism from the opponent legal scholars and lawyers who intend to protect and maintain the traditional concept of obligations. But we do not go into details of such controversies. We would like to concentrate our attention on the following two points:

   A) The Commission proposed a clear distinction between "*damages due to default*" under [3.1.1.64] and "*damages in lieu of performance*" under [3.1.1.65];

   B) The Commission listed *four grounds for the entitlement to "damages in lieu of performance"*; namely (a) impossibility of performance, (b) refusal of performance, (c) non-performance after expiry of a period of time determined by the creditor, and (d) rescission of contract.

A-3. Rescission as a ground for "damages in lieu of performance"

6. Among these four grounds, the point (d) was especially problematic. However, this ground seemed to be quite important for the Commission because it was proposed as official adoption of a customary legal practice into a statutory provision. In the Court judgment in Japan, rescission of contract was widely acknowledged as a "switch of the mode of claim" from specific performance to damages in lieu of performance. In this sense, the exercise of the switch means *the creditor's free choice* between performance and damages.

A-4. Final composition of the provisions (2015) and its enactment (2017)

7. After the publication of the "Basic Plans", the proposals were rewritten several times due to the vehement criticism. On 31 March 2015, the final bill for the reform of the law on obligations was submitted to the deliberations in Parliament. In this final version, many reform points were removed, and the composition of the provisions was mostly brought back to the traditional styles. The reform proposals regarding the debtor's liability for non-performance described above resulted in the new Art. 415 as follows:

Art. 415 (compensation for damage 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.

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.

8. We concentrate our attention to the paragraph II. of the provision. The condition (3) under [3.1.1.65] in the "***Basic Plans***" of 2009 was removed, and only three issues are listed as grounds for "damages in lieu of performance"; namely impossibility of performance, refusal of performance, and rescission of contract. The condition (4) was slightly improved in the distinction between "contractual rescission" and "statutory rescission" due to non-performance, but its main idea was maintained unchanged.

A-5. Logical problem of the proposal

9. As already suggested above, however, the last point evokes a serious doubt about the logical consistency of this provision. It is quite doubtlessly acceptable that "impossibility of performance" and "refusal of performance" may be listed as additional conditions for the entitlement to "damages in lieu of performance". However, "rescission" itself is a "consequence" and "entitlement" due to the debtor's non-performance. It cannot be any "condition" for another entitlement due to the same ground (non-performance). Indeed, the entitlement to damages and the entitlement to rescission are two different consequence from the same reason. *Something is apparently wrong in the logical concept of this provision*.

   Despite of the strong objection from the side of the opponent legal scholars and practicing lawyers, the bill was approved in the Parliament and enacted on 2 June 2017. The reformed law on obligations was put into effect on 1 April 2020.

10. How could such a problem and confusion happen? In order to understand this point, we would like to look into the historical background of the Japanese legal practice and try to trace the cause and reason of the problem from the time of the drafting works of the German civil code (BGB).

[B] “Rescission of contract” as a switch of the mode of claims

B-1. A sample case: "Woody sandals" case (1946)

11. On 13 October 1946, soon after the end of the World War II, Mr X (buyer) and Mr Y (seller) concluded a sale contract of wood material for manufacturing Japanese woody sandals. According the contract, the purchase price was ¥25,000, and the wood should be delivered within one month. Mr X immediately paid ¥17,500 to Mr Y as an initial deposit. However, Mr Y did not delivered the wood even after the deadline has passed. Mr X made a request to Mr Y for deliver of the item, but unsuccessfully. For this reason, on 1 September 1947, Mr X rescinded the contract according to Art. 541, Japanese Civil Code (same as ป.พ.พ. มาตรา 387) and claimed payment of ¥67,500. This amount consisted of return of the purchase price paid (¥17,500) and compensation of damages for non-performance (¥50,000).

12. What was the ground for the amount of damages? At the time, the economic situation in Japan was quite critical and confused. The inflation rate was extremely high. The market price of the wood material sold between Mr X and Mr Y increased to over ¥80,000 at the time of the rescission. So long as Mr Y would refuse the delivery of the wood, Mr X would have to buy a similar item from another seller for ¥80,000. By simply calculating, the “*expectation interest*” for Mr X (expected economic benefits from the contractual transaction) mounted to ¥55,000; this is the difference between an *imaginary* payment of the purchase price and the value of an *imaginary* delivery of the item. Under such a circumstance, Mr X claimed ¥ 50,000 as *damages in lieu of performance* from Mr Y according to Art. 545 III. (same as ป.พ.พ. มาตรา 391 วรรค 4).

13. In the Court trial, there were 2 main controversial points; namely (a) category of damages – “usual damage” or “special damage” under Art. 416 (same as ป.พ.พ. มาตรา 222) – and (b) the base point in time for calculating amount of damages – at the time of deadline for performance or at the time of rescission –. On 18 December 1953, the Supreme Court in Japan judged the damages of Mr X as “usual damage” in the sense of Art. 416 I. because it was foreseeable for Mr Y that Mr X would suffer damages in such a high amount if he would continue to refuse the delivery in the actual economic situation. In regard to the base point in time for calculating amount of damages, the Supreme Court decided for the time of rescission with the following argument:

> **民集　第 7 巻 12 号 1446 頁**
> [...] 本件の如く売主が売買の目的物を給付しないため売買契約が解除された場合においては、買主は解除の時までは目的物の給付請求権を有し解除により始めてこれを失うと共に右請求権に代えて履行に代る損害賠償請求権を取得するものであるし、一方売主は解除の時までは目的物を給付すべき義務を負い、解除によつて始めてその義務を免れると共に右義務に代えて履行に代る損害賠償義務を負うに至るものであるから、この場合において買主が受くべき履行に代る損害賠償の額は、解除当時における目的物の時価を標準として定むべきで、履行期における時価を標準とすべきではないと解するのを相当とする。[...]
>
> **Law Reports of Civil Case judgments, Vol. 7 No. 12 Page 1446**
> [...] If a sale contract was rescinded because the seller has not delivered the purchased item to

> the buyer just like in this case, the buyer was entitled to claim for the delivery of the item until the time when he rescinded the contract. He has lost this entitlement through the rescission, instead, he was entitled to the claim for damages in lieu of performance. On the other hand, the seller was obligated to deliver the sold item until the time point of the rescission, he was released from the duty of delivery through the rescission, and instead, he was obligated to compensate damages in lieu of performance. Under such circumstances, it is reasonable to calculate the amount of damages based on the actual value of the item at the time point of the rescission, not at the due date of the obligation. […]

In such a way, the Supreme Court held that Mr X's entitlement to claim for delivery continued to exist until his rescission. This means that *his entitlement firstly transformed into claim for damages in lieu of performance at the time of rescission*.

B-2. Rescission for damages in lieu of performance, a customary law in Japan

14. This judgment shows us clearly that the Court in Japan acknowledged the rescission of contract under Art. 541 (same as ป.พ.พ. มาตรา 387) as *a proper method to switch from claim for performance to claim for damages in lieu of performance*. It is an effect of rescission which the original concept of Art. 545 (same as ป.พ.พ. มาตรา 391 except for วรรค 3) had not intended:

> **Art. 545 Civil Code of Japan (1896)**
>
> I. When one of the parties has exercised his right of rescission, each party is bound to restore the other party to his original state; but the rights of third persons cannot be injured.
> […]
> III. The exercise of the right of rescission does not affect a claim for compensation for damage.
>
> **มาตรา 391 ป.พ.พ. (1925)**
>
> I. เมื่อคู่สัญญาฝ่ายหนึ่งได้ใช้สิทธิเลิกสัญญาแล้ว คู่สัญญาแต่ละฝ่าย จำต้องให้อีกฝ่ายหนึ่งได้กลับคืนสู่ฐานะดั่งที่เป็นอยู่เดิม แต่ทั้งนี้จะให้เป็นที่เสื่อมเสียแก่สิทธิของบุคคลภายนอกหาได้ไม่
> […]
> IV. การใช้สิทธิเลิกสัญญานั้น หากระทบกระทั่งถึงสิทธิเรียกร้องค่าเสียหายไม่

In this sense, the function of rescission as a switch of the mode of claims has been established as *a customary law in the legal practices in Japan*. In this regard, we encounter following two theoretical questions.

[C] Question (1): Relation between rescission and damages

15. The first question is related to the *theoretical relationship between rescission and claim for damages*. It is generally acknowledged that rescission does not nullify effects of judicial acts performed on the basis of the contract. The contract simply looses its binding force; the parties may not claim performance from each other, they may refuse claim for performance from each other. However, in case they already performed wholly or partly their obligation, their performance still remains effective even after rescission, but the parties are obliged to perform addi-

tional acts to put other parties back to the initial state each other. There is no fundamental controversy in this point. On the other hand, positions differ in regard to the effectiveness of the entitlement to claim for damages due to non-performance.

C-1. Position (I)

16. The first position *fully confirms the effectiveness of the entitlement to claim for damages due to non-performance* just same as performance already done before rescission. Accordingly, the creditor may claim damages in lieu of performance ("expectation interest") together with the claim for "restitution to the original state". The French law takes this position. The Japanese law also adopted this position from the time of the enactment of the Civil Code (1896). *Prof. Ume*, one of the leading persons of the Code Investigation Commission, already wrote in his publication of 1910:

> **解除ノ効力**（梅謙次郎著『民法要義』巻之三債権篇 446 頁）
> [...] 當事者ノ一方カ其不履行ニ因リ相手方ニ損害ヲ生セシメタルトキハ必ス之ヲ賠償スヘキコトヲ第四百十五條ノ規定スル所ナリ而シテ是レ契約ノ解除ニ因リテ變更ヲ受クヘキ所ニ非サルナリ故ニ當事者ノ一方ノ不履行ニ因リテ相手者カ解除權ヲ行ヒタル場合ニ於テハ其解除ノ一般ノ效力ノ外相手方ヲシテ其不履行ヨリ生スル一切ノ損害ヲ賠償セシムルコトヲ得ヘシ [...]
>
> **Effects of rescission** (Kenjiro UME: *Principles of Civil Law,* Vol.3 Obligations, 1910, p.446)
> [...] If one of the parties to a contract caused damages to the other party due to his non-performance, Art. 415 in the Civil Code always obliges the damaging party to compensate the damages, this principle cannot be influenced by the circumstance that the suffering party rescinds the contract. Accordingly, in case one party fails to perform his obligation and the other party exercises his right to rescind the contract, besides the general effects of the rescission, this party is, of course, also entitled to the claim for compensation of all the damages occurring from the non-performance of that party [...]

C-2. Position (II)

17. The second position allows the entitled party only *the choice between rescission and damages in lieu of performance*. This is the position of the German law. In principle, however, the German law shares *the same understanding of the effects of rescission* with the French and Japanese law. In the drafting process of the BGB, the provision about the issue in the 1st and 2nd Drafts (1888, 1892) still had the phrases "*as if the contract had not concluded*", which has its origin probably in Art. 1183 French Civil Code (1804). These phrases, however, were suddenly removed from the provision in the 3rd Draft (1898). Only the sentences about the parties' duty to return the performance remained:

> **Sec. 298. [effects of rescission], 2nd Draft (1892)**
> I. If one party to a contract has reserved the right to rescind, the parties are, in case of exercise of the right, obligated to each other *as if the contract had not been concluded*. Each party is entitled to refuse the performance requested under the contract and is **obliged to return any performance received**. The value is to be remunerated for services rendered and for

the transfer of usage or the use of an item.

Sec. 341. [effects of rescission (1)], 3rd Draft (1898)

If a party of a contract has reserved the right to rescind, the parties are, in case of exercise of the right, **obliged to return the performance received to each other**. For services rendered and the transfer of usage of a thing their value is to be remunerated or, if the contract stipulates a consideration in money, this must be paid.

These phrases were removed probably because they could be misleading. This change suggests the basic understanding that the main effect of rescission consists NOT in "restitution of the original state", but simply in the new obligation to return the received performance. In this way, the German law confirms the effectiveness of the rescinded contract, especially *the performance already done*.

At the same time, it also implies the effectiveness of *consequences from non-performance*; the *entitlement to claim for damages due to non-performance remains alive*. However, the mainstream of the German civil law theory ("Romanist" lawyers) at the time strictly refused the combination of rescission and damages in lieu of performance because it could allow the parties to misuse the right of rescission and threaten the reliability of contract. The exercise of this right must be expensive and risky for the entitled party; he may rescind a contract only if he is ready to give up any chance to claim damages. As a result, the German law forced the entitled party to select *either rescission or damages*:

Sec. 326. [rescission or damages due to default], BGB (1898)

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. If the performance is only partially not effected within the period, the provision of Sec. 325 par. 2 applies mutatis mutandis.

However, this is not any theoretical consequence, but a decision in the legal policy. Indeed, the German Court strictly refused "damages in lieu of performance", but still allowed the entitled party to claim "damages besides performance", for instance, damages due to delay of performance or "extended damages" due to "positive breach of contract".

C-3. Position (III)

18. The third position regards a rescinded contract as a nullified one just similar to a contract of "*initial impossibility*"; namely a contract performance of which is already impossible at the time of its conclusion. Consequently, the entitled party may claim only "*negative interest*" or "*reliance interest*" besides return of the performance already done. For instance, the Swiss Law on Obligations (1911) takes this position:

Art. 109, Swiss Law on Obligations (1911)

I. A creditor rescinding a contract may refuse the promised counter-performance and demand the return of any performance already made.

II. In addition he may claim *damages for the lapse of the contract*, unless the obligor can prove that he was not at fault.

In any case, the third position would need a special provision which clearly restricts the target of claim for damages to "negative interest" in case of rescission due to non-performance. The Civil Code of Japan does not possess such a provision besides Art. 415. For this reason, the first position is the only reasonable answer to the question about the relation between rescission and claim for damages due to non-performance.

[D] Question (2): Switch of the mode of claims, Purpose of rescission

19. The second question is related to the reason or purpose of the rescission of contract. According to the first position described above, the party rescinding the contract is also entitled to claim for damages in lieu of performance. In this point, there seems be no essential difference between the claim for damages *with rescission* and *without rescission*. However, there must be a particular reason for the party *why he has to rescind the contract* instead of simply and directly claiming damages in lieu of performance.

D-1. Time point to switch the mode of claims

20. Indeed, it is a fundamental question when the creditor may claim damages in lieu of performance. If the performance has become wholly impossible, then it is quite doubtless that the creditor may immediately and directly claim damages in lieu of performance. In cases of other types of non-performance (delay, partial performance, imperfect performance), however, it would be a matter of legal policy to determine the point of time *when the creditor may be entitled to such a claim*.

21. In the case of the Civil Code of Japan (1896), the drafters apparently recognized no necessity to make such a decision. According to their vision, the debtor is immediately in default when the time for performance arrived (Art. 412), and the creditor may immediately claim compensation for damages (Art. 415). They did not distinguish among different types of non-performance and among different types of damages. They probably presumed that *the creditor may always claim performance and damages at the same time*:

Civil Code of Japan (1896)

Art. 412 [time of performance and default]

I. If there is a definite term for the performance of an obligation, the debtor is *in default from the time of the term arrives*.

[…]

Art. 415 [compensation for damages]

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. […]

D-2. Substantial damage to obligation

22. However, the situation of the creditor would be completely diverse according to kinds of damages; namely, if the non-performance does not directly affect the substantial content of the obligation, then the creditor may *simultaneously* claim compensation for such damages while he still continues to claim performance in a proper way. Accordingly, such damages can be called "*damages besides performance*". On the other hand, in cases where the non-performance seriously affects the substantial content of the obligation, then the creditor would be, *giving up his claim for performance*, forced to shift to the alternative claim. This alternative is called "*damages in lieu of performance*". Under such circumstances, we have to determine *the necessary conditions* for the shift of claims from performance to damages.

23. As already described above, the Japanese provisions about the effects of non-performance say nothing about this point. Fortunately, we can find a suitable provision in the part of the effects of "Reciprocal Contracts":

> **Art. 541**
> If one party does not perform his obligation, the other party may fix a reasonable period of time and demand performance within such period; and if the contract is not performed within that period of time, the other party may rescind it.

This is apparently the decisive reason why the creditor normally rescinds the contract in order to claim damages in lieu of performance; he has to do so because the Japanese Civil Code offers no comparable procedure in the part of general about the "Remedies for non-performance" (Arts. 412 – 422, Japanese Civil Code; มาตรา 203 – 225, ป.พ.พ.).

D-3. "Thought experiment" with a fictive provision

24. Under such circumstances, we could try to do a "thought experiment"; we would like to try imagine that *the Code would possess a provision similar to Art. 541 or มาตรา 387* as follows. If such a fictive provision could really exist, then the creditor would have often no need to rescind the contract:

> **Art. 415 α (fictive)**
> 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 215 / α** ***(please, imagine: ป.พ.พ. would have a following provision …)***
> ถ้าลูกหนี้ไม่ชำระหนี้ เจ้าหนี้จะกำหนดระยะเวลาพอสมควรแล้ว บอกกล่าวให้ลูกหนี้ชำระหนี้ภายในระยะเวลานั้นก็ได้ ถ้าลูกหนี้ไม่ชำระหนี้ภายในระยะเวลาที่กำหนดให้ เจ้าหนี้เรียกเอาค่าสินไหมทดแทนเพื่อความเสียหายอันเกิดแต่การไม่ชำระหนี้ก็ได้

25. What would happen if Mr X in our "Woody sandals" case had directly claim damages in lieu of performance under "Art. 415 α"? We try to compare its result with the real case as follows:

Mr X claims "Restitution" & "Damages"		
	Deposit:	- ¥17,500
Rescission under Arts. 541, 545	Restitution:	+ ¥17,500
Damages under Art. 415	Imaginary payment: Imaginary delivery in value:	- ¥25,000 + ¥80,000
Amount of claim	 (Mr X's claim in trial:	¥72,500 ¥67,500)

Mr X claims "Damages" only		
	Deposit:	- ¥17,500
Damages under Art. 415 α	Imaginary payment: Imaginary delivery in value:	- (¥25,000 - ¥17,500) = - ¥7,500 + ¥80,000
Amount of claim		¥72,500

As this simple calculation shows, the result is the same amount of ¥72,500. It means, the rescission of contract has no influence on the claim for damages in lieu of performance. Unfortunately, such a provision as Art. 415 α or มาตรา 215/α does not really exist. As a result, Mr X had to use Art. 541, however, not for the purpose to claim more amount of damage, but merely as a "*virtual switch of modes of claim*". At this moment, we encounter two more questions.

[E] Question (3): Genuine function of rescission

E-1. Traditional function

26. Firstly, what would be the genuine function of rescission if it has no substantial influence on claim for damages? Please, imagine that Mr X and Mr Y concluded, instead of a sale contract, an exchange between a used bicycle and wood material in value of ¥25,000. Mr X immediately delivered his used bicycle to Mr Y, but Mr Y refused delivery of wood material to Mr X. In between, the value of wood material increased up to ¥80,000, the value of the bicycle also moved up to ¥50,000. Mr X wished to have his bicycle returned. For this purpose, he decided to rescind the exchange contract and claimed the return of his bicycle. At the same time, he claimed payment of ¥30,000 as damages in lieu of performance:

Mr X claims "Restitution" & "Damages"		
	Delivery:	- his bicycle
Rescission under Arts. 541, 545	Restitution:	+ his bicycle
Damages under Art. 415	Imaginary payment: Imaginary delivery in value:	- ¥50,000 + ¥80,000
Amount of claim		his bicycle & ¥30,000

Mr X claims "Damages" only		
	Delivery:	- his bicycle
Damages under Art. 415 α	Imaginary payment: Imaginary delivery in value:	- ¥0 + ¥80,000
Amount of claim		¥80,000

In this way, the rescission can exercise its special function insofar as the delivered item has certain unique value for the entitled person. If one party to a reciprocal contract has already delivered something special for him, then he may claim the return of this item with rescission of

contract. In case one party performed his obligation but it consists in payment of money, the restitution of the payment could be useless because it would be set-off again by the (imaginary) payment in the calculation of damages in lieu of performance. Moreover, the claim for restitution could cause more harm than good because it makes the whole procedure unnecessarily complicated.

E-2. Modern functions

27. In the recent reform of the law on obligations in Germany and Japan, the claim for restitution had obtained another function; namely, (a) restitution of the performance already done *without claim for damages* and (b) *preventive measure* against foreseeable damages. For instance, the old provision Art. 543 of the Japanese Civil Code required the debtor's liability for impossibility of performance as a condition for rescission. For this reason, the creditor always rescind the contract and claimed damages due to non-performance at the same time. The reformed provision Art. 542, however, removed this condition:

Civil Code of Japan (1896)

Art. 543

If the performance has become wholly or partially impossible due to *a ground for which the debtor is responsible*, the creditor may rescind the contract.

The reformed Civil Code of Japan (2017)

Art. 541 Rescission with request for performance

If one party does not perform his obligation, the other party may fix a reasonable period of time and demand performance within such period; and if the contract is not performed within that period of time, the other party may rescind it; provided, however, that this does not apply if the non-performance of the obligations within the period is trivial in light of the contract and the common sense in the transaction.

Art. 542 Rescission without request for performance

I. In the following cases, the creditor may immediately rescind the contract without making the claim of performance with a period of time under Art. 541:
   1. if the performance of the whole of the obligation is impossible;
   2. if the debtor seriously declares his intention to refuse to perform the obligation in whole;
   3. if the performance of part of the obligation is impossible, or if the debtor clearly declares his intention to refuse to perform part of the obligation, and the purpose of the contract cannot be achieved by the performance of the remaining part of the obligation;
   4. if, due to the nature of the contract or a declaration of intention by the parties, the purpose of the contract cannot be achieved unless the obligation is performed at a specific time on a specific date or within a certain period of time, and the debtor fails to perform the obligation at that time or before that period of time expires; or
   5. besides the cases described above, if the debtor does not perform the obligation, and it is obvious that the debtor is unlikely to perform the obligation to the extent necessary to

achieve the purpose of the contract even if the creditor would have made the claim of performance with a period of time under Art. 541.

II. In the following cases, the creditor may immediately rescind a part of the contract without making the claim of performance with a period of time under Art. 541:
1. the performance of the part of the obligation is impossible; or
2. the debtor clearly declares his intention to refuse to perform the part of the obligation.

Art. 543 Non-performance due to the creditor's responsibility

If the non-performance of an obligation is due to *a ground for which the creditor is responsible*, the creditor may not rescind the contract under the preceding two Articles.

The cases described in Art. 542 (I) No.1, 3, 4, and 5, and (II) No.2 cover both of cases *with and without the debtor's liability*. In the latter cases, the creditor has no entitlement to claim for damages. So, the rescission apparently performs different functions as compared with classical cases. On the other hand, Art.543 excludes the rescission if the creditor himself is responsible for the ground of non-performance.

28. Also the modernized German Civil Code of 2001 removed the condition for the rescission regarding the debtor's liability as follows:

The final version of BGB (1898)

Sec. 325, BGB (1898)

I. If the performance due from one party to a reciprocal contract has become impossible *in consequence of a circumstance for which he is responsible*, the other party may *claim damages for non-performance or rescind the contract*. In the event of partial impossibility, if the partial fulfillment of the performance is of no interest to him, he is entitled to claim damages for non-performance of the entire obligation in accordance with Sec. 280 par. 2 or to rescind the entire contract. Instead of the claim for damages and the right of rescission, he can also exercise the rights for the case of Sec. 323.
[...]

The modernized BGB (2001)

Sec. 323 Rescission due to non-performance or performance not in conformity with the contract

I. If, in the case of a reciprocal contract, the debtor does not effect the performance in due time, or does not effect it in conformity with the contract, then *the creditor may rescind the contract*, if he has unsuccessfully set a reasonable period for performance or cure.

II. Setting a period of time is not necessary if
1. the debtor seriously and definitively refuses performance,
2. the debtor does not effect performance by a date specified in the contract or within a specific period and the creditor has made it clear in the contract that his interest in performance hinges on performance been effected in good time, or
3. there are special circumstances which, when the interests of both parties are weighed up, justify immediate rescission.

III. If the nature of the breach of duty is such that setting a period of time is out of the question, a warning notice shall be given instead.
IV. The creditor may rescind the contract before performance becomes due if it is obvious that the requirements for rescission will be met.
V. If the debtor has performed in part, the creditor may rescind the whole contract only if he has no interest in partial performance. If the debtor has not performed in conformity with the contract, the creditor may not rescind the contract if the breach of duty is trivial.
VI. *Rescission is excluded if the creditor is solely or very predominantly responsible for the circumstance* that would entitle him to rescind the contract or if the circumstance for which the debtor is not responsible occurs at a time when the creditor is in default of acceptance.

Sec. 325 Damages and rescission

The right to demand damages in the case of a reciprocal contract is not excluded by rescission.

Sec. 326 Release from duty of counter-performance and rescission in case the duty of performance is excluded

[...]
V. If the debtor does not have to perform according to Sec. 275 pars. 1 to 3 [=impossibility and other equivalent reasons], *the creditor may rescind the contract*; Sec. 323 applies to the rescission mutatis mutandis with the proviso that it is not necessary to specify a period of time.

The cases described in Sec. 323 (II) No. 2 and 3, (IV), (V), and Sec. 326 (V) apparently cover both of cases *with and without the debtor's liability*. On the other hand, Sec. 323 (VI) excludes rescission if the creditor himself is responsible for the ground of non-performance.

[F] Question (4): Cause of the lack of the provision

F-1. Ignorance of the Japanese drafters about the question

29. Now, we would like to consider the next question about the cause or reason *why the Civil Code of Japan (1896) did not possess any suitable provision to "switch the mode of claims"* like the fictive "Art. 415 α" discussed above. As already mentioned above (Paragraph 21 above), the drafters in the "Code Investigation Commission" did not recognize any necessity to introduce such a provision to switch the mode of claims; they thought that the creditor always claim performance and compensation for damages at the same time.

So, we would like rather to change our perspective to the question. Perhaps, it was an accidental event that they decided to introduce Art. 541 after the models of the German and Swiss laws. Speaking generally, however, they did not treat the German law (the 1st and 2nd Draft BGB) seriously as a candidate for the part "Effects of Obligations" of the Civil Code of Japan. The German concept of obligations was absolutely unacceptable for them because the German law strictly refused the creditor's entitlement to claim for damages so long as the performance is possible. The French concept of obligations was much better for them, but just for the same rea-

son, they rejected also the French concept of "*putting in default*" under Art. 1146, French Civil Code. For the Japanese drafters, the creditor should be entitled to claim for damages immediately after the obligation becomes due *without any necessity of formal procedure at the Court* (☛ Art. 412, Civil Code of Japan).

F-2. Adoption of the German and Swiss concept of rescission

30. In the part of "Rescission of contract", however, the position of the French and German laws was turned over. Art. 1184 (III), French Civil Code, required the formal procedure at the Court to exercise the right of rescission. Apparently, the French lawyers had concerned about the risk of misuse of this right. For this reason, they decided to put the exercise of this right under the control by the Court. In Germany, the mainstream of the legal scholars rejected the right of rescission for a long time. In the middle of the 19. century, they gradually accepted the "*contractual right of rescission*". Then in the discussion about the "General German Commercial Code (1861)", the German lawyers eventually began to develop their own concept of "*statutory right of rescission*" based on the French concept, but they found that the control by the Court could make the right of rescission completely useless. For this reason, they decided to create their concept of right of rescission as a "Gestaltungsrecht (dispositive right)"; it means, the creditor may declare rescission of contract by himself and it becomes immediately effective. The 1st Draft for the German Civil Code (1888) formally introduced this concept (Secs. 426 – 436):

> **Sec. 426. [declaration of rescission], 1st Draft BGB of 1888**
> I. If a contracting party has reserved the right to rescind the contract, the rescission is complete when the entitled party declares the rescission to the other party.
> II. The declaration is irrevocable.

In regard with the "statutory right of rescission", the German legal scholars distinguished between the impossibility of performance and other types of non-performance. In case of the impossibility, they allowed the creditor himself to declare rescission of contract (Sec. 369 I.). However, in case of other types of non-performance, the German legal scholars decided put the exercise of the same right under the control by the Court (Sec. 369 II.); the creditor had to sue the debtor at the Court. If he obtained *the final judgment for the debtor's liability*, then he was entitled to rescission after the expiry of a reasonable period of time for performance. Moreover, they rejected the combination of rescission and damages. This restriction was their legal policy to prevent the misuse of the right of rescission.

31. For the Japanese drafters, the German provision Sec. 426 was welcoming. So, they decided to adopt it (☛ Art. 540, Civil Cod of Japan). However, the German concept of "statutory right of rescission" (Sec. 360) was unacceptable for them. Instead of the German model, they followed the Swiss model:

Swiss Federal Code of Obligations (1881)

Art. 122. [warning notice in case of debtor's default]

If, in the case of reciprocal contracts, one party is in default, the other party is entitled to *set a reasonable period of time for subsequent performance* or to have it set by a competent authority with the warning that *the contract will be rescinded at the end of this period*.

Art. 123. [rescission in a "fixed business"]

If it results from the contract that, according to the intention of the parties, the obligation was to be performed at a fixed time, neither sooner nor later, or within a fixed period and not later, the party towards whom the obligation is not discharged at the agreed time or within the required period, *may leave the contract without further formality*.

Art. 124. [effects of rescission]

In the cases provided for in Arts. 122 and 123, the party leaving the contract may *demand the restitution of what it has paid* and, in addition, *damages if it proves that the other party is at fault*.

These three Swiss provisions were the main models for the Arts. 541, 542, and 545, Civil Code of Japan (1896). Arts. 543 (rescission due to impossibility) and 544 (plurality of persons in a party) were composed again after German models because the Swiss Code did not possess such provisions. This was the background and process how the Japanese provision Art. 451 was established. The 2nd Draft BGB (1892) introduced also a new provision (Sec. 277) which had a similar content to the Swiss Art. 122. However, the Japanese drafters seemed to have no interest in it any more. This German provision was not cited in the Minutes of the "*Code Investigation Commission*" of 23 April, 1895.

F-3. German legal policy, rigid restriction of the creditor's choice

32. Now, we return to the original question about the lack of a provision for switch of the mode of claims. It would be virtually imaginable that the Japanese drafters had considered such a provision if the Drafts BGB would have possessed such one. In reality, however, it did not exist in all the three Drafts BGB, but why?

The mainstream of the German legal scholars had not only put *the right of rescission* under the control by the Court, but they required the creditor to sue the debtor at the Court also for *the claim for damages*. If he obtained *the final judgment for the debtor's liability*, then he was entitled to claim damages in lieu of performance after the expiry of a reasonable period of time for performance:

1st Draft BGB (1888)

Sec. 240. [damages due to impossibility]

I. If the debtor cannot fulfill his obligation because the performance charged to him has become wholly or partially impossible as a result of a circumstance for which he is responsible, the debtor is obliged to compensate the creditor for the damage caused by the non-performance. […]

Sec. 243. [claim of damages after final judgment]

The provisions of Secs. 240 – 242 [claim for damages due to impossibility] apply mutatis mutandis if the debtor, *after having been held liable for non-performance with a final and binding judgment*, fails to perform within a reasonable period of time, which is to be determined by the creditor. The determination of the period must show that the creditor no longer wants performance after the period has expired.

In case of impossibility of performance (Secs. 240 – 242), of course, the creditor may immediately claim damages in lieu of performance without any formal procedure at the Court. In case of default, however, the creditor has to sue the debtor at first. After the final judgment, he may start the procedure to switch the mode of claims from performance to damages, and he would have to sue the debtor once again if the debtor refuses to pay damages. It was the result of the legal policy of the mainstream of the German legal scholars at the time. They tried to strictly control the shift of the mode of claims in order to keep the effectiveness of obligations or contracts as long as possible. This provision was maintained also in the 2nd and 3rd Drafts and resulted in Sec. 283, the final version of BGB (1898):

The final version of BGB (1898)

Sec. 280. [damages due to impossibility]

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. [claim of damages after final judgment]

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. The obligation to pay damages does not arise if performance has become impossible as a result of a circumstance for which the debtor is not responsible.

[...]

However, it is completely useless because nobody would like to sue the debtor two times for damages. Moreover, the existence of this provision *completely blocked the chance to introduce a provision like our fictive one as an effect of default*. This is the reason why *even the German Civil Code had to suffer the lack of the provision for switch of the mode of claims*. In any way, it was eventually removed from the "**Modernized BGB**" (2001).

F-4. Where could a missing provision be located in the German law?

33. At last, we would like to try another "thought experiment"; namely, *where could our fictive provision be located in the final version of BGB (1898) if Sec. 283 would not exist?* In order to determine the location, we have to examine the "symmetric structure" between the provisions in "*Obligation of performance*" and in "*Reciprocal contract*" as follows:

Table 1: (A)symmetric structure of the provisions on non-performance

"Obligation of performance"		"Reciprocal contract"	
§§ **275**, 281	*Release from obligation*: impossibility or inability for which the debtor is not responsible	§ **323**	*Release from obligation & loss of claim*: impossibility for which nobody is responsible
		§ **324**	*Release from obligation & retaining claim*: impossibility for which the creditor is responsible
§§ **280**, 281	*Damages* due to impossibility for which the debtor is responsible	§ **325**	*Damages or rescission*: impossibility for which the debtor is responsible
§ **284**	Default of the debtor		
§ **286**	*Damages* due to default	§ **326**	*Damages or rescission* due to default

This table shows clearly that Sec. 286 (claim of damages due to default) and Sec. 326 (claim of damages or rescission due to default) stay in a corresponding relation to each other. Accordingly, we will examine the contents of these two provisions and compare them with each other as follows:

Table 2: Corresponding relation and "Asymmetry" in BGB (1898)

"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.	
[Blank]	**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. If the performance is only partially not effected within the period, the provision of Sec. 325 par. 2 applies mutatis mutandis.
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. The provisions of Sec. 346 to 356 regarding the contractual right of rescission apply mutatis mutandis.	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.

Apparently, Sec. 286 does not possess any provision which should correspond with Sec. 326 I. while Sec. 286 II. corresponds with the content of Sec. 326 II. Consequently, we reach the final conclusion that *this position between Sec. 286 I. and II. could be the location for the missing provision*.

F-5. Corresponding location in the Japanese and Thai laws

34. This location, of course, just corresponds with the position of our fictive provisions in the Civil Code of Japan (1896) and in the ป.พ.พ. (1925) as follows:

Table 3: Location of the fictive provision in the Japanese and Thai Code

Civil Code of Japan (1896)	ป.พ.พ. (1925)
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** เมื่อลูกหนี้ไม่ชำระหนี้ให้ต้องตามความประสงค์อันแท้จริงแห่งมูลหนี้ไซร้ เจ้าหนี้จะเรียกเอาค่าสินไหมทดแทนเพื่อความเสียหายอันเกิดแต่การนั้นก็ได้
Art. 415 α (fictive: 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.	**มาตรา 215 / α (fictive)** ถ้าลูกหนี้ไม่ชำระหนี้ เจ้าหนี้จะกำหนดระยะเวลาพอสมควรแล้ว บอกกล่าวให้ลูกหนี้ชำระหนี้ภายในระยะเวลานั้นก็ได้ ถ้าลูกหนี้ไม่ชำระหนี้ภายในระยะเวลาที่กำหนดให้ เจ้าหนี้เรียกเอาค่าสินไหมทดแทนเพื่อความเสียหายอันเกิดแต่การไม่ชำระหนี้ก็ได้
	มาตรา 216 ถ้าโดยเหตุผิดนัด การชำระหนี้กลายเป็นอันไร้ประโยชน์แก่เจ้าหนี้ เจ้าหนี้จะบอกปัดไม่รับชำระหนี้และจะเรียกเอาค่าสินไหมทดแทนเพื่อการไม่ชำระหนี้ก็ได้
Art. 415 Sentence 2 The same applies when performance has become impossible owing to a cause for which the debtor is responsible.	**มาตรา 218** I. ถ้าการชำระหนี้กลายเป็นพ้นวิสัยจะทำได้เพราะพฤติการณ์อันใดอันหนึ่งซึ่งลูกหนี้ต้องรับผิดชอบไซร้ ท่านว่าลูกหนี้จะต้องใช้ค่าสินไหมทดแทนให้แก่เจ้าหนี้เพื่อค่าเสียหายอย่างใดๆ อันเกิดแต่การไม่ชำระหนี้นั้น [...]

F-6. Solution of the problem in the modernized German law (2001)

35. In the “Modernized BGB (2001)”, as mentioned above, the defective Sec. 283, BGB (1898), was finally removed. In return, a new provision Sec. 281 I. was introduced, which exactly corresponds with Sec. 323 I. in the part of “Reciprocal contract” as follows:

Table 4: Corresponding relation and “Symmetry” in the modernized BGB (2001)

“Obligation of performance”	“Reciprocal contract”
Sec. 280 Damages for breach of duty I. If the debtor breaches a duty arising from the obligation, the creditor can demand compensation for the damage caused thereby. This does not apply if the	

debtor is not responsible for the breach of duty. II. Damages for delay in performance may be demanded by the creditor only subject to the additional requirement of Sec. 286. III. Damages in lieu of performance may be demanded by the creditor only subject to the additional requirements of Secs. 281, 282 or 283.	
Sec. 281 Damages in lieu of performance for non-performance or failure to effect performance as owed	**Sec. 323 Rescission due to non-performance or performance not in conformity with the contract**
I. Insofar as *the debtor does not effect performance in due time or does not effect performance as owed*, the creditor may, subject to the requirements of Sec. 280 par. 1, demand damages in lieu of performance, if *he has unsuccessfully set a reasonable period for the debtor for performance or cure*.	I. If, in the case of a reciprocal contract, *the debtor does not effect the performance in due time*, or *does not effect it in conformity with the contract*, then the creditor may rescind the contract, if *he has unsuccessfully set a reasonable period for performance or cure*.
If *the debtor has performed only in part*, the creditor may demand damages in lieu of complete performance only if he has no interest in the partial performance. If *the debtor has not effected performance as owed*, the creditor may not demand damages in lieu of performance if the breach of duty is trivial.	V. If *the debtor has performed in part*, the creditor may rescind the whole contract only if he has no interest in partial performance. If *the debtor has not performed in conformity with the contract*, the creditor may not rescind the contract if the breach of duty is trivial.
II. *Setting a period of time is not necessary* if the debtor seriously and finally refuses to perform or if there are special circumstances which, after weighing up the interests of both parties, justify the immediate assertion of a claim for damages.	II. *Setting a period of time is not necessary* if 1. the debtor seriously and definitively refuses performance, 2. the debtor does not effect performance by a date specified in the contract or within a specific period and the creditor has made it clear in the contract that his interest in performance hinges on performance been effected in good time, or 3. there are special circumstances which, when the interests of both parties are weighed up, justify immediate rescission.
III. If *setting a period of time is out of the question due to the nature of the breach of duty*, a warning notice shall be given instead.	III. If *the nature of the breach of duty is such that setting a period of time is out of the question*, a warning notice shall be given instead.
	IV. The creditor may rescind the contract before performance becomes due if it is obvious that the requirements for rescission will be met.
IV. The claim for performance is excluded as soon as the creditor has demanded damages in lieu of performance.	
	VI. Rescission is excluded if the creditor is solely or very predominantly responsible for the circumstance that would entitle him to rescind the contract or if the circumstance for which the debtor is not responsible occurs at a time when the creditor is in default of acceptance.

V. If the creditor demands damages in lieu of complete performance, the debtor is entitled to claim the return of what he has already performed in accordance with Secs. 346 to 348.	

In the modernized German law, the old provision about damages due to default (Sec. 286) was improved as a general clause about damages due to "*breach of duty*" – "non-performance" and "breach of duty of protection" – and put to the position of the old provision about damages due to impossibility (Sec. 280). The provision about impossibility itself was moved to Sec. 283 as one of three grounds for damages in lieu of performance. The newly introduced provision for the switch of the mode of claims was located as the first ground for damages in lieu of performance (Sec. 281).

36. This order of Secs. 280, 281, and 283 in the modernized BGB (2001) shows a certain similarity to the order in the Civil Code of Japan (Arts. 415 Sentence 1, 415 α, and 415 Sentence 2) or in the Thai code (มาตรา 215, 215 / α, 216, and 218). Such a phenomenon of "*convergency*" of the three laws would suggest that *the new provision Art. 415 II. No. 3 in the reformed Civil Code of Japan (2017) is a wrong answer to the question of a "missing provision"*, and that the abandoned solution was rather a correct answer.

Summary and Conclusion

37. As the "Code Investigation Commission" worked on the draft Civil Code of Japan, the Japanese drafters did not clearly distinguish between "damages besides performance" and "damages in lieu of performance". For this reason, they did not recognize the necessity of a provision for the switch of the mode of claims. The creditor may always claim performance in a proper way together with compensation for "*damages besides performance*". On the other hand, the creditor must once give up his claim for performance in order to claim compensation for "*damages in lieu of performance*". However, the Civil Code of Japan (1896) did not offer any genuine procedure for the switch of the mode of claim.

38. Fortunately, the Japanese drafters adopted the newly developed concept of "Rescission of contract" from the German and Swiss laws. In accordance with the French and German theory of rescission at the time, the Japanese drafters accepted the understanding that the rescission would not nullify the contract. Consequently, the creditor's claim for damages due to non-performance also remains alive together with the effectiveness of the rescinded contract. According to this understanding of the drafters, the rescission of contract and the claim for damages in lieu of performance are completely independent two issues. In case of non-performance, therefore, the creditor may rescind the contract and claim damages in lieu of performance at the same time. Under such circumstances, a certain legal practice was established in Japan; namely, the creditor exercised the right of rescission in order to shift the target of his claim from specific performance to damages in lieu of performance. However, switching the mode of claims is not a genuine function of the rescission. Rather, it was a provisional solution. The true cause of the

problem was a lack of a proper provision for this function in the part of "Effects of obligations".

39. As the discussion about the civil code reform began in Japan, the so-called "*Japanese Civil Code (Law of Obligations) Reform Commission*" proposed to clearly distinguish between "damages due to default" and "damages in lieu of performance". For the claim of the letter kind of damages, the Commission listed four conditions; namely (a) impossibility of performance, (b) clear and definitive refusal of performance, (c) non-performance after expiry of a period of time determined by the creditor, and (d) rescission of contract. The condition (c) was, as already described above, a correct solution of the true cause of the difficulty in the legal practice.

    On the other hand, the condition (d) was quite questionable. The Commission wanted to legalize the customary practice and formally introduce into the Civil Code. However, this practice was a mere "provisional solution" or "emergency escape", it did not solve the true problem.

    Moreover, the condition (d) was seriously affected by several logical fallacies. Firstly, "rescission" and "damages in lieu of performance" are two different consequences from non-performance of obligation. They are completely independent each other. Therefore, they may not be combined in a logical relation between a "condition" and a "result". "Damages in lieu of performance" is not a result of "rescission", but a consequence from non-performance.

    Secondly, "rescission" and "damages in lieu of performance" are not two occurrences which would always take place simultaneously. According to the new concept of rescission, the creditor may rescind the contract even if the debtor is not responsible for the cause of non-performance. In such a case, the creditor may rescind the contract, but he is not entitled to claim for damages in lieu of performance.

    In our eyes, therefore, the points (a), (b), and (c) are correct and reasonable conditions for claim of "damages in lieu of performance". Especially, the point (c) was an effective measure against the real defect in the Civil Code of Japan (1896). On the other side, the point (d) is simply wrong and unreasonable. The Commission, however, removed the point (c) and preserved the points (a), (b), and (d) in its final draft of 2015!! This error is seriously affecting the plausibility and reliability of the reformed Civil Code of Japan (2017).

40. In the codification process of the German Civil Code, the drafters possessed a precise understanding about the issues regarding "rescission" and "damages in lieu of performance". However, their extremely conservative consideration in the legal policy prevented an effective solution of the problem. In the modernized German Civil Code of Germany (2001), the defect in the Civil Code ("asymmetry" in the provisions) was effectively removed.

    In the field of "Remedies for non-performance", accordingly, we would reach the conclusion that the modernized German Civil Code offers a much better and more comprehensive model for the possible reform of the Thai law than the reformed Japanese Civil Code.