"Modernization of Law on Obligations" in Germany (1984 –)

- ***Motive 1***: Harmonization of civil law among EU-member countries
- ***Motive 2***: Integration of Judge-made-laws into the Code
- Commission for the Revision of law on obligations in 1984
- Final Report of the Commission published in 1992.
- Draft Law for Modernization of Law on Obligations in May 2001
- The modernized Law on Obligations was put into effect in January 2002

Main Subjects of the “Modernization of Law on Obligations” in Germany

- Modernization of regulation on ***Prescription***
- Integration of special laws for ***Consumer Protection***
- New concepts of the ***Remedies for Non-performance of obligations***
- Reform of law on Sale and abolition of ***special liability for defects*** in “Sale Contract” and “Contract for Work”

  … and so on

Reform Project of 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, an non-governmental group of legal scholars and lawyers —"Investigating Committee for the Reform of Law on Obligations"— was organized in October 2006.
- The Committee published the "***Basic Plans for the Reform of Law on Obligations with the Main Proposals***" in March 31, 2009.

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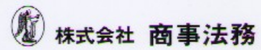
債権法改正の基本方針

民法（債権法）改正検討委員会 編



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-oriented 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 for the Reform of Law on Obligations”

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. Acknowledgement 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. ***Abolishment 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 Basic Rule of Liability for Damages by "Investigating Committee"

- The basic intention of the Committee in this issue consists in declaration of liability for damages as "***Contractual liability***".

[3.1.1.62] (Compensation for non-performance)

When the debtor does not perform his obligation, the creditor may demand compensation for damages resulting from the non-performance.

[3.1.1.63] (Exemption of liability)

1. The debtor is not liable for damages arisen from his non-performance due to matters for which *he has beard no risk in the contract.*
2. The debtor is not liable for damages when he has a statutory right of defense.

Criticism against the Proposals presented by "Investigating Committee" 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***".
- It insists on maintaining the current "***Pandects System***".

Counter-proposal for Basic Rule of Liability for Damages by "Society for Civil Code Reform"

- Its basic intention consists in declaration of liability for damages as "***Statutory liability***".
- 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 debtor is not responsible for the cause of the non-performance*.

— Alternative Proposal —

Art. 342 (Compensation for non-performance)

1. 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 or if the performance becomes impossible, *unless the debtor is not responsible for the cause of the non-performance*.

2. A prior agreement to exempt the debtor from liability for intentional non-performance is void.

Provisional Proposal for the Reform of Law on Obligations by "Legislative Council"

- Due to hard criticism against "Basic Plans", the Legislative Council of the Ministry of Justice published "***Provisional Proposals for the Reform of Law on Obligations***" in March 2013.
- In regard to the liability for non-performance, the Legislative Council accepts the *responsibility of the debtor* as a requirement for liability and the *distinction between contractual and non-contractual obligations*.

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

1. When 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* when the non-performance is caused due to *matters for which he is not responsible* 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* when the non-performance is caused due to *matters for which he is not responsible* in consideration of the reason of the obligation and other related circumstances.

The controversy continues …

Tentative Outline for the Reform of Law on Obligations by "Legislative Council"

- "***Provisional Proposals 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 for the Reform of Law on Obligations***".
- On March 31, 2015, the current Cabinet approved this "***Tentative Outline***" and decided to prepare a motion to the Parliament for drafting work of the amendments to the Civil Code in accordance with it.
- In compare to the initial "***Basic Plans***" (2009), the scope of the reform is tremendously reduced to the minimal contents. Even so many controversial parts have been already deleted from the reform plans,, the "***Tentative Outline***" covers still 39 titles (more than 200 issues) as follows:

Book I

1. Public order and good moral
   ความสงบเรียบร้อย หรือศีลธรรมอันดีของประชาชน
2. Mental capacity
   (ความสามารถของบุคคลที่จะเข้าใจสภาพ)
3. Declaration of intention
   การแสดงเจตรา
4. Representation
   ผู้แทน
5. Nullity and voidability
   โมฆะกรรมและโมฆียะกรรม
6. Condition and limit of time
   เงื่อนไขและเงื่อนเวลา
7. Prescription
   อายุความ

Book III

8. Subjects of claim
   วัตถุแห่งหนี้
9. Statutory interest rate
   อัตราดอกเบี้ยไว้โดยบทกฎหมาย
10. Claim for performance
    สิทธิเรียกร้องการชำระหนี้
11. Damages due to non-performance
    ค่าเสียหายเพราะการไม่ชำระหนี้
12. Rescission of contract
    การเลิกสัญญา
13. Risk-bearing
    (ภาระที่จะต้องรับความเสียหาย?; มาตรา ๓๗๐)
14. Creditor's delay in acceptance
    ผิดนัดในการรับชำระหนี้
15. Creditor's subrogation right
    การใช้สิทธิเรียกร้องของลูกหนี้
16. Creditor's right to rescission of fraudulent act
    เพิกถอนการฉ้อฉล
17. Plurality of creditors or debtors
    ลูกหนี้และเจ้าหนี้หลายคน
18. Guarantee obligation
    ค้ำประกัน
19. Assignment of claims
    โอนสิทธิเรียกร้อง
20. Bills
    ตั๋วเงิน
21. Assumption of debts
    (การรับหนี้)
22. Transfer of contractual status
    (โอนฐานะแห่งสัญญา?)
23. Fulfillment of obligation
    การชำระหนี้

24. Set-off
หักกลบลบหนี้

25. Novation
แปลงหนี้ใหม่

26. Basic principles of contract
(บทเบ็ดเสร็จทั่วไปแห่งสัญญา?)

27. Formation of contract
ก่อให้เกิดสัญญา

28. Standard business terms
(ข้อตกลงทางธุรกิจแบบมาตราฐาน?)

29. Contract to the benefit of third parties
(สัญญาเพื่อผลประโยชน์แก่บุคคลภายนอก?)

30. Sale contract
ซื้อขาย

31. Gift
ให้

32. Loan for consumption
ยืมใช้สิ้นเปลือง

33. Lease
เช่าทรัพย์

34. Loan for use
ยืมใช้คงรูป

35. Contract for work
จ้างทำของ

36. Mandates
ตัวแทน

37. Employment contract
จ้างแรงงาน

38. Deposits
ฝากทรัพย์

39. Partnership contracts
(?)

Integration of “Consumer Protection” in “Tentative Outline” (2014)

(I). Mental (In)Capacity

- In 2000, the articles on the issue “Incapacity (คนไร้ความสามารถ)” and “Quasi-Incapacity (คนเสมือนไร้ความสามารถ”(Art. 7 – 21) were once throughout reworked for the benefit of aged persons, and a new concept “***Guardianship Contract***” was introduced. According to this concept, an adult person may assign his/her guardian in near future by contract before his/her mental capacity begin to be weakened due to Dementia or other mental illnesses like Alzheimer's disease. However, the number of persons who will really take advantage of this system is still quite limited.
- On the other hand, the number of highly aged persons who suffer damages from unjust business practice is rapidly increasing. In face of this situation, “***Tentative Outline***” proposes to introduce a general article as follows:

(Mental Capacity)

A juristic act is null and void if the acting party has lost his/her mental capacity at the time of the act.

Integration of "Consumer Protection" in "Tentative Outline" (2014)

(II). Standard Business Terms

- In our everyday life, we conclude so many contracts but quite seldom negotiate with business operators for particular terms. Business operators normally ask us to sign in a already well-formulated document of a contract. Such contents of a contract are called "Standard Business Terms". However, consumers may be quite disadvantaged in such contracts, and business operators may misuse their superior position to obtain unjust profits.
- For this reason, "***Tentative Outline***" proposes to introduce basic rules on effects of these terms as follows:

(Agreement in terms)

If the parties to a transaction have agreed to apply standard business terms to the contract between them, they deem to have agreed in each of such business terms.

(Exclusion of unjust terms)

If certain business terms prepared by one party to the transaction would put limitation to rights of the other parties or impose harder

liabilities on the other parties against the generally accepted common idea in business or against the bona-fide principle, then such terms should be excluded from the effective scope of the agreement.

(Duty of disclosure)

The party to a transaction who prepares the standard business terms owes the duty to disclose their contents to the other party on its demand without undue delay.

(Modification of standard business terms)

If already provided in the standard business terms themselves, the party to a transaction who prepares them may modify their contents in following cases. The other parties deem to have agreed in such a modification without any actual negotiation with them:

a. in cases where the modification would produce benefit to the other parties in general, or

b. in cases where the modification would not be contrary to the purpose of the contract, and such a modification would be necessary, adequate, and reasonable in consideration of whole the circumstances.

Integration of "Consumer Protection" in "Tentative Outline" (2014)

(III). Remedies for faults in delivered goods

- Traditionally, the seller of goods owed a special liability for deficits or defects in delivered goods to the buyer, namely "Seller's warranty against defects (ความรับผิดเพื่อชำรุดบกพร่อง)". This special liability (with a short period of prescription of 1 year), however, competes with the general liability for non-performance (with a period of prescription of 10 years).
- In oder to clear up such a confusion, "***Tentative Outline***" proposes to abolish this short period of prescription for seller's warranty, and to integrate these special and general liabilities together.
- Furthermore, the buyer may demand several new types of remedy for defects from the seller: namely, cures of faults, replacement with faultless goods, and reduction of purchase money.
- In parallel, the traditional remedies for non- or faulty performance are still available, namely damages and rescission of the contract.

(Seller's duty of cures for defects)

If the goods delivered by the seller do not satisfy the type, quality, or quantity specified in the contract, then the buyer may demand cures for such faults, replacement with faultless goods, or additional delivery for the deficit.

(Reduction of purchase money)

In cases where the seller does not deliver goods of the type, quality, or quantity specified in the contract, if the buyer demands cures for the faults of the delivered goods, specifying a reasonable period, and no cures are tendered during that period, the buyer may demand a reduction of the purchase money in proportion to the extent of the faults.

(Damages and rescission of the contract)

A demand for cures for faults in delivered goods or demand for the reduction in the purchase money shall not preclude the buyer from making a claim for damages or rescission of the contract.

Article on Liability for non-performance proposed by "Legislative Council"

- In regard to the liability for non-performance, the Legislative Council proposed a following amendment to the current Art. 415. This proposal seems to be very similar to the "Alternative Proposal" by "Society for Civil Code Reform" (2009). Basically, the principle "***No liability without responsibility***" will be maintained:

(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 obligation or if the performance becomes impossible, *unless the debtor is, in consideration of contracts or other grounds for the obligation as well as the generally accepted common idea in business transaction, not deemed to be responsible for the cause of the non-performance*.

Article on Impossibility of performance proposed by "Legislative Council"

- The current Civil Code of Japan posses no articles on "Impossibility of performance". "***Tentative Outline***" proposes to introduce several new articles on this issue as follows:

(Claim for performance and its impossibility) ***– new –***

The creditor may not claim performance from the debtor if it deems to be impossible in consideration of contracts or other grounds for the obligation as well as the generally accepted common idea in business transaction.

(Damages in lieu of performance) ***– new –***

In cases where the creditor is entitled to damages due to non-performance or faulty performance, he may demand damages in lieu of the whole performance;

1. when the performance is impossible; or
2. when the debtor definitely declares that he will reject the performance; or
3. when the contract as ground for the obligation has been rescinded, or the creditor is entitled to rescission of the contract.

(Liability during default) ***– new –***

While the debtor is in default, he deems to be liable for impossibility of the performance even if none of the both parties is responsible for the cause of the impossibility.