# Part 1
# Reception of the German Law in the Thai Civil law through the Japanese Law

Background of the question
"Primary Remedy for Non-performance"

- German concept (1896 – 2001)
- French concept (1804 – 2016)
- Japanese solution (1896 – 2017)

# Three Concepts of Remedies for Non-performance

◊ What may the creditor demand from the debtor in the lawsuit?

◊ We know three different answers to this question; Common law, French law and German law:

| | Condition for Default | Remedies for Non-performance | Fault (Responsibility) | Choice | Damages |
|---|---|---|---|---|---|
| C/L | Arrival of time | Damages only | – | Debtor | Recovery from damages |
| Fr. | Arrival of time & Demand or warning | Specific perform or Damages | Required | Creditor | Punishment against non-performance |
| Gr. | Arrival of time & Demand or warning | Specific perform only then Damages | Required | Nobody | Recovery from damages |

## "Law of Pandects" in the 19th Century in Germany

◊ The "***Historical School of Law***" in Germany developed a general theory of civil law based on their historical research of the Roman law.

1 ***Principle of Natural Fulfillment*** – the creditor may demand only specific performance so long as it is possible.

2 ***Impossibility of performance*** establishes the liability of the debtor for compensation of damages.

3 ***Default*** (delay in performance) establishes the secondary liability.

4 ***Responsibility*** of the debtor is always required for his liability.

◊ Friedrich Carl von Savigny (1779 – 1864) and Friedrich Mommsen (1818 – 1892).

## Codification in the 19th Century

- The German concept was officially acknowledged in the "***Civil Code for the Kingdom of Saxony***" in 1863.
- The actual "***Pandects System***" was established in this code.


Prof. ***Hozumi*** and Prof. ***Ume*** – two of the main drafters of the Japanese Civil Code – studied this code in Berlin in 1880s.

- ***The first Draft of German Civil Code (1888)*** was composed based on the Saxony Civil Code. The main scholar in charge of this draft was Bernhard Joseph Hubert Windscheid (1817 – 1892).
- ***The second Draft of German Civil Code (1895)***
- ***The third Draft of German Civil Code (1896)*** was enacted and put into effect in 1900.

# German Civil Code (1896 – 2001)

## < Principle of Natural Fulfillment >

**§ 241** – By virtue of an obligation ***the creditor is entitled to claim performance from the debtor***. The performance may consist in a forbearance.

## < Time of performance >

**§ 271** – If a time for performance is neither fixed nor to be inferred from the circumstances the creditor may demand the performance immediately, and the debtor may perform his part immediately. […]

## < Impossibility of Performance >

**§ 275** – The debtor is relieved from his obligation to perform ***if the performance becomes impossible*** in consequence of a circumstance for which he is not responsible occurring after the creation of the obligation. […]

**§ 276** – The debtor is ***responsible***, unless it is otherwise provided, for intentional default and negligence. A person who does not exercise ordinary care acts negligently. […]

**§ 280** – ***Where the performance becomes impossible*** in consequence of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance. […]

## < Default of the Debtor >

**§ 284** – If the debtor does not perform ***after warning*** given by the creditor after maturity, he is ***in default through the warning***. Bringing an action for the performance and the service of an order for payment in hortatory process are equivalent to warning […]

**§ 285** – The debtor is not in default so long as the performance is not effected in consequence of a circumstance for which he is not ***responsible***.

**§ 286** – The debtor shall ***compensate the creditor for any damage*** arising from his default.

If the creditor has no interest in the performance in consequence of the default, he may, by refusing the performance, demand compensation for non-performance […]

**§ 287** – A debtor is responsible for all negligence during his default. He is also responsible for impossibility of performance arising accidentally during the default, unless the injury would have arisen even if he had performed in due time.

## < Initial Impossibility >

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

## Inflexibility of the German concept

- Soon after the implementation of the Code, a hard controversy arose among German legal scholars. Some of them complained about "***Gaps in the law***" and insisted on the necessity to fill these gaps with new theories and doctrines.

- In the 20. Century, the German civil law developed a variety of general theories on the issue "Non-performance of obligations" and applied them to fill the gaps by judge-made law:

  1. Theory of "***Positive breach of contracts***" (defective performance etc.)
  2. Theory of "***Associated or secondary duty***" of parties
  3. Theory of "culpa in contrahendo" (liability during negotiation)

  etc.

## How about the French law? (1804 – 2016)

◊ The French civil law shares a same position as the German principle of "***Natural Fulfillment***" in regard to "*Primary effect of obligations*".

The creditor shall at first demand ***specific performance*** from the debtor. It is called "***Putting (the debtor) in default***" (Art. 1139).

◊ The French concept requires also "***Responsibility***" of the debtor for his liability (Art. 1147).

◊ However, "*Impossibility of performance*" does not play any important role.

The creditor is entitled to ***a choice*** between demand for specific performance or for damages after "Putting in default".

## < Obligation to give >

**Art. 1136** – The obligation to give carries with it the obligation to deliver the thing and to preserve it until delivery, ***under penalty of damages*** to the creditor.

## < Putting in default >

**Art. 1139** – A debtor is ***put in default*** either ***through a formal demand*** or any other equivalent act such as a personal letter when its wording clearly amounts to enough a warning notice […]

## < Obligation to do or not to do >

**Art. 1142** – Any obligation to do or not to do ***resolves itself in damages*** in case of non-performance on the part of the debtor.

**Art. 1143** – Nevertheless, the creditor has the right to demand that what has been done in violation of the agreement be destroyed; and he may be authorized to destroy it ***at the expense of the debtor*** […]

**Art. 1144** – A creditor may also, in case of non-performance, be authorized to perform the obligation himself ***at the debtor's expense***. […]

## < Responsibility of the debtor >

**Art. 1147** – A debtor shall be ordered to pay damages, […] whenever he cannot establish that ***the non-performance was due to an external cause that cannot be imputed to him*** provided, moreover, there is no bad faith on his part.

## Japanese solution (1896 – 2017)

- The Codification Commission in Japan decided to adopt the German civil law system (***Pandects system***). Indeed, we can recognize a strong influence of the "***Civil Code for the Kingdom of Saxony***" (1863) in the Japanese Civil Code, especially in Book III (Obligations).
- However, *they rejected completely the German concept of "Remedies for non-performance"*. They decided to stay in the French concept.
- The Commission decided to put the provision on "***Claim for enforcement of specific performance***" (Art. 414) just before the provision on "***Claim for damages***" (Art. 415).
- Despite of this basic policy, the Commission deleted the requirement of "*Putting in default*" and tried to make possible to ***demand damages immediately*** without any demand of performance (Art. 412). This position follows rather the Common law concept and caused a logical difficulty.

### < Time for performance and responsibility for default >

Art. 412 – When there is a definite term for the performance of an obligation, the debtor is ***responsible for delay*** from the time when the term arrives.

When there an indefinite term for the performance of an obligation, the debtor is ***responsible for delay*** from the time he knew of the arrival of the term.

When there is no fixed term for the performance of the obligation, the debtor is ***responsible for delay*** from the time when he has received a demand for performance.

### < Enforcement of specific performance >

**Art. 414** – When a debtor does not voluntarily perform the obligation, the creditor may make ***demand for compulsory performance*** to the Court, unless the nature of the obligation does not permit it. […]

### < Damages for non-performance >

**Art. 415** – When 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***. The same applies when performance has become impossible owing to a cause ***attributable to the debtor***.

## Part 2
## Reception of the German Law in the Thai law through the Japanese Law

Different Decisions by Thai Drafters

- Draft of 1919, Code of 1923
- Code of 1925

# Thai approach in 1919

◊ In 1919, the Code Commission (กองกรรมการชำระประมวลกฎหมาย) of the Siamese government accomplished its final draft for the "Civil and Commercial Code of the Kingdom of Siam". In this Draft, we can find following provisions on the issue "Default of the debtor":

**Chapter II. NON PERFORMANCE**

**Part I. - DEFAULT OF THE DEBTOR**

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

**258.** – If the obligation is to be performed at a definite time, that is to say on a date which was known beforehand, the debtor is ***in default from such date***.

If the obligation is to be performed at a time which is not definite, the debtor is ***in default from the moment when he knows that such time has arrived***, or when he would have known of it if he had exercised such care as may be expected from a person of ordinary prudence.

If the performance of the obligation by the debtor depends on an act to be done by the creditor or by another person, the debtor is not in default until such act is done.

**259.** – If no time, definite or otherwise, has been fixed for the performance of the obligation, the debtor is ***in default after a demand for performance is made to him***.

◊ According to Sec. 258, the debtor is in default when the time for performance has arrived. This concept follows rather the Common law concept and shows ***a close similarity to the Japanese Art. 412***.

◊ However, after the arrival of the time for performance, the creditor has ***a free choice among three different remedies*** for non-performance (Sec. 262):

> **Part II. - Remedies of the Creditor**
>
> **262.** – From the time when the debtor is in default, the creditor may ***claim specific performance*** of the obligation.
>
> If the obligation arose out of a contract, the creditor may ***claim cancellation of the contract***, except when the law provides that his remedy is to determine the contract.
>
> The creditor is also entitled to ***compensation for any injury*** caused to him by the non-performance, except in the cases provided by Part IV of this Chapter.
>
> **Part III. - Specific Performance**
>
> **265.** – The Court may ***in its discretion*** order specific performance of an obligation whenever such performance is possible and desirable.

◊ In the end, the Court has the final word over the art of the remedies (Sec. 265).

◊ In other words, this approach clearly differs from the Common law concept and also from the French concept. Such an ***originality and uniqueness*** of this Draft could cause serious difficulty for international acknowledgment.

# Civil and Commercial Code of 1923

◊ Based on the Draft 1919, the Siamese government enacted **ประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. ๒๔๖๖**. Its second book had following provisions which were exactly corresponding to those in the Draft 1919:

## ลักษณ ๓ การไม่ชำระหนี้

## หมวด ๑ ลูกหนี้ผิดนัด

**มาตรา ๓๒๓**

อันว่าหนี้ถ้าไม่ชำระไซร้ ลูกหนี้ได้ชื่อว่าอยู่ในฐานผิดนัด

**มาตรา ๓๒๔**

ถ้าหนี้จะต้องชำระณเวลามีกำหนดแน่ คือว่าในวันอันรู้กันอยู่ก่อนแล้ว นับว่าลูกหนี้**ผิดนัดแต่วันนั้นไป**

ถ้าหนี้มีกำหนดชำระแต่มิได้นัดวันกันแน่ ท่านว่าลูกหนี้**ผิดนัดตั้งแต่ขณะเมื่อตนรู้ว่าถึงกำหนดชำระ** ฤๅในขณะอันควรจะรู้เช่นนั้น ถ้าหากใช้ความระมัดระวังอันจะพึงคาดหมายได้แต่วิญญูชน

ถ้าการที่ลูกหนี้จะชำระหนี้อาศัยต่อการอันหนึ่งอันใดซึ่งเจ้าหนี้หรือบุคคลอื่นจะได้กระทำลงก่อนไซร้ ท่านว่าลูกหนี้ยังไม่ผิดนัดจนกว่าการวันนั้นจะได้กระทำแล้ว

**มาตรา ๓๒๕**

ถ้ามิได้มีเวลากำหนดไว้เป็นแน่ ฤๅมิได้กำหนดไว้ด้วยประการอื่น เพื่อให้ชำระหนี้ ท่านว่าลูกหนี้ย่อม**ผิดนัดจำเดิมแต่เมื่อได้ถูกทวงถามให้ชำระหนี้**

## หมวด ๒ ทางแก้ของเจ้าหนี้

**มาตรา ๓๒๘**

ตั้งแต่เวลาลูกหนี้ผิดนัด เจ้าหนี้จะ**เรียกให้ชำระหนี้โดยเฉภาะเจาะจง**ก็ได้

ถ้าหนี้นั้นเกิดแต่มูลสัญญาไซร้ เจ้าหนี้จะ**เรียกให้เพิกถอนสัญญา**ได้ เวนแต่ในคดีที่กฎหมายบัญญัติว่าทางแก้ของเจ้าหนี้นั้นจะพึงเลิกสัญญาเสียเอง

เจ้าหนี้ยังชอบที่**ได้ค่าสินไหมทดแทน**ที่ต้องเสียหายอย่างใดๆ อันเกิดขึ้นแก่ตนด้วยการไม่ชำระหนี้ เว้นแต่ในบทที่บัญญัติไว้ในหมวด ๔ แห่งลักษณนี้

## หมวด ๓ การชำระหนี้เฉภาะเจาะจง

**มาตรา ๓๓๑**

เมื่อใดการชำระหนี้โดยเฉภาะเจาะจงเป็นวิสัยจะทำได้และเป็นที่พึงปรารถนาไซร้ ศาลจะสั่งบังคับให้ชำระหนี้นั้นโดยเฉภาะเจาะจงก็ได้**สุดแต่จะพินิจเห็นสมควร**

☞ For details, see ***Text of Book I*** and ***Text of Book II***

# Civil and Commercial Code of 1925

- 2 years later, the Civil and Commercial Code of 1923 was completely replaced with its revised version (ประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. ๒๔๖๘).
- The reason of this revision was the intervention by a young Thai legal officer, ***Phraya Manava Rajasevi*** (พระยามานวราชเสวี).
- He insistently complained about the inconsistency of the Draft of 1919 and loudly appealed the need for revision of the whole draft. He strongly recommended the ***Japanese method*** (วิธีญี่ปุ่น); it means, the adoption of the German Civil Code in a similar way as the Japanese Civil Code (1896/98) did.
- His claim and proposal eventually motivated the Siamese government to the revision of the Draft of 1919.

## Contents of Book II (1925)

- In Book II, the quite unique construction of Book II (1923) was replaced with the overall framework of the Japanese Civil Code Book III which was based on the ***Civil Code for the Kingdom of Saxony*** **(1. General provisions, 2. Contractual obligations, 3. Non-contractual obligations)**. However, the Siamese drafters moved the whole chapters on "เอกเทศสัญญา" in Title II "สัญญา" to Book III.
- Unlike in Book I, only few provisions were preserved from the Code of 1923 **(33 of totally 259 articles)**; for example in the part on "การใช้สิทธิเรียกร้องของลูกหนี้", "ลักษณะ ๔ ลาภมิควรได้" **and** "ลักษณะ ๕ ละเมิด".
- In the other parts of Book II, the Japanese and German provisions are quite dominant **(respectively 104 and 94 of 259 articles)**. Roughly speaking, the Japanese provisions are dominant in Title I "ลักษณะ ๑ บทเบ็ดเสร็จทั่วไป" **(except in the part on** "การไม่ชำระหนี้" **and** "ลูกหนี้และเจ้าหนี้หลายคน"**)**.
- On the other side, the German provisions are relatively dominant especially in "ลักษณะ ๒ สัญญา" and "ลักษณะ ๕ ละเมิด".

## ⟨Table 1⟩ Book II (1925), Origin of the Provisions

| บรรพ ๒ หนี้ | 1923 | Jp. (Gr.orig) | Gr. | Sw. | Fr. | Oth. | Total |
|---|---|---|---|---|---|---|---|
| ลักษณะ ๑ บทเบ็ดเสร็จทั่วไป | | | | | | | |
| หมวด ๑ วัตถุแห่งหนี้ | 1 | 2 (2) | 6 | - | - | - | **9** |
| หมวด ๒ ผลแห่งหนี้ | | | | | | | |
| ส่วนที่ ๑ การไม่ชำระหนี้ | **3** | **3 (-)** | **17** | - | - | - | **23** |
| ส่วนที่ ๒ รับช่วงสิทธิ | 1 | 1 (1) | 2 | - | 1 | 2 | **7** |
| ส่วนที่ ๓ การใช้สิทธิเรียกร้องของลูกหนี้ | 4 | - | - | - | - | - | **4** |
| ส่วนที่ ๔ เพิกถอนการฉ้อฉล | 2 | 1 (-) | - | - | - | 1 | **4** |
| ส่วนที่ ๕ สิทธิยึดหน่วง | - | 8 (1) | - | 2 | - | - | **10** |
| ส่วนที่ ๖ บุริมสิทธิ | 1 | 34 (-) | - | - | - | 4 | **39** |
| หมวด ๓ ลูกหนี้และเจ้าหนี้หลายคน | - | 1 (-) | 12 | - | - | - | **13** |
| หมวด ๔ โอนสิทธิเรียกร้อง | 2 | 7 (1) | 2 | - | - | - | **11** |
| หมวด ๕ ความระงับหนี้ | | | | | | | |
| ส่วนที่ ๑ การชำระหนี้ | 2 | 12 (3) | 9 | 2 | 1 | - | **26** |
| ส่วนที่ ๒ ปลดหนี้ | - | 1 (1) | - | - | - | - | **1** |
| ส่วนที่ ๓ หักกลบลบหนี้ | 1 | 5 (4) | 2 | - | - | - | **8** |
| ส่วนที่ ๔ แปลงหนี้ใหม่ | - | 4 (-) | - | - | - | - | **4** |
| ส่วนที่ ๕ หนี้เกลื่อนกลืนกัน | - | 1 (-) | - | - | - | - | **1** |

| บรรพ ๒ หนี้ | 1923 | Jp. (Gr.orig) | Gr. | Sw. | Fr. | Oth. | Total |
|---|---|---|---|---|---|---|---|
| ลักษณะ ๒ สัญญา | | | | | | | |
| หมวด ๑ ก่อให้เกิดสัญญา | 2 | 4 (3) | 9 | - | - | - | **15** |
| หมวด ๒ ผลแห่งสัญญา | - | 5 (3) | 2 | 1 | - | - | **8** |
| หมวด ๓ มัดจำและกำหนดเบี้ยผรับ | - | - | 9 | - | - | - | **9** |
| หมวด ๔ เลิกสัญญา | - | 7 (7) | 2 | - | - | - | **9** |
| ลักษณะ ๓ จัดการงานนอกสั่ง | 1 | 1 (1) | 9 | - | - | - | **11** |
| ลักษณะ ๔ ลาภมิควรได้ | 5 | 4 (2) | 3 | 1 | - | 1 | **14** |
| ลักษณะ ๕ ละเมิด | | | | | | | |
| หมวด ๑ ความรับผิดเพื่อละเมิด | 5 | 2 (-) | 4 | 2 | - | 5 | **18** |
| หมวด ๒ ค่าสินไหมทดแทนเพื่อละเมิด | - | 1 (-) | 6 | 4 | - | - | **11** |
| หมวด ๓ นิรโทษกรรม | 3 | - | - | 1 | - | - | **4** |
| **Total** | **33** | **104 (29)** | **94** | **13** | **2** | **13** | **259** |

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

## Thai approach in Code of 1925

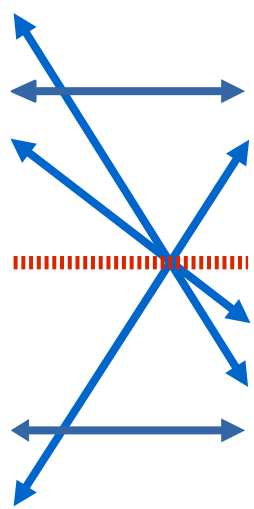
- Hereafter, we return to our central subject "***Primary effect of obligations***" and "***Remedies for non-performance***". Which position is adopted in the Code of 1925, English, German, French or Japanese?
- As is shown in the "Table 2" above, 17 of totally 23 provisions in the part "การไม่ชำระหนี้" were adopted from the German civil code. However, is it correct to say that the Siamese drafters decided for the German concept?
- The original sequence of the 17 German provisions is seriously disturbed while the 3 (and other corresponding 5) Japanese provisions keep their original order. We could draw from this point the following conclusion: ***Probably, the Siamese drafters decided for the German provisions, but they completely rearranged them in accordance with the sequence of the Japanese provisions***. ⇔P.28
- For the Siamese drafters, ***the French-Japanese approach would be more familiar and persuasive*** than the German concept. However, ***the German Civil Code offers better detailed provisions*** than the French or Japanese codes. The Siamese drafters tried to combine the both concepts and to overcome their shortcomings each other.

## ⟨Table 2⟩ Segmentation of the relevant German provisions

| Segments | | | Targeted Provisions |
|---|---|---|---|
| 1. | Compensation for damages | §§ 249 – 254 | 249, 252, 254 |
| 2. | Time for performance | § 271 | 271 |
| 3. | Impossibility of performance | §§ 275 – 280 | 275, 278, 280 |
| 4. | Debtor's default | §§ 284 – 287 | 284, 285, 286, 287 |
| 5. | Delinquency charge | §§ 288 – 290 | 288, 289, 290 |
| 6. | Creditor's default | §§ 293 – 301 | 293, 294, 295, 296, 297, 298, 299, 301 |

## ⟨Table 3⟩ Correlation between the German and Japanese provisions

| Segments of German Articles | | Japanese Articles | |
|---|---|---|---|
| | | | |
| **Seg. 1** | Compensation for damages | | |
| **Seg. 2** | Time for performance | **Art. 412** | Time for performance, debtor's default |
| **Seg. 3** | Impossibility of performance | **Art. 413** | Creditor's default |
| | | **Art. 414** | Enforcement of performance |
| **Seg. 4** | Debtor's default | **Art. 415 Sentence 1** | Damages for non-performance |
| | | **Art. 415 Sentence 2** | Impossibility, responsibility |
| | | **Art. 416,417,418** | Scope of compensation |
| **Seg. 5** | Delinquency charge | **Art. 419** | Delinquency charge |
| **Seg. 6** | Creditor's default | | |



☞ For details, see ***Rearrangemnet of the German Provisions***

⇔P.37

# Start point of Rearrangement

◊ The first step would be the comparison between the German ***Segment 4*** (Debtor's default) and the Japanese ***Art. 415 Sentence 1***. They show the following similarity:

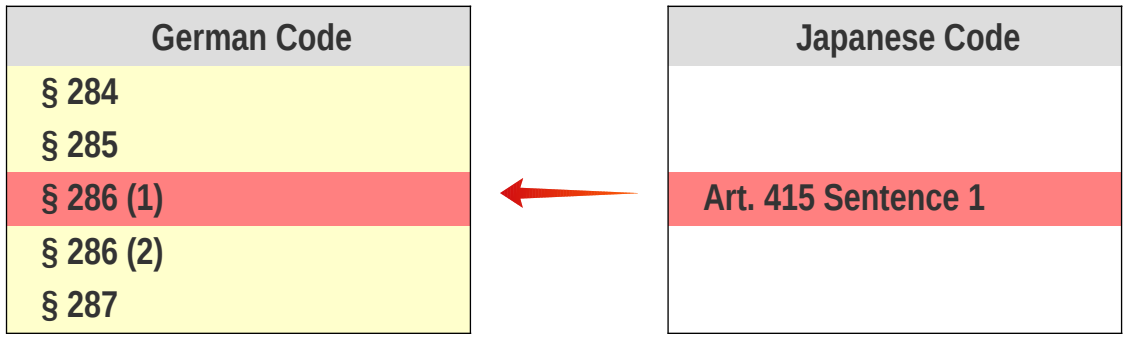
**§ 286 (1) – German Civil Code**
The debtor shall compensate the creditor for any damage ***arising from his default***.

**Art. 415 Sentence 1 – Japanese Civil Code**
When 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.

If we replace the phrase "***arising from his default***" in § 286 (1) with the phrase "***arising from his non-performance***", these two provisions would be almost identical:

**§ 286 (1)* – German Civil Code**
The debtor shall compensate the creditor for any damage ***arising from his non-performance***.

**⟨Table 4⟩ Damages for non-performance**



## Step 2

### ⟨Table 5⟩ Time of performance

| German Code | | Japanese Code |
|---|---|---|
| § 271 | <===> | Art. 412 |
| § 284 | | |
| § 285 | | |
| § 286 (1) | ← | Art. 415 Sentence 1 |
| § 286 (2) | | |
| § 287 | | |

## Step 3

### ⟨Table 6⟩ Enforcement of performance

| German Code | | Japanese Code |
|---|---|---|
| § 271 | <===> | Art. 412 |
| § 284 | | |
| § 285 | | |
| | ← | Art. 414 |
| § 286 (1) | ← | Art. 415 Sentence 1 |
| § 286 (2) | | |
| § 287 | | |

## Step 4

### ⟨Table 7⟩ Impossibility of performance

| German Code | | Japanese Code |
|---|---|---|
| § 271 | <===> | Art. 412 |
| § 284 | | |
| § 285 | | |
| | ← | Art. 414 |
| § 286 (1) | ← | Art. 415 Sentence 1 |
| § 286 (2) | | |
| § 287 | | |
| § 280 | <===> | Art. 415 Sentence 2 |
| § 275 | | |
| § 278 | | |

## Step 5

### ⟨Table 8⟩ Scope of damages

| German Code | | Japanese Code |
|---|---|---|
| § 271 | <===> | Art. 412 |
| § 284 | | |
| § 285 | | |
| | ← | Art. 414 |
| § 286 (1) | ← | Art. 415 Sentence 1 |
| § 286 (2) | | |
| § 287 | | |
| § 280 | <===> | Art. 415 Sentence 2 |
| § 275 | | |
| § 278 | | |
| § 249 | ← | Art. 416 |
| § 254 | | |

## Step 6

### ⟨Table 9⟩ Delinquency damages

| German Code | | Japanese Code |
|---|---|---|
| § 271 | <===> | Art. 412 |
| § 284 | | |
| § 285 | | |
| | ← | Art. 414 |
| § 286 (1) | ← | Art. 415 Sentence 1 |
| § 286 (2) | | |
| § 287 | | |
| § 280 | <===> | Art. 415 Sentence 2 |
| § 275 | | |
| § 278 | | |
| § 249 | ← | Art. 416 |
| § 254 | | |
| §§ 288, 289 | <===> | Art. 419 |
| § 290 | | |

## Step 7

### ⟨Table 10⟩ Creditor's default

| German Code | | Japanese Code |
|---|---|---|
| § 271 | <===> | Art. 412 |
| § 284 | | |
| § 285 | | |
| § 293 | <===> | Art. 413 |
| §§ 294, 295 | | |
| § 296 | | |
| 298 | | |
| 297 | | |
| 299 | | |
| | ← | Art. 414 |
| § 286 (1) | ← | Art. 415 Sentence 1 |
| § 286 (2) | | |
| § 287 | | |
| § 280 | <===> | Art. 415 Sentence 2 |
| § 275 | | |
| § 278 | | |
| § 300 | | |
| § 249 | ← | Art. 416 |
| § 254 | | |
| §§ 288, 289 | <===> | Art. 419 |
| § 290 | | |

## Step 8

### ⟨Table 11⟩ 3 provisions from the Code of 1923

| German Code | | Japanese Code |
|---|---|---|
| § 271 | <===> | Art. 412 |
| § 284 | | |
| § 285 | | |
| § 293 | <===> | Art. 413 |
| §§ 294, 295 | | |
| § 296 | | |
| 298 | | |
| 297 | | |
| 299 | | |
| | ← | Art. 414 |
| § 286 (1) | ← | Art. 415 Sentence 1 |
| § 286 (2) | | |
| § 287 | | |
| § 280 | <===> | Art. 415 Sentence 2 |
| § 275 | | |
| § 278 | | |
| § 300 | | |
| § 249 | ← | Art. 416 |
| § 254 | | |
| §§ 288, 289 | <===> | Art. 419 |
| § 290 | | |

# ⟨Table 12⟩ Final Arrangement

| [Gr. Civil Code] (1900 – 2001) | [Code of 1923] | | [Civil and Commercial Code] (1925) | | | [Jp. Civil Code] (1896) |
|---|---|---|---|---|---|---|
| § 271 | | → | มาตรา 203 | Time of performance | ≈ | Art. 412 |
| § 284 | | → | มาตรา 204 | Debtor's default through warning | | |
| § 285 | | → | มาตรา 205 | No default without responsibility | | |
| | มาตรา 327 | → | มาตรา 206 | Debtor's default in cases of unlawful acts | | |
| § 293 | มาตรา 355 | → | มาตรา 207 | Creditor's default | ≈ | Art. 413 |
| §§ 294, 295 | | → | มาตรา 208 | Actual and verbal tender | | |
| § 296 | | → | มาตรา 209 | Cases where no tender is required | | |
| § 298 | | → | มาตรา 210 | No tender of counter-performance | | |
| § 297 | | → | มาตรา 211 | Cases where creditor is not in default (1) | | |
| § 299 | | → | มาตรา 212 | Cases where creditor is not in default (2) | | |
| | | | มาตรา 213 | Enforcement of performance | ← | Art. 414 |
| | มาตรา 373 | → | มาตรา 214 | Enforcement from whole properties of debtor | | |
| § 286 (1) | | ≈ | มาตรา 215 | Damages for non-performance | ← | Art. 415 S.1 |
| § 286 (2) | | → | มาตรา 216 | Damages in lieu of performance | | |
| § 287 | | → | มาตรา 217 | Strict liability during default | | |
| § 280 | | → | มาตรา 218 | Impossibility under responsibility of debtor | ≈ | Art. 415 S.2 |
| § 275 | | → | มาตรา 219 | Impossibility without responsibility | | |
| § 278 | | → | มาตรา 220 | Vicarious liability | | |
| § 301 | | → | มาตรา 221 | No interest during creditor's default | | |
| § 249 | | ≈ | มาตรา 222 | Scope of damages | ← | Art. 416 |
| § 254 | | → | มาตรา 223 | Contributory negligence | ≈ | Art. 418 |
| §§ 288, 289 | | → | มาตรา 224 | Statutory interest for money debts | ≈ | Art. 419 |
| § 290 | | → | มาตรา 225 | Interest upon lost values | | |

⇔P.22

## Actual Issue: มาตรา 216

- This rearrangement of ***Phraya Manava Rajasevi*** was very successful. Over 90 years long since its enactment, it has offered suitable solutions for new types of conflicts in the society.
- On the other hand, we could recognize several issues which probably need technical improvement. One of them would be ***มาตรา 216*** compared to ***มาตรา 215***:

> **มาตรา ๒๑๕**
> เมื่อลูกหนี้**ไม่ชำระหนี้ให้ต้องตามความประสงค์อันแท้จริงแห่งมูลหนี้**ไซร้ เจ้าหนี้จะเรียกเอาค่าสินไหมทดแทนเพื่อความเสียหายอันเกิดแต่การนั้นก็ได้
>
> **มาตรา ๒๑๖**
> ถ้า**โดยเหตุผิดนัด** การชำระหนี้กลายเป็นอันไร้ประโยชน์แก่เจ้าหนี้ เจ้าหนี้จะบอกปัดไม่รับชำระหนี้ และจะเรียกเอา**ค่าสินไหมทดแทนเพื่อการไม่ชำระหนี้**ก็ได้

- มาตรา 215 provides the general liability of the debtor ***for all kinds of non-performance***. On the other hand, มาตรา 216 provides the liability for the "**Damages in lieu of performance**" ***in the case of default***.
- However, ***is there any reason to limit such a liability only to cases of "Default"?***
- Just this question was one of the central issues in the "***Modernization of the German Law of Obligations***" in 2001.

# Part 3
# What has been changed in the German concept?

- From “Impossibility” to “Breach of duty”
- Internally twisted structure
- High comparability with Thai law

# Project "Modernization of Law on Obligations" in Germany (1984 – 2001)

***Motive 1:*** Harmonization of civil law among EU-member countries
Conformity with international trade law (CISG)

***Motive 2:*** Integration of the ***Judge-made-law*** development during 100 years into the Code

***Subject 1:*** Modernization of regulation on ***Prescription***

***Subject 2:*** Integration of special laws for ***Consumer Protection***

***Subject 3:*** New concepts of the ***Remedies for non-performance of obligations***

***Subject 4:*** Integration of the ***special liability for defects*** in "Sale Contract" and "Contract for Work" into the general liability for non-performance

- Commission for the Revision of law on obligations in 1984
- ***Law for Modernization of Law on Obligations*** in November 2001
- The modernized Law on Obligations was put into effect in January 2002

## What happened to the German concept?
### [A] Extension of duties

- Legal relations like obligations could work and have effects only under reliable and stable social relationship. Therefore, ***we always owe certain moral duty to pay attention to such social circumstances***. This is an additional, secondary duty besides the main, primary duty of performance.
- Legal troubles could occur in following situations:
  - (a) During the negotiation for a certain contract, one party caused negligently damages to the other party. The negotiation was broken down, and the contract was not concluded (cupla in contrahendo).
  - (b) The debtor performed completely and perfectly his obligation, he however caused damages to other properties of the creditor (extended damages).
- As a ground for such a liability, the 2nd paragraph was added to § 241 as follows:

> **§ 241** **Duties arising from an obligation**
>
> (1) By virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance may also consist in forbearance.
>
> (2) An obligation may also, depending on its contents, ***oblige each party to take account of the rights, legal interests and other interests of the other party***.

## [B] Separation between Impossibility- and Liability-question

◊ There are several different grounds for liability of the debtor; "***breach of duty of care***", "***default***", "***imperfect or defective performance***". The "impossibility" is not only ground any more.

◊ For this reason, the effect of the impossibility and other obstacles must be limited to ***the release of the debtor from his duty of performance only***:

> **§ 275** **Exclusion of the duty of performance**
>
> (1) ***A claim for performance is excluded*** to the extent that performance is impossible for the debtor or for any other person.
>
> (2) The debtor may refuse performance to the extent that performance requires expense and effort which […] is grossly disproportionate to the interest in performance of the creditor. […]
>
> (3) In addition, the debtor may refuse performance if he is to effect the performance in person and […] performance cannot be reasonably required of the debtor.
>
> (4) ***The rights of the creditor are governed by §§ 280, 283 to 285, 311a and 326.***

◊ Moreover, the traditional distinction between "***initial***" and "***subsequent***" impossibility, between "***objective***" and "***subjective***" impossibility looses its meaning because they all may have a same single effect "release of the debtor from duty of performance".

## [C] Damages for breach of duty

◊ ***§ 280 (1) Sentence 1*** is comparable to the Japanese Art. 415 or มาตรา 215. It introduces a new principle of the general liability "***Damages for breach of duty***" and covers all grounds of the liability; namely ***delay***, ***impossibility***, ***defective performance***, ***breach of duty of care***.

◊ ***§ 280 (1) Sentence 2*** retains the traditional requirement of "***Responsibility***". The negative sentence style shows that ***the debtor bears the burden of proof***.

◊ ***§ 280 (2)*** is the successor of the old § 286 (1) on the issue "Damages caused by default".

◊ ***§ 280 (3)*** is the successor of the ***old § 286 (2)*** on the issue "Damages in lieu of performance". This paragraph plays the central role in the issue "Liability of the debtor for breach of duty".

**§ 280** **Damages caused by breach of duty, delay in performance**

(1) If the debtor ***breaches a duty arising from the obligation***, the creditor may demand compensation for the damage caused thereby. This does not apply ***if the debtor is not responsible for the breach of duty***.

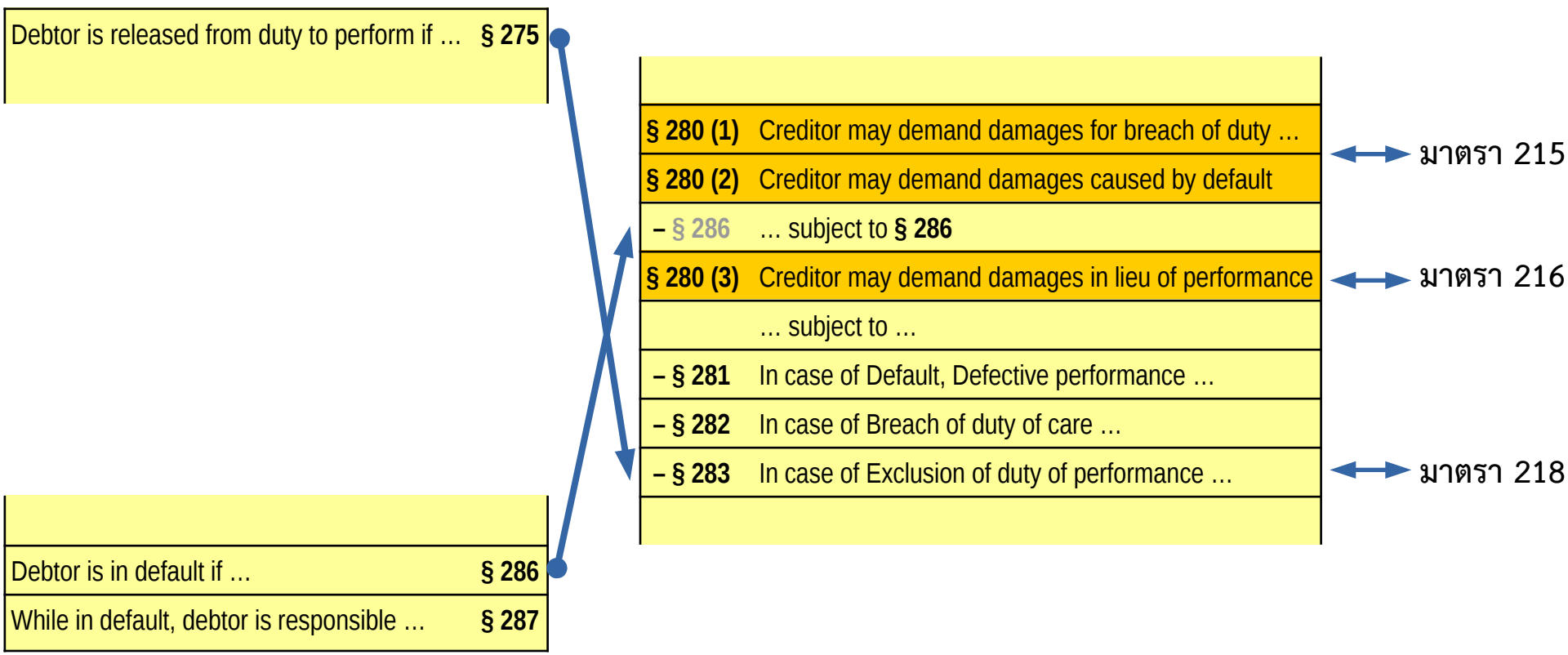
(2) ***Damages for default in performance*** may be demanded by the creditor *only subject to the additional requirement of § 286*.

(3) ***Damages in lieu of performance*** may be demanded by the creditor *only subject to the additional requirements of §§ 281, 282 or 283*.

# Internally twisted logical structure

◊ The positions of the provision on “Exclusion of duty of performance (impossibility)” and those on “Default of the debtor” are not changed. However, the logical structure among them has been ***internally twisted*** as follows:

⇔P.23




As a result, the ***sequential similarity*** between the new German concept and the Thai approach has become clearer. From this viewpoint, they are now ***easily comparable each other***.

# Damages in lieu of performance

◊ In the new German law, the type of remedy "***damages in lieu of performance***" plays a central role:

**§ 281 Damages in lieu of performance for default and defective performance**

(1) So far 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 § 280 (1), demand ***damages in lieu of performance*** . […]

**§ 282 Breach of a duty under § 241 (2)**

If the debtor ***breaches a duty under § 241 (2)***, the creditor may, subject to the requirements of § 280 (1), demand ***damages in lieu of performance***, […]

**§ 283 Exclusion of duty of performance under debtor's responsibility**

If the debtor is ***released from duty to perform*** under § 275 (1) to (3), the creditor may, subject to the requirements of § 280 (1), demand ***damages in lieu of performance***. […]

# Summary:
# Wide range of options for the choice of the creditor

The new German law allows a wide range of options as remedies for the creditor:

## [1] Demand for damages caused by default (delay in performance)

## [2] Demand of damages in lieu of performance ("Expectation interest")

- §§ 281, 282, 283 capture ***all cases of non-performance*** (default, impossibility, defective performance, breach of duty of care).
- After a reasonable period has elapsed unsuccessfully, then the creditor has ***a choice*** between ***demand for performance*** or ***damages in lieu of performance*** (§ 281).
- In case of "Partial default", "Partial impossibility" or "Defective performance", demand for ***damages in lieu of the unfinished part or the cure*** is also possible.
- In case of the "Breach of duty of care"(§ 282) or "Exclusion of duty of performance (impossibility)"(§ 283), setting a period is not necessary.

## [3] Reimbursement of useless expenses ("Reliance interest")

- Instead of "damages in lieu of performance", it is allowed to demand compensation for "Reliance interest" (§ 284), for example in case of "culpa in contrahendo".

## [4] Rescission of contract

- §§ 323, 324, 326 capture ***all cases of non-performance*** (default, impossibility, defective performance, breach of duty of care).
- Responsibility of the debtor is not required.