The Thai Civil Law on Non-performance in a Comparative, Structural View — from the Past into its Future —

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Introductory Overview

This paper aims to describe the structural features of the Thai civil law on "Non-performance" and to determine its position from the view point of comparative law, namely its position between German scheme and French-Japanese concept. Generally speaking, it is widely believed that the Thai civil law was formed under the strong influence of the German civil law, but over the Japanese civil law. Such an understanding would be very conceivable and persuasive if the Japanese civil law itself would have been formed exclusively in accordance with the German civil law. In the reality of the Japanese legal history, however, the current Japanese civil code was born under a high tension and friction between French and German law traditions. This circumstance must have had certain serious consequences when the whole concept of the Civil and Commercial Code of Thailand was conceived through a competitive fusion of the Japanese and German civil codes again.

For the purpose to exactly define the structural features of the Thai civil law on "Non-performance", I would like to start our research with the overview of the whole composition of the Civil and Commercial Code of Thailand, Book II in advance. Then, we will analyze the basic scheme of the German approach to the issue "Non-performance", and trace the drafting process of the Japanese civil law on the same issue. After we have clearly recognized the structural features of the both laws, then we will return to our main subject, and try to specify some hidden structural tension inside the Thai law. At the end of this paper, I will try to suggest certain possible development of the Thai law on this issue in future, namely the solution of its internal tension and the enhancement of the structural consistency.

A. Overall Composition of the Thai Law on Obligation

A-1. Historical Background

It was probably in the year 1919 that the first draft for the "**Civil and Commercial Code for the Kingdom of Siam**" was accomplished. After a profound rearrangement of the order of the articles, the first two books on "**General Principles**" and "**Obligations**" were promulgated 4 years later on November 11, 1923. The third Book on "**Contracts**" followed in 1924. In 1925, however, these first two books (so-called "**Old Text**") were replaced with new books (so-called "**New Text**"), which were compiled under a strong leadership of *Praya Manava Rajasevi* [1]. In this replacement, especially the second Book on Obligations experienced a fundamental rebuild. In this paper, I would like to research one aspect of the historical formation of the current Book II.

According to the advice of *Sir John Simon* [2], *Praya Manava Rajasevi* planed the whole composition of the new book on obligations based on the third book of the "**Revised Civil Code of Japan**" (1896) except its Section 2 - 14 of Chapter II, which should be located in the third Book on "Contracts".[3] Accordingly, the current Book II contained "**General Provisions of Obligations**", "**General Provisions of Contracts**", "**Management of Affairs without Mandate**", "**Undue Enrichment**", and "**Wrongful Acts**". Additionally, *Praya Manava Rajsevi* integrated the obligation-related articles on real securities ("**Right of Retention**" and "**Preferential Rights**", which are placed in Book II "Real Rights" of the "Revised Civil Code of Japan") into Title II, Chapter II on "**Effect of Obligations**".

A-2. Major Foreign Elements in Book II

In order to assess the intensity of the Japanese influence upon the Thai Civil and Commercial Code and to recognize the relation between Japanese and other resources, especially German elements inside of the Thai Civil and Commercial Code, we have to rely basically upon the "table of reference" the compilation of which *Praya Manava Rajsevi* himself supervised.[4] He called it often simply "*Index*" or "*Reference*". However, I reached to an unsavory conclusion that this table needed a massive supplement and improvement after I carefully inquired its entries. For this reason, I decided to compile an own "*Reference*" with my supplementary entries from "Old Text", the German, Swiss, and Japanese Civil law.[5]

Based on my own "*Reference*" with supplementary entries, I tried to determine a supposedly decisive model for each article of the Civil and Commercial Code, Book I and II (1925). In case of totally 259 articles of Book II, I counted following numbers of articles which seemed to be based on "*Old Text*", German, Swiss, French, and Japanese civil codes:

[Table 1] Number of Articles in the current Book II (1925) based on

Old Text	Japanese Code	German Code	Swiss Codes	French Code	uncertain
32	105	92	13	2	15

According to this result, an overwhelming majority of the whole articles comes either from the "**Revised Civil Code of Japan**" (at least 105 articles) or from the "**German Civil Code**" of 1900 (at least 92 articles). On the other hand, we can easily see that the influence of the "**Old Text**" of 1923 upon the current Book II is quite modest — mainly only in three parts, namely "Exercising Debtor's Claim" (Part 3 of Chapter 2 in Title I), "Unjust Enrichment" (Title IV), and "Liability for Wrongful Acts" (Chapter 1 in Title V) — while its presence in the current Book I on "**General Principles**" is still impressive (in the first version of 1925, at least 77 articles of the whole 193 articles).

A-3. The Parts mainly based on Japanese Civil Code

Looking into details and contents, we can recognize many articles which are heavily influenced by Japanese Civil Code, especially the following parts of the current Book II, at first in Title I;

[Table 2] Number of Articles based on Japanese Civil Code (Group A)

Title I "General Provisions"		
Chapter 2 "Effect of Obligations"	Part 5 "Right of Retentions"	8 / 12 articles
	Part 6 "Preferential Rights"	34 / 39 articles
Chapter 4 "Transfer of Claim"		7 / 11 articles
Chapter 5 "Extinction of Obligations"	Part 1 "Performance"	12 / 26 articles
	Part 4 "Novation"	4 / 4 articles

We will call these articles "**Group A**". In other parts of Title I and the Title II, there are another group of articles which are based even so upon the "**Revised Civil Code of Japan**", but with different nature. We will call the latter "**Group B**";

[Table 3] Number of Articles based on Japanese Civil Code (Group B)

Title I "General Provisions"		
Chapter 5 "Extinction of Obligations"	Part 3 "Set-off"	5 / 8 articles
Title II "Contract"		
Chapter 2 "Effect of Contract"		5 / 8 articles
Chapter 4 "Rescission of Contract"		7 / 9 articles

What is the difference between these two groups? Namely, the model articles of "**Group A**" belong to the so-called "***Boissonade's* Heritage**". In the history of the Japanese Civil Code, the initial codification attempt was led by a French legal scholar, *Prof. Gustave Emile Boissonade* (1825 – 1910). This draft was enacted in 1890, but could not be put into force due to a wide range of criticism. In 1892, the Japanese Diet decided to revise this so-called "**Old Civil Code of Japan**". However, it left traces and vestiges deeply in many articles of the "**Revised Civil Code of Japan**" (1896, 98). We call them "***Boissonade's* Heritage**".

In other words, the model articles for the "**Group A**" stay in the French law tradition inside of the Japanese civil law. Accordingly, the German Civil Code (1900) does not possess any similar articles which would be comparable to them. On the other side, the model articles for the "**Group B**" were composed mainly based on the articles of the first Draft for German Civil Code, and they themselves stay in the German law tradition inside of the Japanese civil law.

A-4. The Parts mainly based on German Civil Code

The second dominant group of articles in the current Book II is articles which are composed directly based upon the German Civil Code. According to my analysis, the following parts have their model articles mainly in the German Civil Code;

[Table 4] Number of Articles based on German Civil Code

Title I "General Provisions"		
Chapter 1 "Subjects of Obligations"		7 / 9 articles
Chapter 2 "Effect of Obligations"	***Part 1 "Non-performance"***	17 / 23 articles
Chapter 3 "Plurality of Debtors and Creditor"		12 / 13 articles
Chapter 5 "Extinction of Obligations"	Part 3 "Set-off"	7 / 9 articles
Title II "Contract"		
Chapter 1 "Foundation of Contract"		11 / 15 articles
Chapter 3 "Earnest and Stipulated Penalty"		9 / 9 articles
Title III "Management of Affairs without Mandate"		
		9 / 11 articles

Title V "Unlawful Acts"	
Chapter 2 "Compensation for Unlawful Acts"	7 / 14 articles

Quite roughly speaking, the German influence seems really dominant in the current Book II if the articles of "**Group B**" mentioned above would be also counted in such "German elements".

As a result, the competitive relationship of influence by different foreign codes in the current Book II could be presented as follows if we would clearly distinguish two groups of the Japanese articles (French and German elements);

[Table 5] Number of Articles in the current Book II (1925) based on

Old Text	Japanese Code			German C.	Swiss C.	French C.	uncertain
	Boissonade (Group A)	uncertain	German C. (Group B)				
32	**60**	**16**	**29**	**92**	**13**	**2**	**15**

Above all, the description above would give us a quite clear impression that the Thai civil law on obligation bears deeply engraved German marks while the French-Japanese law and "Old Text" have left their traces only sporadically in several parts. However, the realty is not so clear and simple as we would assume. We can realize this point as soon as we go into details of the articles on "***Non-performance***" for example. Indeed, this part could be held as representative for these German elements in the current Book II. All the main articles in this part have their origin in the German Civil Code (17 of 23 articles) while the Japanese Code and the "Old Text" left quite modest traces on it (respectably only 3 articles). The presence of the German law is so dominant, however, we may not speak of "Reception of German law on Non-performance".

A-5. "Divergence" from the German Concept of "Non-performance"

What would keep us from a conclusion of "Reception of German law" in this subject? The reason is quite clear, namely a drastic change of the arrangement of the whole related articles in this part as clearly seen in **[Table 6]**. Its "**Twisted Order**" of the articles indicates a deep cut of modification into the original concept of "Non-performance" in the German civil law. In other words, the German concept of "Non-performance" must have experienced a drastic rework in the Thai civil law (I would like to call it "Divergence" from the original concept). In the following part of this paper, we will concentrate our attention on the peculiarity of this part.

B. Original Concept of the German Approach to the Issue "Non-performance"

In order to verify and measure this "divergence" from the original German concept, I will shortly summarize the essential points of the German approach to the subject "Non-performance". Its starting point is the so-called "**Principle of natural fulfillment of obligation**". According to this principle, the creditor is entitled exactly and exclusively to demand the particular performance stipulated in the obligation insofar as it is for the debtor still possible and for the creditor useful. A

classical document explains this principle as follows; [6)]

> " The creditor must be allowed to force the debtor to perform his obligation even against the debtor's wishes. […] The creditor must be entitled to bring an action, namely an effective action against the debtor for the fulfillment of his obligation; there is no valid obligation without creditor's right for action. […]
>
> It is true that certain economic benefits for the creditor are always hidden behind every [valid] obligation as duty to perform something of value, namely economic value which will be or would be provided to the creditor if the obligation will be or would be performed '**in natura**', that is, just in a proper way. However, it never means that the debtor would be by nature entitled to free choice either to tender the natural fulfillment of his obligation or to pay its economic value, nor leads to the conclusion that the creditor would be by nature entitled to free choice to demand either the natural fulfillment or the payment of its economic value. Above all, on the side of the obligation as well as on the side of the right of claim, 'natural fulfillment' alone may be all that initially matters."

The duty to perform the obligation must be fulfilled just in a proper way in so far as it is possible for the debtor and useful for the creditor. In other words, a valid contract binds not only the debtor but also the creditor to its fulfillment in the same strictness. The binding force of obligation and contract (**pacta sunt servanda**) is maximized almost to the level of an ethical requisite. According to such a strict ethical concept of obligation and contract, the creditor may not enjoy the freedom to switch his claim from the natural fulfillment of the obligation to the compensation of its economic value even if the debtor does not willingly perform his duty so long as the possibility of the natural fulfillment is approved and its usefulness for the creditor is recognized. Accordingly, the initial and primary remedy for any trouble in the performance must be the enforcement of the obligation or so-called "specific performance". However, this is almost a self-evident thing for the German concept. So, the Civil Code has no article which would declare the enforcement as a initial and primary remedy (for example, Art. 414 of Japanese Civil Code). The regulation on the enforcement of the obligation is rather a task of the law on civil procedure. In other words, the regulations for "Non-performance" in the Civil Code have their main targets in cases where neither enforcement nor specific performance of the obligation is possible on the one side, and in cases where enforcement or specific performance is still possible, but the creditors do not want such remedies for certain reasons on the other side.

Such a strict "Principle of natural fulfillment of the obligation" consequently requires a quite rigid concept of "Non-performance" as its logical requisite; namely, the German Civil Code recognizes a case of genuine "Non-performance" only when the natural fulfillment of the obligation is already impossible. "Impossibility of performance" is a synonym for "Non-performance". For such cases, "**Impossiblium nulla obligatio"** should be an initial effect of "Non-performance". The obligation is extinguished, and the debtor may be exempted from his duty to perform his obligation as long as he bears no responsibility for impossibility. Accordingly, the article which provides this rule stays at the starting point of the law on "Non-performance" in the German Civil Code (§275), and the basic rules on the debtor's liability for impossibility follow (§§276 – 282). Principally, the debtor

[Table 6] “Divergence” from the Original Order

German Civil Code (1900 – December 2001)		Twisted Order	Book II (1925 –)	Straight Order	Japanese Civil Code (1896 –)	
Co-responsibility of creditor	§ 254		มาตรา 203			
			มาตรา 204	comparable	Art. 412	Delay in performance
Time of performance	§ 271		มาตรา 205			
			มาตรา 206			
Impossibility without debtor's liability	§ 275		มาตรา 207	comparable	Art. 413	Delay in acceptance
Responsibility of debtor (intention and negligence)	§ 276		มาตรา 208		(Art. 493)	
Liability for responsibility of agents	§ 278		มาตรา 209			
Debtor's liability for compensation due to impossibility	§ 280		มาตรา 210		(Art. 533)	
			มาตรา 211			
Debtor's delay in performance	§ 284		มาตรา 212			
No liability for delay without responsibility	§ 285		มาตรา 213		Art. 414	Enforcement of performance
Compensation of damages due to delay	§ 286(I)		มาตรา 214			
Compensation instead of performance (due to delay)	§ 286(II)		มาตรา 215		Art. 415	Compensation for non-performance and impossibility
Increased liability during delay	§ 287		มาตรา 216		(Art. 543)	
Interest rate on money obligation	§ 288		มาตรา 217			
No interest on interest	§ 289		มาตรา 218		(Art. 536)	
Interest rate on perished value	§ 290		มาตรา 219		(Art. 536)	
			มาตรา 220			
Creditor's delay in acceptance	§ 293		มาตรา 221			
Real tender of performance	§ 294		มาตรา 222		Art. 416	Scope of compensation
Tender of performance by words	§ 295		มาตรา 223	comparable	Art. 418	Co-responsibility of creditor
Release from duty to tender performance	§ 296		มาตรา 224	comparable	Art. 419	Interest rate on money obligation
No delay in acceptance during delay in performance	§ 297		มาตรา 225			
Delay in acceptance in case of non-counter-performance	§ 298					
No delay in acceptance in case of temporal hindrance	§ 299					
No interest on money obligation during delay in acceptance	§ 301					

has to take responsibility for his "**Intention and Negligence**" (the principle of "No liability without responsibility").

The same will be apply for cases where the enforcement of the obligation or the specific performance is unrealistic, inappropriate, or undesirable. According to the "Principle of natural fulfillment", the creditor may only demand a willing performance from the side of the debtor also in such cases. Eventually, the creditor may be allowed to demand compensation only when the debtor's intention to refuse the natural fulfillment of his obligation becomes definitive and undeniable (§283).

In the sight of this German scheme, on the other side, the "**Delay in performance**" (§284) is so long not any genuine "Non-performance" yet as the natural fulfillment of the obligation is still possible for the debtor and useful for the creditor. The initial and primary effect of the "Delay in performance" is rather such an increased liability for impossibility of the performance as a strict one (§287). However, the principle of "No liability without responsibility" may apply even to this increased liability (§285). Above all, the "Delay in performance" still does not constitute any genuine type of "Non-performance", accordingly, still *no liability* would result from it yet, but it constitutes rather *a circumstance or condition for an increased liability* for Non-perform (= impossibility).

Consequently, for any damage which the creditor would suffer due to "Delay in performance" itself, the German law needs another extraordinary ground for its liability than the normal ground for the compensation for damages arising from "Non-performance". Hence, §286, Paragraph (1) provides the additional liability, and §§288 – 290 determine the scope of compensation for damages arising from the debtor's "Delay in performance" itself while §280 provides the standard liability, and §249 determines the scope of compensation for damages arising from ordinary "Non-performance (impossibility)". However, in certain exceptional cases, also such a simple "Delay in performance" could cause even quite frustrating and desperate effects to the creditor. In these cases where consequences from "Delay in performance" may be comparable to such ones from "Impossibility", the creditor may be allowed to reject the acceptance of an useless performance and to demand compensation for damage arising from a "Quasi-impossibility". This is the original meaning of §286, Paragraph (2).

As mentioned above, the creditor is also bound to the natural fulfillment of the obligation, it means, he is initially entitled only to demand the natural fulfillment of the obligation from the debtor. However, the creditor owes the debtor no duty to accept his fulfillment. Hence, the "**Delay in acceptance**" (§293) dos not constitute any infringement of the debtor's rights. So, the creditor does not incur any liability to the debtor. This is the basic understanding of the issue "Delay in acceptance" in the German concept. A classical document describes this point as follows: [7)]

> " The debtor's delay requires an infringement of right as its reason for liability, namely infringement of the creditor's right to receive a fulfillment of the obligation right on time. This infringement must be attributable to the debtor. Contrary to this, cases of the creditor's delay

show us a quite different situation. It is still not enough for approval of the creditor's delay to demonstrate a mental circumstance that the creditor does not wish the realization of the obligation. Such a circumstance must take a figure which is clearly recognizable from outside. However [even if such a remarkable figure is recognized], any consequence of liability is regularly put beside the question because the creditor owes no duty to accept the performance. The creditor's refusal of acceptance constitutes no infringement of the debtor's right."

Accordingly, the creditor's "Delay in acceptance" effects mainly the reduction of the debtor's liability for Non-performance and so-called "Passage of risk" (§300), and the basic rules for the tender of performance provide the requirements for these statutory effects of "Delay in acceptance" (§§294 – 296).

The basic scheme of the German concept for "Non-performance" described above could be summarized as follows; namely "Natural fulfillment of performance" → "Liability of the debtor for impossibility of performance" → "Responsibility of debtor (Intention and negligence)" → "Delay in performance" → "Delay in acceptance".

At the end, this concept should be further extended with the applied scheme for "Performance in bilateral contract":

a) A party may be released from his obligation if his obligation becomes impossible due to circumstances for which neither he nor the other party is responsible, but loses his claim for the counter-performance (§323);
b) A party may be released from his obligation if his obligation becomes impossible due to the other party's responsibility, and he may keep his claim for the counter-performance (§324);
c) A party may keep his claim for the counter-performance if his performance becomes impossible due to his own responsibility, but the other party may demand compensation for damages resulting from the impossibility. Otherwise, the other party may rescind the contract and let himself released from the duty of counter-performance (§325);
d) The same shall also apply to cases of "Delay in Performance" where the responsible party's intention to refuse his performance is quite obvious (§326).

In the pattern c) and d), "Claim for compensation" and "Rescission of Contract" are coupled in an alternative relationship of "**either-or**" in the traditional German concept. This circumstance makes the final decision for the creditor very difficult and painful (either "compensation against counter-performance" or "rescission with risk of damages"), and he is often forced to stay at "claim for natural fulfillment" as long as possible.

C. Non-performance in Japanese Civil Code and its Problems

C-1. The Concept of Prof. *Boissonade*

How about the concept of the Japanese Civil Code of Japan (1896)? Our next task is to analyze the basic scheme of the Japanese law on Non-performance. The drafters in the "*Code Investigatory Commission*" which was in charge of the revision of the "Old Civil Code of Japan" started their

discussion always with the articles of the latter. So, we have to once return to the basic concept of Non-performance proposed by Prof. *Boissonade*. Its following five articles are of interest for our purpose. In this part, Prof. *Boissonade* apparently followed the French Civil Code. His Art. 336 is comparable with Art. 1139 in the French Civil Code, Art. 383 with Art. 1147 and 1148, and Art. 384 with Art. 1146. However, Prof. *Boissonade* put between them two additional articles, namely one article which declares the "**Natural fulfillment**" as primary effect of obligation (Art. 381) and another one which provides "**Specific performance**" as initial remedy for non-performance (Art. 382). The text of these articles is as follows: [8)]

Art. 336 [Responsibility for delay in performance]
The promisor or any other debtor bears the responsibility for delay in performance in the following cases:

1. when there is a claim [brought by the promisee or any other creditor] before the Court, or delivery of a letter of demand or a writ of enforcement in a good and due form after the arrival of the fixed time for performance;
2. when the fixed time for performance has arrived in cases where it is prescribed by law or by mutual consent that [the promisor bears] such a responsibility simply on the arrival of the time;
3. when the promisor failed to perform in due time even though he knew that any delayed performance would be useless for the promisee.

Art. 381 [Effect of obligation]
(1) The effect of obligation primarily consists in entitling the creditor to take a legal action for specific performance, and alternatively in cases of non-performance a legal action for compensation for damages according to the distinctions provided in Title I, II, and III of this Chapter.

(2) Furthermore, the scope of the effect of obligation differs according to the distinction of sorts of obligation provided in Title IV.

Art. 382 [Specific performance]
(1) The Court has to order specific performance *in accordance with its proper form and content* upon the claim of the creditor whenever it is possible to enforce it without any physical restraint of the debtor.

(2) If the tangible object to be delivered to the creditor is located in the properties of the debtor, then the Court has to seize it and deliver it to the creditor.

(3) In case of obligation for an act, the Court may allow the creditor to cause a third person to perform such act at the expense of the debtor.

(4) In case of obligation for an inaction, the Court may allow the creditor to cause a third person to remove the outcome of such act performed by the debtor at the expense of the latter, and to take appropriate arrangements to prevent any such act in future.

(5) In the cases mentioned above, furthermore, the creditor may also demand compensation for damages if he suffers any.

(6) The enforcement of specific performance takes place according to the provisions in the Code of Civil Procedure.

Art. 383 [Compensation for damages arising from non-performance]
(1) In cases where the debtor refuses to perform his obligation, the creditor may demand compensation for damages if he failed to claim for enforcement of specific performance, or where the nature of the obligation does not permit such an enforcement; the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible.

(2) The creditor may demand compensation for damages also in a case of delay in performance.

(3) The amount of compensation should be, so long as the parties have reached no agreement on it, determined by the Court according to the distinctions and conditions provided in following articles unless a certain amount of compensation is prescribed by law.

Art. 384 [Claim for compensation]
(1) The duty to pay compensation is not due until the debtor bears the responsibility for his delay in performance according to Art. 336.

(2) In cases where the obligation consists in duty of inaction, however, the debtor always and inevitably bears the responsibility for delay in performance [whenever he breached his duty].

(3) The same shall apply to the cases where someone has duty to return money or other valuable things which he deprived others of through criminal offenses.

According to this scheme proposed by Prof. *Boissonade*, the creditor in normal cases would have to get the debtor's responsibility confirmed by the court in advance. Otherwise, he would not be entitled to bring a claim for enforcement or for damages. This scheme would play a role to guarantee an opportunity of defense to the debtor, and to establish the principle of "*No liability without responsibility*" in a procedural way.

C-2. Basic Concept of the Drafters

In the 57th session of the "*Code Investigatory Commission*" on Jan. 18, 1895, its members discussed these articles. Principally, they had a mind to follow the basic scheme proposed by Prof. *Boissonade*, however decided to delete Art. 336 and Art. 384 quoted above. They found quite bothersome and inadequate if the creditor would have to bring a claim for enforcement before the court each time when he will exercise his right of claim and even only demand compensation for non-performance from the debtor. It would be too much protection for the debtor. For this reason, the article on "Responsibility for delay in performance" should be modified to a simple provision on "Time of performance". At this stage of the revision work, the drafters proposed the following quite simple articles instead of those ones by Prof. *Boissonade*: [9)]

Art. 406 [Time of performance] **(comparable to the current Art. 412)**
The creditor may at any time demand performance of the obligation from the debtor in cases where no fixed time for the performance is determined.

Art. 408 [Claim for enforcement] **(comparable to the current Art. 414)**
(1) If the debtor fails to perform his obligation, then the creditor may bring a claim for enforcement of specific performance before the court, unless the nature of the obligation does not permit it.

(2) In cases where the nature of the obligation does not permit the enforcement of specific performance, if the obligation has performance of an action for its subject, then the creditor may demand the court to cause a third person to do this act at the expense of the debtor.

(3) With regard to the obligation for an inaction, the creditor may demand removal of the outcome of the action at the expense of the debtor as well as adequate measures adopted for the future.

(4) The provisions of the preceding three Paragraphs do not affect a claim for compensation for damages.

Art. 409 [Compensation for damages] (comparable to the current Art. 415)
If the debtor fails to perform his obligation *in accordance with its proper form and content* *), then the creditor may demand compensation for damages arising therefrom, unless the debtor is not responsible for a cause of his non-performance.

*) This phrase came from Art. 382 of the "Old Civil Code" (the original French wording is "*suivant sa forme et teneur*"). In the English translation of the "Revised Civil Code of Japan" by *Joseph Ernest de Becker*, he used another phrase "*in accordance with the true intent and purpose*". The original Japanese wording in Art. 409 (Art. 415 in the current version), however, would be rather "*in a proper way of the obligation*" or simply "*properly*".

We can easily recognize what Prof. *Nobushige Hozumi*, the main person in charge, pursued in this simplified scheme of "Non-performance":

a) He tried to reduce procedural matters and charges as much as possible, and wanted to give parties a possibility of direct and rapid dispute settlement by themselves. (→ Art. 406);
b) At the same time, however, the principle of "Natural Fulfillment" as primary effect of obligation, and the principle of "Enforcement of Specific Performance" as initial remedy should be maintain. In this sense, the members of the commission excluded the debtor's choice between natural fulfillment or payment of economic benefits as compensation. (→ Art. 408);
c) He tried to integrate all the possible types of troubles in performance into a single category of "Non-performance" and unify the regulation for them, including "Delay in performance" and "Impossibility of performance".(→ Art. 409, Sentence 1)
d) At the end, he tried to clearly declare the general principle of "*No liability without responsibility*" which was provided even in the French Civil Code (Art. 1147) but not in the "Old Civil Code of Japan" (→ Art. 409, Sentence 2). Prof. *Boissonade* had chosen a procedural way to guarantee the fairness in this sense as mentioned above.

C-3. Rehabilitation of "Delay in performance"

Such a drastic simplification, however, must have sever consequences in the conceptual scheme of "Non-performance". Suddenly, certain important technical terms like "Delay in performance" or "Impossibility of performance" disappeared from the articles. Above all, the reduction of the article on the "Delay in performance" (Art. 336 in "Old Civil Code") to a simple article on "Time of performance" (Art. 406) caused a serious problem of uncertainty regarding the issue of the debtor's responsibility. Even though the second sentence of Art. 409 declared the principle of "*No liability without responsibility*", there is no detailed provision on this issue, especially such points; when and under which conditions the creditor may be entitled to claim performance or compensation for damages, and the debtor should accept enforcement or his liability for non-performance.

Later, Prof. *Hozumi* himself became aware of this problem. In the 75th session of the commission on Apr. 5, 1895, he proposed a drastic change of the article on "Time of performance". [10] This

proposal was improved once again and discussed in the 9th session of the "*Draft Civil Code Compilation Conference*" on Dec. 26, 1895. In such a way, Art. 336 in the "Old Civil Code" on responsibility for delay in performance" was rehabilitated in a modified form. Its final version should provide now as follows: [11)]

Art. 409 [Delay in performance] **(same as the current Art. 412)**

(1) In cases where a definite due time is determined for the performance of the obligation, then the debtor shall be responsible for the delay in performance on and after such a due time arrived.

(2) In cases where only an indefinite due time is decided for the performance of the obligation, then the debtor shall be responsible for the delay in performance on and after he is noticed of the arrival of the due time.

(3) In cases where there is no fixed due time determined for the performance of the obligation, then he shall be responsible for the delay in performance on and after the debtor received the demand of the performance from the creditor.

C-4. Conceptual Confusion in "Delay in performance"

As we have seen above, Art. 336 in the "Old Civil Code" had provided a procedural condition for the creditor's claim for *enforcement* (Art. 382) on the one side. The same article had also another task to provide a procedural condition for the creditor's claim for *damages* arising from the non-performance on the other side (Art. 384). In other words, the same wording of "Delay in performance" had two different tasks; firstly, it determined the time point of the debtor's *responsibility* for possible (*still not occurred*) "Non-performance" and damages arising from it. Secondly, it determined also the due time of the debtor's *liability* to compensate (*already occurred*) damages arising from "Non-performance" in general (including "Impossibility of performance").

The drafters located this new article on "Delay in performance" preceding to the article on "*Enforcement of specific performance*". According to this location, the primary task of this article would be the same as the first task of Art. 336 in the "Old Civil Code". In the sight of the drafters, however, its main task should consist rather in the second one described above, namely the task to provide the procedural condition for the creditor's action for *damages* and to determine the due time of the debtor's *liability* for damages arising from his "Non-performance" in general. With this article on "Delay in performance", indeed, the drafters aimed to make it possible for the creditor to skip the article on "Claim for enforcement" and spring directly to the article on "Compensation for damages", namely to take a legal action for damages soon after the due time of the obligation arrived without any necessity to bring any extra action for the enforcement in advance, regardless of what caused damages in question (delay in performance itself or rather any other types of non-performance).

Consequently, this discrepancy between its location and main task caused a serious confusion to the concept of "Delay in performance". In the discussion on Apr. 5, 1895, a member of the commission brought against the proposal a doubting comment that it would be rather correct to put a certain

time span between the due time of the obligation and the beginning of the debtor's liability for delay in performance. However, one of the drafters, Prof. *Tomi-i,* defended their proposal with the argument that the debtor would breach his promise of performance just on the arrival of its due time and infringe the creditor's right. According to the understanding of the drafters, the debtor would be *responsible for his non-performance* already on the arrival of the due time of the obligation. Hence, the debtor would be also *liable for damages* at the same time. Furthermore, another effect of "Delay in performance" would be the so-called "Passage of risk" from the creditor to the debtor. [12)]

C-5. "Impossibility of performance" and Conceptual Uncertainty

Besides the problem of "Delay in performance", there was another conceptual problem, namely the uncertainty in regard to "Impossibility of performance". Initially, the drafters had planned to follow the model of the "Old Civil Code" and to dedicate several articles to provide basic principles regarding this issue. In the discussion of the commission on Apr. 5, 1895, however, the drafters proposed to delete all the planned articles regarding "Impossibility of performance". They justified this proposal with the argument that it would be self-evident for everybody that the debtor would be released from his obligation and from any responsibility for non-performance if the natural fulfillment of his obligation became impossible due to "*force majeure*" for example. [13)] The proposal was approved in the commission. On the other hand, however, the drafters found a certain necessity to change the wordings in the article on the "Compensation for damages" (at this time point, Art. 414). The original version had provided that the creditor may demand compensation for damages if the debtor fails to perform his obligation in accordance with its proper form and contents. Suddenly, it became quite uncertain if the wording "*fail to perform the obligation*" would cover also cases where the debtor "*can not perform the obligation*". For this reason, they proposed to replace the second sentence of the article "unless the debtor is not responsible for a cause of his non- performance" with the second sentence of Paragraph 1 in Art. 383 of the "Old Civil Code" in order to clearly signify that "Non-performance" includes also "Impossibility". The modified article should provide as follows: [14)]

> **Art. 410 [Compensation for damages]** **(comparable to the current Art. 415)**
> If the debtor fails to perform his obligation in accordance with its proper form and content, then the creditor may demand compensation for damages arising therefrom; *the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible*.

This proposal of change in the composition was approved in the commission, but with very heavy costs in the conceptual consistency and clarity. In the original composition in the "Old Civil Code", this sentence had played a role to extend the scope of application by cases of impossibility. Contrary to this original role, the drafters in the commission for the "Revised Civil Code" aimed to indicate that the scope of application should include also cases of impossibility as one sample type of non-performance. Unfortunately, this composition was nothing less than a misleading one. So, the modified article could suggest such an understanding that the scope of application of this article should *be extended by cases of impossibility if the impossibility of performance was caused by any reason for which the debtor was responsible* (!) Consequently, it would be even legitimate to limit the application of the principle of "*No liability without responsibility*" exclusively to cases of

impossibility, but not to apply to any other type of non-performance.

C-6. Additional Article on "Delay in acceptance"

Later, in the 87th session of the "Codes Investigatory Commission" on May 22, 1895, Prof. *Hozumi* proposed an additional article on the issue "*Delay in acceptance*". The drafters became aware of the necessity to put an article on this issue after they decided to adopt an article on "Delay in performance" in the 75th session of the commission on Apr. 5, 1895. In the original blueprint plan for the drafting work, such an article on this issue was located in the part on sale contract. Prof. *Hozumi* commented on this original plan and said that he had chosen this location because he had found quite inadequate if no article would prescribe the buyer's duty to accept a proper delivery of the object of the sale. However, he realized that a similar situation could be found in any type of contract. So, he decided to adopt an article on this issue as a general principle of obligation. It should be located just next to the article on "Delay in performance" and provide as follows: [15)]

> **Art. 412 [Delay in acceptance] (same as the current Art. 413)**
> If the creditor refuses to accept the tender of the performance, or is prevented from such an acceptance, then he shall be responsible for the delay on and after the time of the tender of the performance.

Prof. *Hozumi* explained his idea on this issue and said that neither intention nor negligence would be required for the creditor's "responsibility" for delay in acceptance. Hence, the creditor should take his "responsibility" for delay even if he is prevented from the acceptance due to "*force majeure*" for example. In other words, this is not any responsibility in the genuine legal sense. The creditor does not infringe any right of others, but he has to take possible risks during his delay in acceptance. On the other side, the debtor's responsibility may be reduced so much as the creditor has to take his risk for the delay in acceptance. In this sense, Prof. *Hozumi* had given up his original idea to prescribe the creditor's duty for acceptance. As a result, the main effect of the "Delay in acceptance" was limited to the reduction of the debtor's responsibility in quite similar sense to the "Delay in acceptance" in the German Civil Code.

C-7. Selective Scheme of Remedies for Non-performance

In such a way, the basic scheme of the Japanese concept for "Non-performance" was born, which could be summarized as follows; namely "Delay in performance" → "Delay in acceptance" → "Enforcement of specific performance" → "Compensation for damages".

As mentioned above, the initial idea of the members of the commission had been to follow the basic scheme proposed by Prof. *Boissonade*. So, they provided "Enforcement of specific performance" as a primary remedy for non-performance in Art. 414. Indeed, the debtor may not enjoy any free choice between natural performance of his obligation or compensation of its economic value. On the other side, however, it is now openly allowed for the creditor to spring from Art. 412 directly upon to Art. 415 skipping Art. 414. As a result, a selective scheme of remedies for non-performance was formed, which could be seen also as "Return to the original scheme in the French Civil Code".

In regard to the third remedy, namely "Recession of contract", Prof. *Hozumi* proposed to follow the

German model and to provide “Restoration to original state” as primary effect of recession. On the other hand, Prof. *Hozumi* clearly rejected the selective composition between “Recession of contract” and “Claim for compensation” in the German concept. [16] The proposal of Prof. *Hozumi* was approved in the discussion of the commission and resulted in the following final articles:

> **Art. 541 [Rescission after notification]**
> If one party fails to perform his obligation, then 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, then the other party may rescind it.
>
> **Art. 542 [Rescission without notification]**
> If one party does not perform his obligation at a fixed time or within a fixed period of time, then the other party may just upon the passage of such time or period of time rescind the contract without making the notification prescribed in the preceding article in cases where the object for which the contract has been concluded, according to the nature of the contract or to the intention expressed by the parties, cannot be attained unless it has been performed just at such time or within such period of time.
>
> **Art. 543 [Rescission in case of impossibility]**
> If the performance has become totally or partially impossible due to a cause for which the debtor is responsible, then the creditor may rescind the contract.
>
> **Art. 545 [Effects of rescission]**
> (1) 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 may not be injured.
>
> (2) In the case described in the preceding paragraph, the amount of money received must restored with interest from the day of receipt.
>
> (3) The exercise of the right of rescission does not affect a claim for compensation for damages.

In regard to the article on the rescission In case of impossibility (Art. 543), Prof. *Hozumi* offered the same explanation as to the relationship of the first sentence of Art. 415 to its second one; he said that Art. 543 had to be located here because the wording “*fail to perform the obligation*” in Art. 541 would not cover cases where the debtor “*can not perform the obligation*”.

[Summary of Part I]

Except the part of “*Boissonade's* Heritage”, the German influence dominates in Book II of the Civil and Commercial Code of Thailand. For example, the most articles in the law on “Non-performance” are directly based on the German Civil Code. In a closer look, however, we can recognize a strange feature in it; namely, the order of the articles are curiously twisted, and rearranged in a quite similar context to the Japanese articles on “Non-performance”. The Thai law based on the German law stays in a “Twisted order” to the German articles, but in a “Straight order” to the Japanese ones. The essential question is whether this unique challenge of the Thai drafters was successful or has caused any serious tensions in the structural scheme of the law on “Non-performance”.

In order to answer this question, we have taken a step toward the analysis of basic scheme in the German and Japanese concept of law on “Non-performance”. The German law has its starting point

in the “Principle of natural fulfillment of the obligation”, and concentrates on regulation of “Impossibility of performance” as a single genuine type of “Non-performance” besides “Delay in performance” as a secondary issue. Consequently, the German civil law faced a serious doubt of “gaps in the law” soon after the German Civil Code was taken in force. Since then, the judge-made-laws and the legal academic theories in Germany have gone hand-in-hand to develop additional regulations of other issues and to close the “gaps in the law” on Non-performance; for example, “positive violation of contract” or “imperfect performance”, “breach of associated duties”, “cupla in contrahendo”, “fall of the basis of contract” and so on.

The Japanese law on “Non-performance” did choose a quite different way. It started from Prof. *Boissonade's* proposal and basically followed the French model. However, the Japanese drafters tried to simplify and generalize the French concept, and successfully formated an unique single approach to the question of “Non-performance” (Art. 415) and the selective scheme of remedies for “Non-performance”. With this French-Japanese scheme, the Japanese law could clear several serious problems which the German civil law had to solve through judge-made-laws and academic theories. On the other hand, the Japanese concept has conceived quite different structural problems; namely, confusion in the concept of “Delay in performance” and uncertainty of the “Responsibility of debtors”.

Above all, the Thai drafters decided for the French-Japanese concept even though they adopted articles themselves from the German law. The reason for such a unique strategy was obviously that serious doubt of “gaps in the law” which the German civil law faced at the beginning of the 20th century. The next question for us is whether the strategy of the Thai drafters was really successful or not, and what kind of difficulties were conceived inside the unique “*twisted*” structure of the Thai law on “Non-performance”, and how these structural tensions inside the Thai law could resolved in the future. These points will be the main issues in Part II of this paper.

D. From Old Text to New Text

E. Possible Deviation from the Original German Concept
E-1. Primary Remedy for Non-Performance
E-2. Main Aspects of "Delay in Performance"
E-3. Responsibility of Debtor as a Requisite for liability

1) พระยามานวราชเส (ปลอด วิเชียร ณ สงขลา, 18 กันยายน พ.ศ. 2433 - 17 กุมภาพันธ์ พ.ศ. 2527)
2) John Allsebrook Simon, 1st Viscount Simon (28 February 1873 – 11 January 1954). He entered the House of Commons as a Liberal Member of Parliament for Walthamstow at the general election in 1906, and later entered the British Government as Solicitor-General in 1910, and advanced in 1913 to Attorney-General. He held this position until May 1915. On request of his friend Prince Rabi (พระเจ้าบรมวงศ์เธอ พระองค์เจ้ารพีพัฒนศักดิ์ กรมหลวงราชบุรีดิเรกฤทธิ์), he probably took care of the young ปลอด วิเชียร ณ สงขลา when the latter stayed in London for the study at the "Inner Temple" during 1912 – 16.
3) According to his statement in the interview which was recorded in :
   - บันทึกคำสัมภาษณ์พระยามานวราชเสวี โดย ภาควิชานิติศึกษาทางสังคม ปรัชญา และประวัติศาสตร์, ครั้งที่ ๒ วันที่ ๑๐ ธันวาคม พ.ศ. ๒๕๒๓, น.๔๐ – ๔๑
   - กำรำลึกของพระยามานวราชเสวี ในหนังสืออนุสรณ์ครบรอบ ๔๘ ปี พ.ศ. ๒๕๒๔, สำนักงานคณะกรรมการ กฤษฎีกา, น.๓
4) "ที่มาของกฎหมายในประมวลกฎหมายแพ่งและพาณิชย์ บรรพ ๑-๕". This table is attached to the following publication : อุทาหรณ์สำหรับประมวลกฎหมายแพ่งและพาณิชย์ บรรพ ๑-๒ ฉบับกรมร่างกฎหมาย, เนื่องในโอกาสครบรอบ ๑๐๐ปี พระยามานวราชเสวี, ๑๘ กันยายน ๒๕๓๓
5) This table of reference with suplimentary entries can be downloaded at the following URL: http://openlegaltextbook.info/Resources/04_Index-Book1+2-V1_20130930_EN.pdf
6) *Neuner, Carl*: „**Wesen und Arten der Privatrechtsverhältnisse.** Eine civilistische Ausführung, nebst einem Anhange, den Grundriß zu einem neuen Systheme für die Darstellung des Pandektendrechts enthaltend", Kiel, 1866, S.66f. The original German text is as follows;
   „Der Berechtigte muß den Verpflichteten selbst wider dessen Willen zur Erfüllung nöthigen können: […] Dem Berechtigten muß daher gegen den Verpflichteten eine Klage und zwar eine wirksame Klage auf Erfüllung zustehen; keine wahre obligatio ohne actio. […] Hinter jeder Obligtion als Verpflichtung zu geldwerther Leistung steht, wie oben bemerkt das pecuniäre Interesse des Gläubigers, der Geldwerth, welchen es für ihn hat, wenn die Obligation, und zwar in allseitig gehöriger Weise, in natura erfüllt wird oder worden wäre. Dieß führt jedoch nicht dahin, daß es von vornherein in des Schuldners Belieben stünde, entweder Naturalerfüllung oder den Geldwerth anzubieten, oder daß Gläubiger von vornherein beliebig eines von den beiden fordern könnte. Vielmehr geht Verpflichtung wie Forderung zunächst nur auf Naturalerfüllung".
7) *Mommsen, Friedrich*: „**Die Lehre von der Mora**, nebst Beiträge zur Lehre von der Culpa", Braunschweig, 1855, S.5. The original German text is as follows;
   „Die Mora des Schuldners setzt zur ihrer Begründung eine Rechtsverletzung voraus, nämlich eine Verletzung des Rechtes des Gläubigers auf rechtzeitige Erfüllung der Obligation, und zwar muß diese Rechtsverletzung dem Schuldner zugerechnet werden können. Ganz anders verhält es sich mit der Mora des Gläubigers. Zwar genügt der Umstand allein, daß der Gläubiger die Obligation nicht realisieren will, noch nicht zur Begründung dieser Mora; der Wille des Gläubigers muß sich äußerlich manifestieren. Eine Verschuldung ist aber hier regelmäßig ausgeschlossen, weil dem Gläubiger eine Verpflichtung zur Annahme nicht obliegt, durch die Verweigerung der Annahme also auch kein Recht des Schuldners verletzt wird."
8) The original French text of the draft compiled by Prof. *Boissonade* are as follows:
   Art. 336. Le promettant ou tout autre débiteur est mis en demeure dans les cas suivants:
   1° Lorsqu'il y a une demande en justice, une sommation ou une signification du titre exécutoire en bonne et due forme, après l'échéance du terme fixé;
   2° Lorsque le terme est échu, si telle est la disposition expresse de la loi ou de la convention;
   3° Lorsque le promettant a laissé passer l'époque après laquelle il savait que l'exécution ne pouvait plus être utile au stipulant.

   Art. 381. L'effet principal d'une obligation est de donner au créancier une action en justice pour l'exécution directe de ladite obligation et, subsidiairement, pour les dommages-intérêts, en cas d'inexécution, suivant les distinctions portées aux Sections I, II et III ci-après.
   (2) Lesdits effets des obligations sont, en outre, plus ou moins étendus, suivant les diverses modalités

des obligations, telles qu'elles sont prévues à la Section IV.

Art. 382. Dans tous les cas où l'exécution directe de l'obligation, suivant sa forme et teneur, est requise par le créancier et peut être obtenue sans contrainte sur la personne du débiteur, les tribunaux doivent l'ordonner:
(2) S'il s'agit de choses corporelles à délivrer et se trouvant dans les biens du débiteur, elles sont saisies par autorité de justice et délivrées au créancier;
(3) S'il s'agit d'obligation de faire, le tribunal autorise le créancier à la faire exécuter par des tiers, aux frais du débiteur;
(4) S'il s'agit d'obligation de ne pas faire, le créancier est autorisé à faire détruire, aussi aux frais du débiteur, ce qui a été fait en contravention à l'obligation, et à prendre pour l'avenir telles mesures qu'il convient ; Sans préjudice de dommages-intérêts, dans tous ces cas, s'il y a lieu.
(5) Les voies d'exécution forcée contre le débiteur sont réglées au Code de Procédure civile.

Art. 383. En cas de refus d'exécuter par le débiteur, si le créancier n'exige pas l'exécution forcée, ou si la nature de l'obligation ne la comporte pas, il obtient la condamnation aux dommages-intérêts ; il en est de même au cas d'impossibilité d'exécuter imputable au débiteur.
(2) Le créancier peut aussi obtenir des dommages-intérêts pour le simple retard dans l'exécution.
(3) Hors les cas oh les dommages-intérêts sont fixés par la loi et quand ils ne l'ont pas été par les parties, ils sont fixés par le tribunal, sous les distinctions et conditions ci-après.

Art. 384. Les dommages-intérêts ne sont encourus qu'après que le débiteur a été constitué en demeure, conformément à l'article 336.
(2) Toutefois, si l'obligation est de ne pas faire, le débiteur est toujours de plein droit en demeure.
(3) Il en est de même de celui qui est tenu par un délit de rendre une chose ou des valeurs appartenant à autrui.

9) 日本學術振興會編『法典調査會民法議事速記録』 "**The Minutes of the discussion on Civil Code in the Codes Investigatory Commission**" (compiled by Japan Society for the Promotion of Science), Vol.18, pp. 29 – 78.
10) Ibid., Vol.23, pp. 147 – 150.
11) 日本學術振興會編『法典調査會民法整理會議事速記録』 "**The Minutes of the Draft Civil Code Compilation Conference in the Codes Investigatory Commission**" (compiled by Japan Society for the Promotion of Science), Vol.3, pp. 131 – 133.
12) 日本學術振興會編『法典調査會民法議事速記録』 "**The Minutes of the discussion on Civil Code in the Codes Investigatory Commission**" (compiled by Japan Society for the Promotion of Science), Vol.23, pp. 147 – 149.
13) Ibid., Vol.23, pp. 145 – 146.
14) Ibid., Vol.23, pp. 150 – 155.
15) Ibid., Vol.30, pp. 104 – 109.
16) Ibid., Vol.25, pp. 109 – 114.