Basic View
to

Reconstruction of the Arrangement of the Articles on "Remedies for non-performance" in the Civil and Commercial Code of Thailand (1925)

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

by

Shiori Tamura
(Faculty of Law, Thammasat University)

Contents

A. Preliminary Consideration

A-1. "Adoption of the Japanese Way" and the Identity of the Thai Concept

The leading drafter of the "**Civil and Commercial Code of Thailand (1925)**", *Phraya Manava Rajasevi* [1] had once described his own proposal and vision for an alternative codification project as "*Adoption of the Japanese way*".[2] Indeed, he might really have had the understanding that the Japanese Civil Code were a duplication of the German Civil Code (BGB) or a simplified BGB.[3] However, the "*Adoption of the Japanese way*" in his mind would not always mean any simple "duplication" of the German or Japanese Civil Code. When his drafting work progressed, he must have clearly realized the essential differences between the German and the Japanese Civil Codes in

1 พระยามานวราชเสวี (ปลอด วิเชียร ณ สงขลา, 18 กันยายน พ.ศ. 2433 – 17 กุมภาพันธ์ พ.ศ. 2527)

2 "... ผมก็เลยเสนอให้เราใช้วิธีแบบของญี่ปุ่น คือก็อปปี้ (Copy) กฎหมายญี่ปุ่นมา ..." (มหาวิทยาลัยธรรมศาสตร์, ๒๕๒๕, น.๒๑ – ๒๒)

3 มุนินทร์ พงศาปาน (๒๕๕๖), น. ๗๕๐ – ๗๕๑.

certain parts. Such differences must have been serious challenges to be addressed for his drafting policy. In order to overcome such challenges, surely he had to develop own strategic plans, and these strategies were often so unique that the results of his arrangement have obtained a certain level of *originality* which individualized the Thai code against the both foreign codes.[4] The best sample of such unique arrangements would be the part on the subject "**Remedies for non-performance**" in the "Civil and Commercial Code of Thailand (1925)". Its uniqueness and originality consists in following point; it is one of the most representative parts in this code where the influence from "**German Civil Code, Book II (1900)**" is quite decisive, at the same time however, this part shows us also its clear "***Divergence***" from the German concept on this subject as I described already in <Part I> of this paper. [5] Apparently, *Phraya Manava Rajasevi* has followed the arrangement of articles in the "**Revised Civil Code of Japan, Book III (1896)**" as we may assume from the "***Straight Order***" between the Thai and the Japanese articles while the relationship between the Thai and German articles could be described as "***Twisted Order***".[6] In other words, the drafter adopted the most part of the provisions from the *German* code, and he completely rearranged them in accordance with the *French-Japanese* concept on this subject. Especially in the field of law on obligations, the "**Revised Civil Code of Japan**" was not just the model code for the drafter, but it functioned rather as a sort of "*Navigator*" for him to reach his final goal (namely "*Adoption of the German Civil Code*").

As a matter of course, such an experimental attempt must have involved taking risk of disturbance in "*system consistency*" or "*integrity*". For this reason, we would be now urgently requested to reconfirm the consistency or integrity in this part of the Civil and Commercial Code of Thailand. In order to correctly respond to this request, the next task would be for us to figure out the drafter's work-method and to describe each step of the whole procedure of the arrangement in this part of the code. This is the main issue of <Part II> of my paper. The reconstruction of such steps would, if successful enough, clearly reveal the *identity* and *uniqueness* of *Phraya Manava Rajasevi's* attempt, and it would unveil even its *actuality*, which will be properly thematized in <Part III> of this paper. In this reconstruction, we would be able to recognize also the actual role and function of the Japanese Civil Code as "*Navigator*" in the codification work of the "Civil and Commercial Code of Thailand (1925)".

A-2. Initial Consideration to the Arrangement of the Articles

The attempt of the drafter *Phraya Manava Rajasevi* to adopt the German articles in accordance with the French-Japanese scheme could be characterized as an attempt to achieve a "*synthesis*" between these two heterogeneous concepts on the subject "Remedies for non-performance". In order to correctly reconstruct the whole procedure of this work, we would at first have to find out a certain "*middle point*" or "*common place*" between these heterogeneous concepts, in other words, a core provision which could crossly link these two concepts. What would be such middle point or a common place in regard with our question?

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4 *Phraya Manava Rajasevi* also called his work "comparative system" in another document (สำนักงานคณะกรรมการกฤษฎีกา, ๒๕๒๔, น. ๕)

5 See Tamura (2013), น. ๙๐๕.

6 See Tamura (2013), Table 6, น. ๙๐๗.

Firstly, we would like to identify the core part for "Remedies for non-performance" in the "**Revised Civil Code of Japan (1896)**". It would be easy to identify, namely Art. 415, which is a single, general clause on debtor's liability for all possible types of non-performance:

> **Art. 415, Revised Civil Code of Japan** (de Becker, 1909, Volume II, p. 25)
> When the debtor does not perform the obligation in accordance with the true intent and purpose of the same (in forma specifica), *the creditor may demand compensation for accruing damage*. The same applies when performance has become impossible owing to a cause attributable to the debtor.

On the other side, however, the German Civil Code in old fashion did not possess any general provision which would be comparable to Art. 415 of the Japanese code.[7] The traditional German scheme for this subject "Remedies for non-performance" showed rather a sort of *dualism* in regard to the grounds for debtor's liability, namely the liability for "*Impossibility of performance*" (§280, BGB in old fashion) and the liability for "*Default (delay in performance)*" (§286, BGB in old fashion):

> **§ 280, BGB in old fashion** (Wang, Chung Hui, 1907, p. 64)
> (1) 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*.
> (2) In case of partial impossibility the creditor may, by declining the still possible part of the performance, demand compensation for non-performance of the entire obligation, if he has no interest in the partial performance. The provision of 346 to 356 applicable to the contractual right of rescission apply *mutatis mutandis*.
>
> **§ 286, BGB in old fashion** (Wang, Chung Hui, 1907, p. 65)
> (1) *The debtor shall compensate the creditor for any damage arising from his default*.
> (2) 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*. The provision of 346 to 356 applicable to the contractual right of rescission apply *mutatis mutandis*.

According to the original German principle of "*Natural fulfillment*", §280 was the primary ground for debtor's liability for non-performance while the liability in §286 Paragraph (1) was ranked merely as an additional, secondary ground. However, §286 Paragraph (1) could be transformed into a general clause if we completely ignore the theoretical background of the original German concept and replace its phrase "*his default*" with a phrase "*his non-performance*" in a following manner: "The debtor shall compensate the creditor for any damage arising from *his non-performance*", which would be a suitable counterpart to Art. 415 of the Japanese code. Moreover, §286 Paragraph (2) provided a special type of compensation for damages, namely "*Demand for damages in lieu of performance*" while damages under Paragraph (1) may be demanded in parallel to a demand for specific performance in a proper manner of the obligation.[8] In this sense, §286 would be more comprehensive than §280 which provided a "*Demand for damages in lieu of performance*" only.

Indeed, it would be quite assumable that *Phraya Manava Rajasevi* had treated §286 as the core

7 As we will discuss later in <Part III> of this paper, the modernized Law on Obligations of Germany (2001) has introduced a general clause for "Remedies for non-performance" in §280 in new fashion which could be comparable to Art. 415, Revised Civil Code of Japan.

8 The translator of the German Civil Code *Chung Hui Wang* added his English translation of §286 Paragraph (1) a comment which says "As a general rule the creditor cannot rescind the contract on the ground of the default of the debtor. See, however, par. 2" (Wang, Chung Hui, 1907, p. 65).

provision for "Remedies for non-performance" of BGB in old fashion.[9] §280 would be for him rather a special article for rare cases of "*Impossibility of performance*". In this sense, *the cross-linking between Art. 415 of the Revised Civil Code of Japan and §286 Paragraph (1) of BGB in old fashion* would function well as "*middle point*" or "*common place*" for our comparison between the both concepts.

A-3. Segmentation of the Relevant Articles of BGB in old fashion

Before we go into a detailed analysis of each step of the arrangement procedure, we would like to clearly segment the relevant German articles into several small groups in order to keep a clear overview upon the whole arrangement procedure. Following articles of BGB in old fashion will be taken into my consideration:

[Table 1] 6 Segments of the Relevant German Articles

§§ 249 – 253	Scope of damages (Natural restitution)	**Segment 1:** Scope of damages
§ 254	Contributory negligence	
§ 271	Time for performance	**Segment 2:** Time for performance
§ 275	No liability for impossibility without debtor's responsibility	**Segment 3:** Impossibility of performance
§ 276	Definition of debtor's responsibility	
§ 277	Responsibility only for gross negligence in certain cases	
§ 278	Vicarious liability in case of impossibility of performance	
§ 279	No inability in case of obligation designated by species only	
§ 280	Impossibility of performance due to debtor's responsibility; Damages in lieu of performance	
§ 284	Debtor's default through warning	**Segment 4:** Debtor's default (Delay in performance)
§ 285	No default without debtor's responsibility	
§ 286 (1)	Debtor's liability for damages due to default	
§ 286 (2)	Damages in lieu of performance in case of default	
§ 287	Strict liability of debtor during default	
§ 288	Statutory interest as damages in case of money debts	**Segment 5:** Delinquency charge
§ 289	Prohibition of interest upon interest	
§ 290	Interest upon values lost during default	

9 *Phraya Manava Rajasevi* probably has got a decisive hint for his understanding from the annotation to the Japanese Art. 415 by the translator *de Becker*; he added to his English translation of this article a comment which says "In reference *vide* Art. 414; also Arts. 250, 286 and 325 of the German Civil Code" (de Becker, 1909, Vol. II, p. 25). Under these three German articles, §286 would be the best counterpart to the Japanese Art. 415. §250 of the German Civil Code in old fashion provided "*compensation for damages in lieu of restitution*" in case of the expiration of the period which was fixed by the creditor, and §325 provided the liability for impossibility of performance in case of a bilateral contract, namely "*compensation for damages in lieu of performance*" or "*rescission of contract*". So, we could say that §250 and §325 of the German Civil Code in old fashion did not have any essential common point with the Japanese Art. 415.

§ 293	Creditor's default
§ 294	Actual tender of performance
§ 295	Verbal tender of performance
§ 296	Cases where no tender of performance is required
§ 297	No creditor's default in case of debtor's inability for performance
§ 298	Creditor's default in cases of no tender of counter-performance
§ 299	No creditor's default in case of temporary obstacles to acceptance
§ 300	Reduced liability of debtor during creditor's default
§ 301	No interest upon money debt during creditor's default

Segment 6:
Tender of performance
and
Creditor's default
(Delay in acceptance)

A-4. Overall Strategy for Arrangement (Step 1 to 8)

Presumably, *Phraya Manava Rajasevi* had roughly arranged these 6 segments of the German code in accordance with 8 articles of the Revised Civil Code of Japan, namely, Arts. 412, 413, 414, 415, 416, 417, 418, and 419. The following "**Correspondency Structure**" table could show the overall comparability between 6 segments of the German code and 8 articles of the Japanese code:

[Table 2] Overall Cross-linking or Correspondency Structure

German Code		Japanese Code	Arrangement procedure
Segment 1			
Segment 2	Segment 2 ↔	Art. 412	→ Step 2
Segment 3	Segment 6 ↔	Art. 413	→ Step 7
	–	Art. 414	→ Step 3
Segment 4	Segment 4 ↔	Art. 415 Sentence 1	→ Step 1
	Segment 3 ↔	Art. 415 Sentence 2	→ Step 4
	Segment 1 ↔	Art. 416, 417, 418	→ Step 5
Segment 5	Segment 5 ↔	Art. 419	→ Step 6
Segment 6			

Among these 6 lines of correspondency or cross-linking, *the linking between **Segment 4** of the German code and Art. 415 Sentence 1 of the Japanese code works as "axis of rotation"*; namely, Segment 1 and 3 could be linked to the lower side below the axis. On the other hand, Segment 6 could be linked to the upper side over the axis. This rotation is the main reason how the "***Twisted Order***" between the German and Thai codes was formed through the arrangement by *Phraya Manava Rajasevi.* In other words, the real reason of the "***Twisted Order***" was the structural difference between the *German* and the *French-Japanese* schemes for the subject "Remedies for non-performance". We would like to describe the details of his arrangement procedure in following 8 steps:

- Firstly, ***Segment 4*** of the German code which included §286 would be linked to **Art. 415 Sentence 1** of the Japanese Civil Code (**Step 1**). This cross-linking should be set up as a core part of the new arrangement of *Phraya Manava Rajasevi*.
- The top part of the whole arrangement, however, should determine the beginning of the effect of obligations, namely "*Time for performance*". In this sense, the cross-linking between ***Segment 2*** of the German code (§271) and **Art. 412** on "*Debtor's default*" of the Japanese

code should be located at the top of the new arrangement (**Step 2**).

- In the Japanese code, **Art. 414** provided the issue "*Demand for specific performance*" while the German Civil Code did not possess any comparable article on this issue. So, the Japanese article should be adopted as is (**Step 3**).
- According to the discussion in the 57th session of the "*Code Investigatory Commission*" on Jan. 18, 1895, the main purpose of **Art. 415 Sentence 2** consisted in a clear declaration of the general principle of "*No liability without responsibility*".[10] Unfortunately, this sentence was replaced with Art. 383 Paragraph (1) Sentence 2 of the "**Old Civil Code of Japan (1890)**" in the discussion of the commission on Apr. 5, 1895.[11] According to its new wording, this sentence looked like a simple provision on the issue "*Impossibility of performance*". Apparently, *Phraya Manava Rajasevi* really believed in this appearance, and he linked it to ***Segment 3*** of the German code. Indeed, he put its provisions to the position which exactly corresponds to the position of **Art. 415 Sentence 2** of the Japanese code (**Step 4**). Consequently, the provisions on "*Impossibility of performance*" (***Segment 3***) were located after the core part on "*Debtor's default*" (***Segment 4***). This is the first reason why the original order of the German provisions had to be turned over.
- In **Step 5** and **Step 6**, the provisions on "*Scope of damages*" (***Segment 1*** of the German code which is comparable to the provisions of **Arts. 416**, **417**, and **418** in the Japanese code) as well as the special regulations for "*Delinquency charge*" (***Segment 5*** of the German code which is comparable to **Art**. **419** of the Japanese code) would be linked to the respectively corresponding position in the Japanese code. In **Step 5**, the German articles in ***Segment 1*** is linked to the lower side below the axis. This is the second reason for the "***Twisted Order***" described above.
- Additionally, the provisions on "*Creditor's default*" (***Segment 6*** of the German code which is comparable to **Art. 413** of the Japanese code) would be linked to the upper side over the axis and located just next to the provisions on "*Debtor's default*" (**Step 7**). This is the third reason for the "***Twisted Order***" described above.
- During these seven steps described above, *Phraya Manava Rajasevi* adopted only three articles from the Japan code; namely **Arts. 414**, **415 Sentence 1**, and **416**. He adopted **Art. 414** on "*Demand for specific performance*" because the German code did not posses any comparable provision (**Step 3**), and he preferred **Art. 415 Sentence 1** of the Japanese code to §286 (1) of the German code because the former could cover all the possible types of non-performance while the latter regulated only "*Delay in performance*" (**Step 1**). Also in the issue "*Scope of damages*", he preferred **Art. 416** of the Japanese code to §§249 – 253 of the German code (**Step 5**). The reason for this decision is unclear. Probably, he recognized the English origin of **Art. 416**. It must have been familiar to him. At the same time, he might have thought that the German principle of "*Natural restitution*" declared in §249 were not so suitable for the Siam society.

10 See Tamura (2013), p. 917.

11 See Tamura (2013), P. 920.

- At the end (**Step 8**), *Phraya Manava Rajasevi* adopted three articles from the so-called "**Old Text**" and located them among German and Japanese articles, namely, **Arts. 327**, **355**, and **373** of the "**Civil and Commercial Code of Thailand (1923)**".[12]

Regarding "*Creditor's default*" (***Segment 6***), it would be absolutely possible to treat this part directly *after* ***Step 2*** or even *after* ***Step 1***. In such a case, this part would be adopted as **Step 3** or **Step 2** instead of **Step 7**. Indeed, this ordering of steps would be better adapted to the position of the Japanese article **Art. 413**. On the other hand, however, the logical sequence from "*Time for performance*" over "*Debtor's default*", "*Demand for specific performance*" and "*Damages for non-performance*" to "*Scope of damages*" would be once suspended or disturbed. For this reason, I would like rather to keep this logical sequence unbroken and treat the part for "*Creditor's default*" (***Segment 6***) after the completion of the logical sequence concerning debtor's liability for non-performance.

B. Reconstruction of the Arrangement Procedure in Detail

B-1: Step 1 – Setup of the Core Part

Now, we would like to go into detailed consideration of each step of the arrangement procedure. At first, the core provisions on the issue "Remedies for non-performance", namely the basic liability of the debtor for non-performance should be determined. As described above, the cross-linking between ***Segment 4*** of the German code (§§284 – 287) and **Art. 415 Sentence 1** of the Japanese code should fulfill this task:

[Table 3] Core Part on Basic Liability of the Debtor for Non-performance

Gr. BGB		Civil and Commercial Code of Thailand (1925)			Jp. code
					Art. 412
§ 284	→	*มาตรา 204*	*Debtor's default through warning*		
§ 285	→	*มาตรา 205*	*No default without responsibility*		
					Art. 413
					Art. 414
§ 286 (1)	<---------->	*มาตรา 215*	*Damages due to non-performance*	←	*Art. 415 S.1*
§ 286 (2)	→	*มาตรา 216*	*Damages in lieu of performance*		
§ 287	→	*มาตรา 217*	*Strict liability during default*		
					Art. 415 S.2
					[…]

For the provisions of the basic liability of the debtor for non-performance, *Phraya Manava Rajasevi* adopted **§§284 – 287** from the German code. Though, for the reason which I already described above in the "**A-4. Overall Strategy for Arrangement (Step 1 to 8)**", he preferred the Japanese article (**Art. 415 Sentence 1**) to the German §286 (1) as a core provision on this issue. We would like to compare wordings and contents of these articles in order to confirm the adequateness of my consideration:

12 As to the adoption of certain articles from the "Civil and Commercial Code of Thailand (1923)", *Phraya Manava Rajasevi* himself commented in the interview as follows: "ดังนั้นประมวลกฎหมายของเรา จึงถูกเปลี่ยนจาก ซิวิลโค็ด (แบบฝรั่งเศส) มาเป็น แพนเด็กตโค็ด (Pandect Code) แบบเยอรมัน แต่เราก็ต้องรักษาน้ำใจของฝรั่งเศสเอาไว้ โดยเราเอาเค้าโครองแบบเอยรมัน แล้วเอาโพรวิชั่นของฝรั่งเศสเป็นบางตอน เวลาร่างกฎหมายผมก็บอกว่าอันนี้เอามาจากกฎหมายญี่ปุ่น อันนั้นสวิส อันนั้นโอลด์เทกซ์ ที่กรรมการชุดก่อนทำกันไว้" (มหาวิทยาลัยธรรมศาสตร์, ๒๕๒๕, น. ๒๓)

Step 1-a: มาตรา **204**

The top article of the core part prescribes the debtor's liability for default (delay in performance):

§284, BGB in old fashion (Wang, Chung Hui, 1907, p. 65)
(1) 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.

(2) If a time by the calender is fixed for the performance, the debtor is in default without warning if he does not perform at the fixed time. The same rule applies if a notice is required to precede the performance, and the time is fixed in such manner that it may be reckoned by the calender from the time of notice.

มาตรา 204

ถ้าหนี้ถึงกำหนดชำระแล้ว และภายหลังแต่นั้นเจ้าหนี้ได้ให้คำเตือนลูกหนี้แล้ว ลูกหนี้ยังไม่ชำระหนี้ไซร้ ลูกหนี้ได้ชื่อว่าผิดนัด เพราะเขาเตือนแล้ว

ถ้าได้กำหนดเวลาชำระหนี้ไว้ตามวันแห่งปฏิทิน และลูกหนี้มิได้ชำระหนี้ตามกำหนดไซร้ ท่านว่าลูกหนี้ตกเป็นผู้ผิดนัดโดยมิพักต้องเตือนเลย วิธีเดียวกันนี้ท่านให้ใช้บังคับแก่กรณีที่ต้องบอกกล่าวล่วงหน้าก่อนการชำระหนี้ ซึ่งได้กำหนดเวลาลงไว้ อาจคำนวณนับได้โดยปฏิทินนับแต่วันที่ได้บอกกล่าว

Apparently, *Phraya Manava Rajasevi* eliminated §284 Paragraph (1) Sentence 2 from the Thai article มาตรา 204. This sentence regarded the effect of "*action for the performance*" and other similar actions. Presumably, he decided to eliminate it because he had already planed to adopt **Art. 414** of the Japanese code for the issue "*Demand for enforcement of specific performance*", which we will discuss in **Step 3**.

Step 1-b: มาตรา **205**

The next provision prescribes the responsibility of the debtor as a requirement for his liability. The content of this Thai article มาตรา 205 exactly corresponds to §285 of the German code:

§285, BGB in old fashion (Wang, Chung Hui, 1907, p. 65)
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.

มาตรา 205

ตราบใดการชำระหนี้นั้นยังมิได้กระทำลงเพราะพฤติการณ์อันใดอันหนึ่งซึ่งลูกหนี้ไม่ต้องรับผิดชอบ ตราบนั้นลูกหนี้ยังหาได้ชื่อว่าผิดนัดไม่

Step 1-c: มาตรา **215**

The core provision มาตรา 215 was composed after Art. 415 Sentence 1 of the Japanese code instead of the comparable German article §286 Paragraph (1) which will be also cited here again:

Art. 415, Revised Civil Code of Japan (de Becker, 1909, Vol. II, p. 58)
When the debtor does not perform the obligation in accordance with the true intent and purpose of the same (in forma specifica), the creditor may demand compensation for accruing damage. The same applies when performance has become impossible owing to a cause attributable to the debtor.

§ 286, BGB in old fashion (Wang, Chung Hui, 1907, p. 65)
(1) The debtor shall compensate the creditor for any damage arising from his default.

มาตรา 215

เมื่อลูกหนี้ไม่ชำระหนี้ให้ต้องตามความประสงค์อันแท้จริงแห่งมูลหนี้ไซร้ เจ้าหนี้จะเรียกเอาค่าสินไหมทดแทนเพื่อความเสียหายอันเกิดแต่การนั้นก็ได้

The presumable reason for this decision of the drafter was already discussed above in “**A-4. Overall Strategy for Arrangement (Step 1 to 8)**”. Regarding Art. 415 Sentence 2 of the Japanese code, *Phraya Manava Rajasevi* surely believed that it were simply a provision on “*Impossibility of performance*”. For this issue, however, he planed to adopt ***Segment 3*** of the German code (**§§275, 276, 278,** and **280**) instead of this simple Japanese sentence, which will be the main issue in **Step 4**. Accordingly, he decided to eliminate this sentence from the Thai article มาตรา 215.

[System Integrity Issue (1)]

Unfortunately, this decision of the elimination of Art. 415 Sentence 2 from มาตรา 215 has caused a certain system inconsistency problem to the Thai code. It has been caused because Art. 415 Sentence 2 was not a simple provision only for “*Impossibility of performance*”, but it functions as a declaration of the general principle of “*No liability without responsibility*” at the same time.

In the current version of the Thai code, there are three articles which prescribe the liability of the debtor for non-performance, namely มาตรา 204, 215, and 218. When the debtor does not effect his obligation in due time, then he is in default under มาตรา 204, and he is liable for damages arising from his default under มาตรา 215. Regarding to this liability for *default (delay in performance)* under มาตรา 204, มาตรา 205 requires “*Responsibility*” of the debtor for the circumstance in consequence of which the performance can not be effected. As we have just seen above, this Thai article was composed after the German provision §285 in old fashion.

Regarding also to the liability for *impossibility of performance*, มาตรา 218 requires “*Responsibility*” of the debtor for a circumstance in consequence of which the performance becomes impossible, and มาตรา 219 releases him from the liability when he is not responsible for such a circumstance. These Thai provisions were composed respectively after the German provision §280 and §275 as we will see in **Step 4**. For other types of non-performance (so-called “*Imperfect performance*” or “*Positive breach of contract*”), however, a corresponding requirement of debtor's responsibility suddenly disappeared when *Phraya Manava Rajasevi* decided not to adopt Art. 415 Sentence 2 of the Japanese code into มาครา 215.

[Actuality Issue (1)]

Non the less, the adoption of Art. 415 Sentence 1 of the Japanese Civil Code has brought certain advantages to the Thai concept on the issue “Remedies for non-performance”. In the German civil law, its Civil Code has been considered suffering from a certain “gap in the law” in regard with the debtor's liability in cases of “*Imperfect performance*” or “*Positive breach of contract*”. Since soon after its implementation in 1900, academic theories and judgments tried to develop suitable solutions to close this gap in various forms; for examples, analogical application of the provisions §§280 and 325 (impossibility of performance) or §§286 and 326 (default of the debtor), broader interpretation of the provision §276 (responsibility of the debtor), or even getting back to the general clause §242 (performance in good faith), and so on.[13] Eventually, these solutions were integrated into a general

13 Emmerich (1991), S.214 – 218; Brox (1985), S.166 – 170.

clause on the debtor's liability for breach of duties and clearly declared in the "**Modernized Law on Obligations of Germany (2001)**"; namely its §280 Paragraph (1) in new fashion:

> **§ 280, BGB in new fashion** [14]
> (1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.

When *Phraya Manava Rajasevi* adopted §286 from BGB in old fashion, but at the same time decided to replace its first paragraph with Art. 415 Sentence 1 of the Japanese Civil Code, he had anticipated this German solution in the "**Modernized Law on Obligations of Germany (2001)**". This is the first actuality of his arrangement which must have saved the Thai civil law from many theoretical difficulties.

Step 1-d: มาตรา **216**

As a result of the adoption of Art. 415 Sentence 1 from the Japanese Civil Code, the second paragraph still remained from §286 of the German Civil Code. For this reason, the drafter has separately composed มาตรา 216 after §286 Paragraph (2) which prescribes "*Demand for damages in lieu of performance*":

> **§ 286, BGB in old fashion** (Wang, Chung Hui, 1907, p. 65)
> (2) 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. The provisions of 346 to 356 applicable to the contractual right of rescission apply *mutatis mutandis*.

> **มาตรา 216**
> ถ้าโดยเหตุผิดนัด การชำระหนี้กลายเป็นอันไร้ประโยชน์แก่เจ้าหนี้ เจ้าหนี้จะบอกปัดไม่รับชำระหนี้ และจะเรียกเอาค่าสินไหมทดแทนเพื่อการไม่ชำระหนี้ก็ได้

In the composition of the Thai article มาตรา 216, *Phraya Manava Rajasevi* exactly preserved the original wordings of the German provision §286 Paragraph (2) except its Sentence 2, which provided that the provisions on contractual right of rescission (§§346 to 356) should be analogically applied to the case of non-performance. The drafter of the Thai code, however, carefully eliminated it from the Thai article มาตรา 216. We would like to evaluate it as a "well-considered" decision of him because he repeated the same decision also in regard with มาตรา 218.

In perspective of historical, structural comparison, the composition of the Thai article มาตรา 216 shows its quite interesting actuality in two points as well as certain disturbance of system integrity also in two points:

[Actuality Issue (2)]

As described above in **[Actuality Issue (1)]**, the Thai provision มาตรา 215 was a quite effective way to overcome theoretical difficulties which the German civil law had to tackle for a long time. At this time as the second actuality of the Thai code, มาตรา 216 shows a certain advantage as compared to the Japanese Civil Code; namely, a clear provision for "*Demand for damages in lieu of performance*" is just missing in the current Japanese code. This code had not supposed the necessity to explicitly differentiate damages between "*besides*" and "*in lieu of*" performance.

14 This English translation of BGB was adopted from the official publication by the German Federal Ministry of Justice and Consumer Protection available at: <http://www.gesetz-im-internet.de/englisch_bgb/>

In 2006, the Japanese Ministry of Justice announced its reform project of the law on obligation. Since then, there is ongoing controversy as to necessity and adequacy of such a reform among practicing lawyers and legal scholars in Japan. Amid heated debates, the Ministry announced the "**Draft Amendment to the Civil Code**" on March 31, 2015.[15] This draft proposes to introduce an additional paragraph to Art. 415 as follows:

> **Art. 415, Draft Amendment to the Civil Code (2015)**
> (2) In following cases, the creditor may demand compensation for damages in lieu of performance;
>
> 1. when the performance has become impossible;
> 2. when the debtor has declared his definitive refusal of performance;
> 3. when the contract which originated the obligation in question has been rescinded or when the creditor has been entitled to rescind the contract for a reason of debtor's non-performance.

The adequacy of this proposal is not our subject of discussion now. In any case, we can see clearly that the Thai article มาตรา 216 had anticipated the conceptual differentiation of damages between "*besides*" and "*in lieu of*" performance.

The traditional German concept on the issue "Remedies for non-performance" did know this differentiation. However, the primary form of the debtor's liability was "*damages in lieu of performance*" for its impossibility (§275 in old fashion) in accordance with the principle of "*Natural fulfillment of obligation*". "*Damages besides performance*" were simply an additional, secondary form of liability for delay in performance (§286 in old fashion). This logical relationship between two types of damages has been essentially changed in the "**Modernized Law on Obligations of Germany (2001)**". §280 in new fashion provides the basic principle of the debtor's liability for "*Breach of duties*" in general while §§281 – 283 in new fashion provide for special circumstances which entitle the creditor to demand "*damages in lieu of performance*". Also in this aspect, the Thai articles มาตรา 215 and 216 could be seen as an "anticipator" of this new German concept.

[Actuality Issue (3)]

Furthermore, the Thai provision มาตรา 216 shows another actuality, which regards the elimination of §286 Paragraph (2) Sentence 2 mentioned above. Indeed, it is unclear what was the real consideration of *Phraya Manava Rajasevi* for this elimination. Though, we could strongly presume that he considered this sentence as misleading. As a matter of course, the purpose of "*Damages in lieu of performance*" consists in compensation of so-called "*Expectation damages*" while the institute of "*Rescission of contract*" aims "*Restitution of the original state*". In principle, such a diversity of main purpose would prevent any analogical application between these two institutes.

Also needless to say, it was not the proper aim of the §286 Paragraph (2) Sentence 2 to apply the provisions on rescission to the creditor's right, but *to the debtor's right and the creditor's duty* in regard with a whole or partial performance which was already effected before the refusal of acceptance; namely, when the creditor demand damages in lieu of performance, then he in return owes the debtor for restitution of the already effected performance in a same way as in §346 Sentence 1 ("… if rescission takes place, the parties are bound to return to each other the consideration received …"). Nonetheless, it is not deniable that §286 Paragraph (2) Sentence 2 was somewhat

15 The original Japanese documents are available at: <http://www.moj.go.jp/MINJI/minji07_00175.html>

misleadingly composed. Consequently, its wording has been revised in the "**Modernized Law on Obligations of Germany (2001)**" as follows:

> **§ 281, BGB in new fashion**
> (5) If the obligee demands damages in lieu of complete performance, the obligor is entitled to claim the return of his performance under sections 346 to 348.

Accordingly, we could see this modification of the wording as a justification for *Phraya Manava Rajasevi's* decision. In this sense, the elimination of §286 Paragraph (2) Sentence 2 shows an actuality of his arrangement even though it would be an actuality simply in a "passive mode".

[System Integrity Issue (2)]

On the other side, however, this Thai article มาตรา 216 has got a certain disturbance in its system integrity. This trouble has occurred mainly because *Phraya Manava Rajasevi* exactly maintained the original German wording of §286 Paragraph (2) even though he had already replaced its Paragraph (1) with Art. 415 Sentence 1 of the Japanese Civil Code. With this replacement, the Thai article มาตรา 215 had widened its scope of target from simple "*Debtor's default*" to the "*Debtor's non-performance*" in general. Consequently, *Phraya Manava Rajasevi* would have had no necessity to maintain the next article มาตรา 216 as a provision on "*Debtor's default* ("ถ้าโดยเหตุผิดนัด …)" at all. If we would interpret มาตรา 216 quite rigidly, it might apply only to cases of debtor's default. Consequently, we would miss a provision which could entitle the creditor to demand "*Damages in lieu of performance*" also in cases of "*Imperfect performance*" or "*Positive breach of contract*".

For this reason, *Phraya Manava Rajasevi* rather would have had to formulate a general clause which may entitle the creditor to demand "*Damages in lieu of performance*" in any case where he has no more interest in the specific performance *in consequence of non-performance or not properly effected performance*. We could obtain certain particular image of such a general clause from §281 Paragraph (1) in the "**Modernized Law on Obligations of Germany (2001)**":

> **§ 281, BGB in new fashion**
> (1) To the extent that the obligor does not render performance when it is due or does not render performance as owed, the obligee may, subject to the requirements of section 280 (1) [=culpable breach of duty], demand damages in lieu of performance, if he has without result [=unsuccessfully] set a reasonable period for the obligor for performance or cure. If the obligor has performed only in part, the obligee may demand damages in lieu of complete performance only if he has no interest in the part performance. If the obligor has not rendered performance as owed, the obligee may not demand damages in lieu of performance if the breach of duty is immaterial.

Besides §281, the German Civil Code in new fashion provides for "*Damages in lieu of performance*" in further two provisions; namely in §282 (breach of mutual duty to protect rights and interests among parties) and §283 (impossibility of performance or other similar cases). With these three provisions, the German Civil Code in new fashion intends to cover all the possible cases of non-performance where the creditor should be entitled to demand "*Damages in lieu of performance*". Similar generality of the target could be recognized also in the proposed Art. 415 Paragraph (2) of "**Draft Amendment to the Civil Code (2015)**" in Japan.

[System Integrity Issue (3)]

Furthermore, the Thai article มาตรา 216 suffers another, and more serious integrity problem. As

already described above in "**A-4. Overall Strategy for Arrangement (Step 1 to 8)**", there are two Thai articles which entitle the creditor to demand "*Damages in lieu of performance*", namely, มาตรา 216 and 218. These articles were composed respectively after §286 Paragraph (2) and §280 of the German code. In the Thai code, the order of these two articles is turned over as I mentioned already, namely from the original order of "§280 and §286(2)" to the opposite order of "มาตรา 216=§286(2) and มาตรา 218=§280". In the original German context, the proper meaning and purpose of §286 Paragraph (2) may be determined and justified as an equivalent provision to §280 Paragraph (2). In other words, §286 Paragraph (2) may entitle the creditor to demand "*Damages in lieu of performance*" *only in cases where the consequence of the delay in performance would be so fatal to the obligation as in a case of impossibility of performance*. Indeed, the composition and wording of this paragraph was quite similar to §280 Paragraph (2) on partial impossibility.[16] In this sense, the requirements for "ค่าสินไหมทดแทนเพื่อการไม่ชำระหนี้" under มาตรา 216 would have to been quite objectively determined by a court.[17] In the Thai arrangement, however, มาตรา 216 is located just next to the general clause มาตรา 215 which allows the creditor to demand damages due to "การไม่ชำระหนี้ให้ต้องตามความประสงค์อันแท้จริงแห่งมูลหนี้" (imperfect or improper performance), and it stays before the article มาตรา 218 which prescribes "ค่าสินไหมทดแทนเพื่อการไม่ชำระหนี้เพราะเป็นพ้นวิสัย" (impossibility of performance). If we simply follow the logical sequence of these articles, it would be even reasonable to understand that the creditor may demand "*Damages besides performance*" under มาตรา 215 in case of "การไม่ชำระหนี้ให้ต้องตามความประสงค์อันแท้จริงแห่งมูลหนี้", and at the same time he may even choose to refuse to accept the performance and demand "*Damages in lieu of performance*" just in a same way as in มาตรา 218 when he would consider such an imperfect or improper performance as "เป็นอันไร้ประโยชน์" for him. As a result, the creditor would enjoy a privilege to choose one from these two possible remedies (damages "*besides performance*" on one side, or damages "*in lieu of performance*" on other side).[18] Such an interpretation of มาตรา 216, however, might work rather destructively to an effective contractual relationship between parties.

Step 1-e: มาตรา 217

The last article of the core part prescribes the increased liability of the debtor during his default. Obviously, such a provision could make sense only if the responsibility of the debtor is required for his standard liability for default by law. The Thai article มาตรา 217 exactly corresponds to §287 of the German code:

> **§287, BGB in old fashion** (Wang, Chung Hui, 1907, p. 65)
>
> The 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.

16 For example, *Hans Brox* described as follows: „§286 II 1, der dem §280 II 1 nachgebildet ist" ("§286 Paragraph (2) Sentence 1 which is composed after §280 Paragraph (2) Sentence 1") in his Brox (1985), S.161.

17 For example, Brox (1985), S.146.

18 For example, see the comment of *ศาสตราจารย์ โสภณ รัตนากร* (๒๕๕๖, น.๑๕๑): "การเรียกค่าสินไหมทดแทนอาจเป็นมาตรการแทนหรือมาตราการแถมของการชำระหนี้ก็ได้"); there is also an extreme interpretation to understand มาตรา 216 as a punitive provision, see the comment of *รองศาสตราจารย์ ดร.ดาราพร ถิระวัฒน์* (๒๕๕๖, น. ๖๒): "มาตรา ๒๑๖ เป็นบทบัญญัติที่ลงโทษลูกหนี้ผิดนัดที่หนักขึ้น คือเจ้าหนี้มีสิทธิบอกปัดไม่รับชำระหนี้ และยังมีสิทธิเรียกค่าสินไหมทดแทนเพื่อการไม่ชำระหนี้นั้นได้อีกด้วย กฎหมายให้เจ้าหนี้มีสิทธิที่ไม่รับชำระหนี้แม้ว่าลูกหนี้มาชำระหนี้ให้ได้".

มาตรา 217

ลูกหนี้จะต้องรับผิดชอบในความเสียหายบรรดาที่เกิดแต่ความประมาทเลินเล่อในระหว่างเวลาที่ตนผิดนัด ทั้งจะต้องรับผิดชอบในการที่การชำระหนี้กลายเป็นพ้นวิสัย เพราะอุบัติเหตุอันเกิดขึ้นในระหว่างเวลาที่ผิดนัดด้วย เว้นแต่ความเสียหายนั้นถึงแม้ว่าตนจะได้ชำระหนี้ทันเวลากำหนดก็คงจะต้องเกิดมีอยู่นั้นเอง

A comparable provision is missing in the current Japanese Civil Code.

B-2: Step 2 – Adoption of "Time for Performance"

In **Step 1**, the core part of the "Remedies for non-performance" has been formed with the provision on "*Debtor's default*". It is quite self-evident that a clear determination of "*Time for performance*" must precede such provisions on debtor's default. In the second step of the arrangement, therefore, the cross-linking between §271 of the German code and Art. 412 of the Japanese code could be taken into consideration:

[Table 4] Adoption of "Time for Performance"

Gr. BGB		Civil and Commercial Code of Thailand (1925)			Jp. code
§ 271	→	*มาตรา 203*	***Time for performance***	<---------->	Art. 412
§ 284		มาตรา 204	**Debtor's default through warning**		
§ 285		มาตรา 205	**No default without responsibility**		
					Art. 413
					Art. 414
§ 286 (1)		มาตรา 215	**Damages due to non-performance**		**Art. 415 S.1**
§ 286 (2)		มาตรา 216	**Damages in lieu of performance**		
§ 287		มาตรา 217	**Strict liability during default**		
					Art. 415 S.2
					[…]

Step 2: มาตรา 203

As I already described in <Part I> of this paper, Art. 412 of the Japanese code suffers a certain conceptual confusion and ambiguity.[19] This Japanese provision has to fulfill two kinds of task and effect at once; firstly, it should determine the beginning of *debtor's duty to perform his obligation* and creditor's right to demand specific performance, at the same time, it should determine also the beginning of *debtor's responsibility for possible damages* in a case of non-performance. According to the second effect of this Japanese article, the creditor may directly demand damages from the debtor under Art. 415 without any preceding demand for specific performance under Art. 414.[20] *Phraya Manava Rajasevi* apparently wonted to avoid such a conceptual ambiguity of the issue "*Time for performance*". For this reason, he preferred §271 of the German code to the Japanese article. Indeed, the Thai article มาตรา 203 exactly corresponds to this German provision:

> **§ 271, BGB in old fashion** (Wang, Chung Hui, 1907, p. 61)
> (1) If a time for performance is neither fixed nor to be inferred from the circumstances, the creditor may demand the performance forthwith, and the debtor may perform his part forthwith.
>
> (2) If a time is fixed it is to be presumed, in case of doubt, that the creditor may not demand the

19 See Tamura (2013), pp. 917 – 918.

20 See Tamura (2013), p. 919.

performance before that time; the debtor, however, may perform earlier.

Art. 412, Revised Civil Code of Japan (de Becker, 1909, Vol. II, p. 19)
(1) When there a certain (definite) term for the performance of an obligation, the debtor is responsible for delay (is in mora) from the time when the term arrives.

(2) When there is an uncertain (indefinite) term for the performance of an obligation, the debtor is responsible for delay (is in mora) from the time he knew of the arrival of the term.

(3) When there is no fixed term for the performance of an obligation, the debtor is responsible for delay (is in mora) from the time when he has received a demand for performance.

มาตรา 203

ถ้าเวลาอันจะพึงชำระหนี้นั้นมิได้กำหนดลงไว้ หรือจะอนุมานจากพฤติการณ์ทั้งปวงก็ไม่ได้ไซร้ ท่านว่าเจ้าหนี้ย่อมจะเรียกให้ชำระหนี้ได้โดยพลัน และฝ่ายลูกหนี้ก็ย่อมจะชำระหนี้ของตนได้โดยพลันดุจกัน

ถ้าได้กำหนดเวลาไว้ แต่หากกรณีเป็นที่สงสัย ท่านให้สันนิษฐานไว้ก่อนว่า เจ้าหนี้จะเรียกให้ชำระหนี้ก่อนเวลานั้นหาได้ไม่ แต่ฝ่ายลูกหนี้จะชำระหนี้ก่อนกำหนดนั้นก็ได้

Presumably, *Phraya Manava Rajasevi* had in mind the following scenario: When the time for performance has arrived (มาตรา 203), but the debtor does not perform his obligation, the creditor should once request the specific performance from the debtor because the primary effect of obligations consists just in creditor's right to demand specific performance from the debtor (มาตรา 194),[21] and when the debtor does not perform his obligation even upon the creditor's warning, then the debtor is in default (มาตรา 204), which entitles the creditor to demand compensation for damages under มาตรา 215 or even damages in lieu of performance under มาตรา 216. Consequently, together with the articles มาตรา 194 and 204, มาตรา 203 declares creditor's right to demand specific performance as the primary effect of obligation. In this issue, the Thai concept stays essentially closer to the German principle of “*Natural fulfillment of obligation*” than to the Japanese concept, which does not possess any clear definition of the primary effect of obligations.

B-3: Step 3 – Insertion the article on “Enforcement”

As mentioned already in “**A-4. Overall Strategy for Arrangement (Step 1 to 8)**”, the German Civil Code does not possess any provision regarding the action for enforcement. For this reason, *Phraya Manava Rajasevi* decided to adopt Art. 414 of the Japanese code and placed it between “*Debtor's default*” (มาตรา 204, 205) and “*Damages due to non-performance*” (มาตรา 215) :

21 The content of this article exactly corresponds to the German provision §241 in old fashion.

[Table 5] Insertion of the article on "Enforcement"

Gr. BGB	Civil and Commercial Code of Thailand (1925)		Jp. code
§ 271	มาตรา 203	Time for performance	Art. 412
§ 284	มาตรา 204	Debtor's default through warning	
§ 285	มาตรา 205	No default without responsibility	
			Art. 413
	มาตรา 213	*Enforcement of performance*	*Art. 414*
§ 286 (1)	มาตรา 215	Damages due to non-performance	Art. 415 S.1
§ 286 (2)	มาตรา 216	Damages in lieu of performance	
§ 287	มาตรา 217	Strict liability during default	
			Art. 415 S.2
			[…]

Step 3: มาตรา 213

The Thai article มาตรา 213 exactly corresponds to the Japanese provision Art. 414:

> **Art. 414, Revised Civil Code of Japan** (de Becker, 1909, Vol. II, p. 22)
> (1) 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.
>
> (2) When the nature of the obligation does not permit of compulsory performance, if the obligation has the performance of an act for its subject, the creditor may demand the Court to cause a third person to do the same at the expense of the debtor; but with regard to an obligation which has a juristic act for its subject, a judgment may be substituted for an expression of intention by the debtor.
>
> (3) With regard to an obligation which has a forbearance for its subject, the creditor may demand the removal of what has been done at the expense of the debtor and have proper measures adopted for the future.
>
> (4) The provisions of the preceding three paragraphs shall do not affect a demand for compensation for damages.

> **มาตรา 213**
> ถ้าลูกหนี้ละเลยไม่ชำระหนี้ของตน เจ้าหนี้จะร้องขอต่อศาลให้สั่งบังคับชำระหนี้ก็ได้ เว้นแต่สภาพแห่งหนี้จะไม่เปิดช่องให้ทำเช่นนั้นได้
>
> เมื่อสภาพแห่งหนี้ไม่เปิดช่องให้บังคับชำระหนี้ได้ ถ้าวัตถุแห่งหนี้เป็นอันให้กระทำการอันหนึ่งอันใด เจ้าหนี้จะร้องขอต่อศาลให้สั่งบังคับให้บุคคลภายนอกกระทำการอันนั้นโดยให้ลูกหนี้เสียค่าใช้จ่ายให้ก็ได้ แต่ถ้าวัตถุแห่งหนี้เป็นอันให้กระทำนิติกรรมอย่างใดอย่างหนึ่งไซร้ ศาลจะสั่งให้ถือเอาตามคำพิพากษาแทนการแสดงเจตนาของลูกหนี้ก็ได้
>
> ส่วนหนี้ซึ่งมีวัตถุเป็นอันจะให้งดเว้นการอันใด เจ้าหนี้จะเรียกร้องให้รื้อถอนการที่ได้กระทำลงแล้วนั้นโดยให้ลูกหนี้เสียค่าใช้จ่ายและให้จัดการอันควรเพื่อกาลภายหน้าด้วยก็ได้
>
> อนึ่ง บทบัญญัติในวรรคทั้งหลายที่กล่าวมาก่อนนี้ หากระทบกระทั่งถึงสิทธิที่จะเรียกเอาค่าเสียหายไม่

As I described already in regard with มาตรา 203, *Phraya Manava Rajasevi* adopted the German principle of "*Natural fulfillment of obligation*" as the primary effect of obligations. However, what would be the next step for the creditor when his demand of the specific performance under มาตรา 203 and the warning under มาตรา 204 have been eventually unsuccessful? As regarding the priority of the remedies for non-performance, it is not clearly determined whether the creditor firstly has to bring

action for the specific performance under มาตรา 213 so long as the performance is still possible and adequate, or he may, skipping the step of enforcement, directly demand damages under มาตรา 215 (or, to be more accurate, "*Damages in lieu of performance*" under มาตรา 216). Apparently, the creditor may exercise his right of choice between these two remedies. In this aspect, the Thai concept stays rather closer to the Japanese scheme than to the German principle of "*Natural fulfillment of obligation*". So, we could recognize a similar ambiguity of the concept in regard with "*Primary remedy for non-performance*" also in the Thai code as in the Japanese code.

B-4: Step 4 – Adoption of "Impossibility of performance"

As already mentioned above in "**A-4. Overall Strategy for Arrangement (Step 1 to 8)**", *Phraya Manava Rajasevi* eliminated Art. 415 Sentence 2 presumably because he believed it as a provision simply on the issue "*Impossibility of performance*", and he replaced it with ***Segment 3*** of the German code (§§275 – 280). Under this segment, following articles could be mainly taken into consideration:

[Table 6] Main Articles in Segment 3

§ 275	**No liability for impossibility of performance without debtor's responsibility**
§ 276	**Definition of debtor's responsibility**
§ 277	**Responsibility only for gross negligence in certain cases**
§ 278	**Vicarious liability**
§ 279	**No inability in case of obligation designated by species only**
§ 280	**Impossibility with debtor's responsibility (damages in lieu of performance)**
§ 282	**Burden of proof of responsibility for impossibility**

The order of these German articles is quite unique. It showed a scenario according to the principle of "*Natural fulfillment of obligation*", which I described already in <Part I> of this paper.[22] The creditor is entitled exactly and exclusively to demand the specific performance from the debtor as long as it is for the latter still possible (§§241, 271). The debtor may be released from his duty of the specific performance if it becomes impossible resulting from circumstances for which he is not responsible (§275 Paragraph (1)). In such a case, the duty of the debtor to perform his obligation extincts simply. On the other hand, his duty remains when he is responsible for such circumstances. However, his duty would be transformed into another one, namely the duty to perform compensation ("*Natural restitution*", §249) under §280.[23] In this way, the article §275 on relief from the duty of performance preceded the article §280 on the duty of compensation (damages in lieu of performance).

- ***Phraya Manava Rajasevi's* Modification (1)**
  However, this order of provisions (at first §275, and then §280) would be quite inadequate for his arrangement. The foregoing articles มาตรา 215 – 217 prescribe the debtor's duty of compensation in case of "การไม่ชำระหนี้ให้ต้องตามความประสงค์อันแท้จริงแห่งมูลหนี้". The article next to such ones should then prescribe the debtor's duty of compensation in case of impossibility just like in Art. 415 Sentence 2 of the Japanese code, but not the relief of the debtor from his obligation. For this reason, *Phraya Manava Rajasevi* changed the position of §280 from the bottom to the top of the segment.

22 See Tamura (2013), pp. 905 – 906.

23 For example, Brox (1985), S.144.

- ***Phraya Manava Rajasevi's* Modification (2)**
  The traditional German concept of "Remedies for non-performance" distinguished objective and subjective impossibility of performance. The latter was also called "*Inability* (Unvermögen) of the debtor" for performance. §275 Paragraph (2) in the German code had acknowledged also the "*Inability of the debtor*" as a ground for the relief of the debtor from the obligation. *Phraya Manava Rajasevi* apparently decided to adopt this distinguishing and preserved §275 Paragraph (2) as is in the German code. On the other hand, he eliminated §279 which denied the effect of the "*Inability of the debtor*" under §275 Paragraph (2) in case of obligations "*designated by species only*" even though §279 was one of the most significant consequences of this distinguishing.

- ***Phraya Manava Rajasevi's* Modification (3)**
  §276 of the German code declared the principle of responsibility: "A debtor is responsible […] for willful default and negligence […]". Principally, such a responsibility may be excluded through a particular agreement between the parties except the responsibility for "willful default". Also the responsibility for "gross negligence" may not be excluded in cases where the debtor owes such a duty of care as he is used to exercise in his own affairs (§277).[24] In *Phraya Manava Rajasevi's* arrangement, however, debtor's responsibility is already mentioned in the part of "*Debtor's default*"; firstly in มาตรา 205, and then in มาตรา 217. It might be somewhat strange if such a definition of debtor's responsibility were located after มาตรา 217. So, *Phraya Manava Rajasevi* simply eliminated these provisions §§276 and 277 from his arrangement together with the article §282 on the issue "*Burden of proof*". Accordingly, the debtor's responsibility for non-performance has no definition in the Thai code. Also in this point, the Thai concept stays rather closer to the Japanese code then to the German code.

These modifications described above could be summarized in the following table:

[Table 7] Phraya Manava Rajasevi's Modifications on Segment 3

§ 280	***Impossibility with debtor's responsibility (damages in lieu of performance)***
§ 275	***No liability for impossibility of performance without debtor's responsibility***
~~§ 276~~	~~Definition of debtor's responsibility~~
~~§ 277~~	~~Responsibility only for gross negligence in certain cases~~
§ 278	***Vicarious liability***
~~§ 279~~	~~No inability in case of obligation designated by species only~~
~~§ 282~~	~~Burden of proof of responsibility for impossibility~~

As a result of the modifications in **Step 4**, the remaining three articles were located next to the core part on "Damages due to non-performance", which exactly correspond to the location of Art. 415 Sentence 2 in the Japanese code:

24 For example, Brox (1985), S.129 – 130.

[Table 8] Adoption of "Impossibility of Performance"

Gr. BGB	Civil and Commercial Code of Thailand (1925)			Jp. code
§ 271	มาตรา 203	Time for performance		Art. 412
§§ 275 – 280				
§ 284	มาตรา 204	Debtor's default through warning		
§ 285	มาตรา 205	No default without responsibility		
				Art. 413
	มาตรา 213	Enforcement of performance		Art. 414
§ 286 (1)	มาตรา 215	Damages due to non-performance		Art. 415 S.1
§ 286 (2)	มาตรา 216	Damages in lieu of performance		
§ 287	มาตรา 217	Strict liability during default		
	มาตรา 218	*Impossibility with debtor's responsibility*	< ---------->	Art. 415 S.2
	มาตรา 219	*No liability without responsibility*		
	มาตรา 220	*Vicarious liability*		
				[…]

Step 4-a: มาตรา 218

The Thai article มาตรา 218 exactly corresponds to the German provision §280 except Paragraph (2) Sentence 2:

> **§280, BGB in old fashion** (Wang, Chung Hui, 1907, p. 64)
> (1) 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.
>
> (2) In case of partial impossibility the creditor may, by declining the still possible part of the performance, demand compensation for non-performance of the entire obligation, if he has no interest in the partial performance. The provisions of 346 to 356 applicable to the contractual right of rescission apply *mutatis mutandis*.

> **มาตรา 218**
>
> ถ้าการชำระหนี้กลายเป็นพ้นวิสัยจะทำได้เพราะพฤติการณ์อันใดอันหนึ่งซึ่งลูกหนี้ต้องรับผิดชอบไซร้ ท่านว่าลูกหนี้จะต้องใช้ค่าสินไหมทดแทนให้แก่เจ้าหนี้เพื่อค่าเสียหายอย่างใดๆ อันเกิดแต่การไม่ชำระหนี้นั้น
>
> ในกรณีที่การชำระหนี้กลายเป็นพ้นวิสัยแต่เพียงบางส่วน ถ้าหากว่าส่วนที่ยังเป็นวิสัยจะทำได้นั้นจะเป็นอันไร้ประโยชน์แก่เจ้าหนี้แล้ว เจ้าหนี้จะไม่ยอมรับชำระหนี้ส่วนที่ยังเป็นวิสัยจะทำได้นั้น แล้วและเรียกค่าสินไหมทดแทนเพื่อการไม่ชำระหนี้เสียทั้งหมดทีเดียวก็ได้

The same comment as in **[Actuality Issue (2)]** in regard with มาตรา 216 could apply also to the elimination of §280 Paragraph (2) Sentence 2.

Step 4-b: มาตรา 219

The Thai article มาตรา 219 exactly corresponds to the German provision §275:

> **§275, BGB in old fashion** (Wang, Chung Hui, 1907, p. 62)
> (1) 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.

(2) If the debtor, after the creation of the obligation, becomes unable to perform, it is equivalent to a circumstance rendering the performance impossible.

มาตรา 219

ถ้าการชำระหนี้กลายเป็นพ้นวิสัยเพราะพฤติการณ์อันใดอันหนึ่งซึ่งเกิดขึ้นภายหลังที่ได้ก่อหนี้ และซึ่งลูกหนี้ไม่ต้องรับผิดชอบนั้นไซร้ ท่านว่าลูกหนี้เป็นอันหลุดพ้นจากการชำระหนี้นั้น

ถ้าภายหลังที่ได้ก่อหนี้ขึ้นแล้วนั้น ลูกหนี้กลายเป็นคนไม่สามารถจะชำระหนี้ได้ไซร้ ท่านให้ถือเสมือนว่าเป็นพฤติการณ์ที่ทำให้การชำระหนี้ตกเป็นอันพ้นวิสัยฉะนั้น

[Actuality Issue (4)]

As mentioned above in "**Phraya Manava Rajasevi's Modification (2)**", the Thai code has adopted the German concept of the "*Inability of the debtor*" (มาตรา 219 วรรค (2)) but not §279. The recent development of the German law on obligations has reached the same conclusion as in the Thai code. In the traditional German civil law, particular cases subsumed by the concept of "*Inability of the debtor*" were classified roughly into two groups; namely "*personal obstacles*" (illness or other private difficulties) and "*business obstacles*" (particular circumstances of the debtor, for example financial crunches, insufficient experience or knowledge and so on). The effect of §279 was acknowledged only in the second group of the cases.[25] The "**Modernized Law on Obligations of Germany (2001)**", however, has overhauled not only the traditional distinction between "*initial*" and "*subsequent*" impossibility, but it regulates both the cases of "*objective*" and "*subjective*" impossibility under the uniformed requirements and effects.[26] As a result, core cases of "*personal obstacles*" may be integrated into the category of "*objective impossibility*", and "*business obstacles*" may not be considered as any more grounds for the relief of the debtor from the duty to perform his obligation.[27] Consequently, the provision §279 has lost its *raison d'etre* and has been repealed. The traditional concept of "*Inability of the debtor*" has been maintained solely in §297 which excludes the effect of creditor's default (delay in acceptance) during the time where the debtor is unable to effect performance. §297 was adopted in มาตรา 211 as we will see later. To return to our proper point, what could have been the reason for the elimination of §279 from the Thai code? According to the commentary of *Phraya Manava Rajasevi,* he probably considered only "*personal obstacles*" under the concept of "*Inability of the debtor*" for performance (เป็นคนไม่สามารถจะชำระหนี้ได้).[28] If he would have really understood this concept in this narrow sense, the content of §279 would be simply absurd. In any case, we could recognize a certain actuality of *Phraya Manava Rajasevi's* arrangement and also one case of "*convergence*" between the Thai code and the "**Modernized Law on Obligations of Germany (2001)**" at this issue of "*Inability of the debtor*".

[System Integrity Issue (4)]

On the other hand, the elimination of §§276, 277, and 282 in the "**Phraya Manava Rajasevi's Modification (3)**" has caused a certain integrity disturbance; namely, the concept of "debtor's responsibility" itself has been already provided for in มาตรา 205 (responsibility for default) and 217 (responsibility for impossibility), but despite this, its conceptual definition is missing in the current

25 Palandt (1994), S. 350 – 351.

26 Lorenz (2006), S. 23 – 29.

27 Brox und Walker (2011), S. 205 – 206.

28 พระยามานวราชเสวี (๒๔๖๘), น. ๗๕.

Thai code. Moreover, this inconsistency will cause another difficulty in a subsequent step of the arrangement; namely, the German provision on reduction of debtor's responsibility during creditor's default (§300, BGB in old fashion) could not be introduced in the Thai code (**P*hraya Manava Rajasevi's* Modification (7)** in **Step 7 – Adoption of "Creditor's default"**) probably because the debtor's standard responsibility has not been clearly defined yet. Details about this issue will be discussed in **[System Integrity Issue (5)]** in **Step 7**.

In my sight, the definition of responsibility for non-performance (§276) could have been adopted in the Thai code without any serious system inconsistency. The question might be merely its location. It would be possible to insert §§ 276 and 277 (together with §282) just behind มาตรา 205 (No default without responsibility). Alternatively, they could be located next to มาตรา 215, provided that this Thai article could be extended with a conditional sentence "unless the debtor is not responsible for the cause of his non-performance" just like in the original concept of Japanese Art. 415 Sentence 2.[29]

Step 4-c: มาตรา **220**

The Thai article มาตรา 220 exactly corresponds to the German provision §278 except Sentence 2:

> **§278, BGB in old fashion** (Wang, Chung Hui, 1907, p. 63)
> A debtor is responsible for the fault of his statutory agent, and of persons whom he employs in fulfilling his obligation, to the same extent as for his own fault. The provision of 276, par. 2, does not apply.
>
> **มาตรา 220**
> ลูกหนี้ต้องรับผิดชอบในความผิดของตัวแทนแห่งตน กับทั้งของบุคคลที่ตนใช้ในการชำระหนี้นั้นโดยขนาดเสมอกับว่าเป็นความผิดของตนเองฉะนั้น แต่บทบัญญัติแห่งมาตรา ๓๗๓ หาใช้บังคับแก่กรณีเช่นนี้ด้วยไม่

As already mentioned above in "**Phraya Manava Rajasevi's Modification (3)**", §276 was eliminated from the Thai code. For this reason, the provision number in Sentence 2 of the Thai article มาตรา 220 had to be replaced with another one with the same content. มาตรา 373 was composed after Art. 100 Paragraph (1) of Law on Obligations of Swiss, which denies the effectiveness of agreement in advance to release the debtor from liability for unlawful intention and gross negligence.

B-5: Step 5 – Adoption of "Scope of damages"

In the arrangement of the Revised Civil Code of Japanese, the issue of "*Scope of damages*" is regulated directly after the provision on "*Damages due to non-performance*" (Art. 415). *Phraya Manava Rajasevi* followed this Japanese arrangement and took the cross-linking between ***Segment 1*** of the German code (§§ 249 – 253) and Arts. 416 – 418 of the Japanese code into consideration. As widely known, the main provision of ***Segment 1*** of the German code, namely §249 declared the principle of "*Natural restitution*" as compensation for damages.[30] According to its wordings, the scope of damages should be basically determined through application of the so-called "*Equivalence theory*" (conditio sine qua non). In case of injury to a person or damage to things (§249 Sentence 2), and in cases where such a natural restitution was impossible (§251), monetary compensation was alternatively allowed while Art. 417 of the Japanese code declared monetary compensation as the

29 See Tamura (2013), p. 916; also the proposed Art. 415 Paragraph (1) of "**Draft Amendment to the Civil Code (2015)**" in Japan, supra note 15.

30 For example, Brox (1985), S.201.

primary form of compensation for damages as long as nothing different is provided.[31] It is quite interesting that *Phraya Manava Rajasevi* adopted neither the principle of "*Natural restitution*" (§249 of the German code) nor the provision on monetary principle (Art. 417 of the Japanese code). He simply adopted only Art. 416 of the Japanese code, which must have been familiar to him because this provision had been composed after the judgment in Common law on "*Remoteness of damage*" (Hadley v Baxendale, 1854).[32] On the other side, it is unclear why he did not adopt Art. 417 of the Japanese Civil Code; probably, he still wanted to leave certain room for the German principle of "*Natural restitution*".

In the next article on the issue of "*Contributory negligence*", however, *Phraya Manava Rajasevi* preferred the German provision §254 to the Japanese Art. 418. Probably, the latter was too simple for him. In any way, the arrangement of this part could be presented as follows:

[Table 9] Adoption of "Scope of damages"

Gr. BGB	Civil and Commercial Code of Thailand (1925)			Jp. code
§§ 249 – 253				
§ 254				
§ 271	มาตรา 203	Time for performance		Art. 412
§§ 275 – 280				
§ 284	มาตรา 204	Debtor's default through warning		
§ 285	มาตรา 205	No default without responsibility		
				Art. 413
	มาตรา 213	Enforcement of performance		**Art. 414**
§ 286 (1)	มาตรา 215	Damages due to non-performance		**Art. 415 S.1**
§ 286 (2)	มาตรา 216	Damages in lieu of performance		
§ 287	มาตรา 217	Strict liability during default		
	มาตรา 218	Impossibility with debtor's responsibility		Art. 415 S.2
	มาตรา 219	No liability without responsibility		
	มาตรา 220	Vicarious liability		
	มาตรา 222	*Scope of damages*	←	*Art. 416*, 417
	มาตรา 223	*Contributory negligence*	<---------->	Art. 418
				Art. 419

Step 5-a: มาตรา 222

As explained above, the Thai article มาตรา 222 exactly corresponds to the Japanese provision Art. 416:

> **Art. 416, Revised Civil Code of Japan** (de Becker, 1909, Vol. II, p. 26)
> (1) The demand for damages has for its subject compensation for such damage as takes place under ordinary circumstances in consequence of the non-performance of the obligation.

31 Art. 417 of the Revised Civil Code of Japan was composed after Art. 386, Law on Properties ("Old Civil Code of Japan" drafted by the French adviser *Gustave Émile Boissonade*); see Code Investigatory Commission (1895), Vol.18, p. 81, available at: <http://dl.ndl.go.jp/info:ndljp/pid/1367545/83?full=1>

32 See Code Investigatory Commission (1895), Vol. 18, p. 52, available at: <http://dl.ndl.go.jp/info:ndljp/pid/1367545/83?full=1>

(2) The creditor may also demand the compensation even for such damage as arises under special circumstances, if the circumstances were foreseen, or ought to have been foreseen, by the party concerned.

มาตรา 222

การเรียกเอาค่าเสียหายนั้น ได้แก่เรียกค่าสินไหมทดแทนเพื่อความเสียหายเช่นที่ตามปกติย่อมเกิดขึ้นแต่การไม่ชำระหนี้นั้น

เจ้าหนี้จะเรียกค่าสินไหมทดแทนได้ แม้กระทั่งเพื่อความเสียหายอันเกิดแต่พฤติการณ์พิเศษ หากว่าคู่กรณีที่เกี่ยวข้องได้คาดเห็นหรือควรจะได้คาดเห็นพฤติการณ์เช่นนั้นล่วงหน้าก่อนแล้ว

Step 5-b: มาตรา 223

As mentioned above, มาตรา 223 on the issue "*Contributory negligence*" was adopted from ***Segment 1*** of the German code, which however should apply not only to cases of non-performance of obligations, but also to tort cases. Therefore, the party who bears the duty to compensate damage was called "*party liable*" instead of "*debtor*", and the party who is entitled to demand compensation was described as "*injured party*" instead of "*creditor*". *Phraya Manava Rajasevi* exactly maintained this original wording also in the Thai provision ("ฝ่ายผู้เสียหาย"). For this reason, มาตรา 223 shows a slightly different style than other articles in this part of the Thai code:

§ 254, BGB in old fashion (Wang, Chung Hui, 1907, p. 57)

(1) If any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party.

(2) This applies also even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of an unusually serious injury which the debtor neither knew nor ought to have known, or in an omission to avert or mitigate the injury. The provision of 278 applies mutatis mutandis.

มาตรา 223

ถ้าฝ่ายผู้เสียหายได้มีส่วนทำความผิดอย่างใดอย่างหนึ่งก่อให้เกิดความเสียหายด้วยไซร้ ท่านว่าหนี้อันจะต้องใช้ค่าสินไหมทดแทนแก่ฝ่ายผู้เสียหายมากน้อยเพียงใด ต้องอาศัยพฤติการณ์เป็นประมาณ ข้อสำคัญก็คือว่าความเสียหายนั้นได้เกิดขึ้น เพราะฝ่ายไหนเป็นผู้ก่อยิ่งหย่อนกว่ากันเพียงไร

วิธีเดียวกันนี้ ท่านให้ใช้แม้ทั้งที่ความผิดของฝ่ายผู้ที่เสียหายจะมีแต่เพียงละเลยไม่เตือนลูกหนี้ให้รู้สึกถึงอันตราย แห่งการเสียหายอันเป็นอย่างร้ายแรงผิดปกติ ซึ่งลูกหนี้ไม่รู้หรือไม่อาจจะรู้ได้ หรือเพียงแต่ละเลยไม่บำบัดปัดป้อง หรือบรรเทาความเสียหายนั้นด้วย อนึ่ง บทบัญญัติแห่งมาตรา ๒๒๐ นั้น ท่านให้นำมาใช้บังคับด้วยโดยอนุโลม

B-6: Step 6 – Adoption of "Delinquency charge"

Just like in the foregoing step, *Phraya Manava Rajasevi* followed the Japanese arrangement also in the next issue on "*Delinquency charge*". In this step, the cross-linking between ***Segment 5*** of the German code (§§288 – 290) and Art. 419 of the Japanese code was taken into consideration. In a similar manner as in the foregoing step, *Phraya Manava Rajasevi* preferred the detailed German provisions to the simple Japanese article. In the original German code, these provisions were located next to the provisions on "*Debtor's default*" (***Segment 4*** in our description) In *Phraya Manava Rajasevi's* arrangement, they were moved to the location next to the provision on "*Contributory negligence*", which exactly corresponds to the Japanese arrangement (Art. 419). Moreover, he performed a following slight modifications to §§288 and 289:

- ***Phraya Manava Rajasevi's* Modification (4)**

He inserted §289 between §288 Paragraph (1) and (2) and combined them into a single provision มาตรา 224 with three paragraphs. In doing so, he eliminated §289 Sentence 2 because its content would be almost identical with §288 Paragraph (2).

[Table 10] Adoption of "Delinquency charge"

Gr. BGB		Civil and Commercial Code of Thailand (1925)			Jp. code
§ 254					
§ 271		**มาตรา 203**	**Time for performance**		Art. 412
§§ 275 – 280					
§ 284		**มาตรา 204**	**Debtor's default through warning**		
§ 285		**มาตรา 205**	**No default without responsibility**		
					Art. 413
		มาตรา 213	**Enforcement of performance**		**Art. 414**
§ 286 (1)		**มาตรา 215**	**Damages due to non-performance**		**Art. 415 S.1**
§ 286 (2)		**มาตรา 216**	**Damages in lieu of performance**		
§ 287		**มาตรา 217**	**Strict liability during default**		
		มาตรา 218	**Impossibility with debtor's responsibility**		Art. 415 S.2
		มาตรา 219	**No liability without responsibility**		
		มาตรา 220	**Vicarious liability**		
		มาตรา 222	**Scope of damages**		**Art. 416**, 417
		มาตรา 223	**Contributory negligence**		Art. 418
§§ 288, 289	→	***มาตรา 224***	***Statutory interest for money debts***	<---------->	Art. 419
§ 290	→	***มาตรา 225***	***Interest upon values lost during default***		

Step 6-a: มาตรา 224

As explained just above, มาตรา 224 is a combination of §§288 and 289 of the German code, and it corresponds mostly to the original German provisions. The slight differences can be seen in the raising of the interest rate during default (from 4 to 7.5%) and in the elimination of §289 Sentence 2:

§ 288, BGB in old fashion (Wang, Chung Hui, 1907, p. 65)
(1) A money debt bears interest during default at 4 percent per annum. If the creditor can demand higher interest on any other legitimate ground, this shall continue to be paid.

(2) Proof of further damage is admissible.

§ 289, BGB in old fashion (Wang, Chung Hui, 1907, p. 65)
Interest for default shall not be paid upon interest. The right of the creditor to compensation for any damage arising from the default remains unaffected.

มาตรา 224
หนี้เงินนั้น ท่านให้คิดดอกเบี้ยในระหว่างเวลาผิดนัดร้อยละเจ็ดกึ่งต่อปี ถ้าเจ้าหนี้อาจจะเรียกดอกเบี้ยได้สูงกว่านั้น โดยอาศัยเหตุอย่างอื่นอันชอบด้วยกฎหมาย ก็ให้คงส่งดอกเบี้ยต่อไปตามนั้น

ท่านห้ามมิให้คิดดอกเบี้ยซ้อนดอกเบี้ยในระหว่างผิดนัด

การพิสูจน์ค่าเสียหายอย่างอื่นนอกกว่านั้น ท่านอนุญาตให้พิสูจน์ได้

Step 6-b: มาตรา 225

The Thai article มาตรา 225 exactly corresponds to §290 of the German code:

> **§ 290, BGB in old fashion** (Wang, Chung Hui, 1907, p. 65)
>
> If the debtor is bound to make compensation for the value of an object which has perished during the default, or which cannot be delivered for a reason which has arisen during the default, the creditor may demand interest on the amount to be paid as compensation, from the time which serves as the basis for the estimate of the value. The same rule applies if the debtor is bound to make compensation for the diminution in value of an object which has deteriorated during the default.

> **มาตรา 225**
>
> ถ้าลูกหนี้จำต้องใช้ค่าสินไหมทดแทนเพื่อราคาวัตถุอันได้เสื่อมเสียไประหว่างผิดนัดก็ดี หรือวัตถุอันไม่อาจส่งมอบได้เพราะเหตุอย่างใดอย่างหนึ่งอันเกิดขึ้นระหว่างผิดนัดก็ดี ท่านเจ้าหนี้จะเรียกดอกเบี้ยในจำนวนที่จะต้องใช้เป็นค่าสินไหมทดแทน คิดตั้งแต่เวลาอันเป็นฐานที่ตั้งแห่งการกะประมาณราคานั้นก็ได้ วิธีเดียวกันนี้ ท่านให้ใช้ตลอดถึงการที่ลูกหนี้จำต้องใช้ค่าสินไหมทดแทน เพื่อการที่ราคาวัตถุตกต่ำเพราะวัตถุนั้นเสื่อมเสียลงในระหว่างเวลาที่ผิดนัดนั้นด้วย

B-7: Step 7 – Adoption of "Creditor's default"

In the traditional German theory of obligations, the creditor is entitled to demand the natural fulfillment of the obligation, but he owes the debtor no duty to accept the performance of the latter.[33] Hence, there would be no "non-performance" even though the creditor refuses to accept the fullfilment of the obligation. Consequently, the issue "*Creditor's default*" (***Segment 6***) was clearly separated from the issue the debtor's "*Non-performance*" (***Segment 4***). The main subjects of ***Segment 6*** on "*Creditor's default*" were rather debtor's duty to tender performance and reduction of debtor's liability during creditor's default.

The "**Old Civil Code of Japan (1890)**", on the other hand, had treated the issue "*Tender of performance*" (Arts. 474 – 478, Law on Properties) in the part of "*Extinction of Obligation*" just like the French Civil Code (Arts. 1257 – 1264). The "**Revised Civil Code of Japan (1896)**" followed this French arrangement (Arts. 492 and 493). However, the "**Old Civil Code of Japan (1890)**" had no provision on the issue "*Creditor's default*". In the discussion of "*Codes Investigatory Commission*", therefore, Prof. *Hozumi* proposed to insert a provision on this issue just after the provision on the issue "*Debtor's default*".[34] Apparently, this simple article was composed after the German provision §293; the both provisions required no responsibility of the creditor for his default.

In **Step 7**, *Phraya Manava Rajasevi* simply put ***Segment 6*** of the German code into the position which exactly corresponds to the location of Art. 413 of the Japanese code, and performed following four modifications:

- ***Phraya Manava Rajasevi's* Modification (5)**
  Firstly, he combined §§294 and 295 into a single provision with two paragraphs. In doing so, he introduced one sentence from the Japanese provision Art. 493. The details will be explained below.
- ***Phraya Manava Rajasevi's* Modification (6)**

33 See Tamura (2013), p. 910.

34 See Code Investigatory Commission (1895), Vol 27, p. 103, available at: <http://dl.ndl.go.jp/info:ndljp/pid/1367554/106?full=1> ; also Tamura (2013), pp. 921 – 922.

Secondly, he turned over the order of §§297 and 298. In this way, he put two provisions on the same subject "*No creditor's default*" together (§§297, 299). In the original German arrangement, §297 declared the second requirement for the creditor's default, namely "*ability of the debtor*" for performance while the foregoing three provisions (§§294 – 296) described the first requirement, namely "*tender of performance*", and the following provision (§280) provided for a variant form of "creditor's default" in case of reciprocal contracts.[35] As a matter of course, such a logical sequence in the German concept was somewhat disturbed through the modification of the order of these provisions.

- ***Phraya Manava Rajasevi's* Modification (7)**
  Thirdly, he eliminated §300 which provided an exception to §§276 and 279 on the issue "*Debtor's responsibility*". §300 would not make any sense because he had eliminated §§276 and 279 already in **Step 4**, ***Phraya Manava Rajasevi's* Modification (3)**.

- ***Phraya Manava Rajasevi's* Modification (8)**
  At the end, he separated §301 on the subject "*No interest upon money debt during creditor's default*" from the others and located it next to the provision on "*Vicarious liability*" of the debtor. *Phraya Manava Rajasevi* probably thought that those two provisions, มาตรา 220 and 221, would be special provisions which increased or reduced the standard liability of the debtor. However, §301 in the German arrangement could also constitute an exception to the basic rules of money debts prescribed in §§288 – 291. Seen from the viewpoint on this aspect of §301, it could be more reasonable if this provision would have been located not just next to the provision on "*Vicarious liability*" (มาตรา 220) but next to those on "*Delinquency charge*" (มาตรา 224 – 225).

In any case, these modifications described above could be summarized in the following table:

[Table 11] Main Articles in Segment 6 and Modifications on it

§ 293	**Creditor's default**
§§ 294, 295	***Actual and verbal tender of performance***
§ 296	***Cases where no tender of performance is required***
§ 298	***Creditor's default in cases of no tender of counter-performance***
§ 297	***No creditor's default in case of debtor's inability for performance***
§ 299	***No creditor's default in case of temporary obstacles to acceptance***
~~§ 300~~	~~Reduced liability of debtor during creditor's default~~

§ 301	***No interest upon money debt during creditor's default***

As a result, the first six provisions were inserted between "*Debtor's default*" (มาตรา 203 – 205) and "*Enforcement of specific performance*" (มาตรา 213), and the last provision was located next to "*Impossibility of performance*" (มาตรา 220).

However, I would say that the first provision on "*Creditor's default*" was modified once again in **Step 8**; namely, the German provision §293 was probably replaced with มาตรา 355, ประมวลกฎหมายแพ่งและพาณิชย์ (พ.ศ. ๒๔๖๖) at the last moment of the arrangement. For this reason, we will examine here

35 For example, Brox (1985), S. 171 – 174.

the other six provisions as follows:

[Table 12] Insertion of "Creditor's Default"

Gr. BGB	Civil and Commercial Code of Thailand (1925)			Jp. code
§§ 249 – 253				
§ 254				
§ 271	มาตรา 203	Time for performance		Art. 412
§§ 275 – 280				
§ 284	มาตรา 204	Debtor's default through warning		
§ 285	มาตรา 205	No default without responsibility		
	มาตรา 207	Creditor's default	< ---------->	Art. 413
	มาตรา 208	*Actual and verbal tender of performance*	< ---------->	(Art. 493)
	มาตรา 209	*Cases where no tender is required*		
	มาตรา 210	*No tender of counter-performance*		
	มาตรา 211	*No creditor's default (inability of debtor)*		
	มาตรา 212	*No creditor's default (temporal obstacles)*		
	มาตรา 213	Enforcement of performance		**Art. 414**
§ 286 (1)	มาตรา 215	Damages due to non-performance		**Art. 415 S.1**
§ 286 (2)	มาตรา 216	Damages in lieu of performance		
§ 287	มาตรา 217	Strict liability during default		
	มาตรา 218	Impossibility with debtor's responsibility		Art. 415 S.2
	มาตรา 219	No liability without responsibility		
	มาตรา 220	Vicarious liability		
	มาตรา 221	*No interest during creditor's default*		
	มาตรา 222	Scope of damages		**Art. 416**, 417
	มาตรา 223	Contributory negligence		Art. 418
§§ 288, 289	มาตรา 224	Statutory interest for money debts		Art. 419
§ 290	มาตรา 225	Interest upon values lost during default		
§§ 293 – 301				

Step 7-a: มาตรา 208

As already mentioned in ***Phraya Manava Rajasevi's* Modification (5)**, the Thai article มาตรา 208 on the issue "*Tender of performance*" is a combination of §§284 and 295 of the German code. However, this article is not any direct and simple adoption of the German provisions. *Phraya Manava Rajasevi* has compared the German provisions to a similar Japanese provision Art. 493, which had been composed just after the same German provisions. Then, he adopted a certain wording from the Japanese provision, namely its second sentence which explains "*verbal tender*" probably because the German provision §295 did not clearly show what "*verbal tender*" actually meant. In this sense, มาตรา 208 วรรค (2) ประโยค 1 could be seen as a "*indirect adoption*" of the German provision §295 through Art. 493 of the Japanese code.

On the other side, มาตรา 208 วรรค (2) ประโยค 2 must have been adopted directly from the German provision §295. At this moment, *Phraya Manava Rajasevi* must have wondered why the wording "a

summons to the creditor" should be used here in the English translation by Dr. *Chung Hui Wang*. Indeed, this English translation was not so appropriate; the original German wording was "*Aufforderung an den Gläubiger*". So, it would be rather a "*request*" or "*demand*" than a "*summons*"; if the debtor requests the creditor to perform his necessary act, then it may have same effect as "*verbal tender*". This was the original meaning of §295 Sentence 2 (ในกรณีที่ลูกหนี้ขอให้เจ้าหนี้กระทำการนั้น คำขอของลูกหนี้ก็เสมอกับคำขอปฏิบัติการชำระหนี้). Apparently, *Phraya Manava Rajasevi* had to compose his own second sentence due to this small trouble in the English translation. As a result, we could recognize a small discrepancy between §295 of the German code and มาตรา 208:

§ 294, BGB in old fashion (Wang, Chung Hui, 1907, p. 66)

The performance must be actually tendered to the creditor in the manner in which it is to be effected.

§ 295, BGB in old fashion (Wang, Chung Hui, 1907, p. 67)

A verbal tender by the debtor is sufficient if the creditor has declared to him that he will not accept the performance, or if for effecting the performance an act of the creditor is necessary, e.g. if the creditor has to take away the thing owed. A summons to the creditor to do the necessary act is equivalent to tender of performance.

Art. 493, Revised Civil Code of Japan (de Becker, 1909, Vol. II, p. 96)

Tender of performance must be actually made in accordance with the intent and purpose of the obligation; but if the creditor has refused to receive the same beforehand, or when an act of the creditor is necessary for the performance of the obligation, it is sufficient if he is notified that preparation for performance has been made and called upon to receive same.

มาตรา 208

การชำระหนี้จะให้สำเร็จผลเป็นอย่างใด ลูกหนี้จะต้องขอปฏิบัติการชำระหนี้ต่อเจ้าหนี้เป็นอย่างนั้นโดยตรง

แต่ถ้าเจ้าหนี้ได้แสดงแก่ลูกหนี้ จะไม่รับชำระหนี้ก็ดี หรือเพื่อที่จะชำระหนี้จำเป็นที่เจ้าหนี้จะต้องกระทำการอย่างใดอย่างหนึ่งก่อนก็ดี ลูกหนี้จะบอกกล่าวแก่เจ้าหนี้ว่า ได้เตรียมการที่จะชำระหนี้ไว้พร้อมเสร็จแล้วให้เจ้าหนี้รับชำระหนี้นั้น เท่านี้ก็นับว่าเป็นการเพียงพอแล้ว ในกรณีเช่นนี้ท่านว่าคำบอกกล่าวของลูกหนี้นั้นก็เสมอกับคำขอปฏิบัติการชำระหนี้

Step 7-b: มาตรา 209

This Thai article มาตรา 209 exactly corresponds to §296 Sentence 1 of the German code. However, its Sentence 2 was eliminated. The reason for this elimination is unclear. §284 Paragraph (2) of the German code had a quite similar sentence to this one in §296. In **Step 1**, *Phraya Manava Rajasevi* had maintained such a similar sentence in มาตรา 204 วรรค (2) ประโยค 2. §296 Sentence 2 could have been adopted in the Thai article มาตรา 209, and it would not have caused any system inconsistency:

§ 296, BGB in old fashion (Wang, Chung Hui, 1907, p. 67)

If a time according to the calender is fixed for the act to be done by the creditor, tender is required only if the creditor does the act in due time. The same rule applies if notice is required to precede the act, and the time for the act is fixed in such manner that it may be reckoned by the calender from the time of notice.

มาตรา 209

ถ้าได้กำหนดเวลาไว้เป็นแน่นอนเพื่อให้เจ้าหนี้กระทำการอันใด ท่านว่าจะขอปฏิบัติการชำระหนี้นั้นจะต้องทำก็แต่เมื่อเจ้าหนี้ทำการอันนั้นภายในเวลากำหนด

Step 7-c: มาตรา **210**

This Thai article มาตรา 210 exactly corresponds to §298 of the German code:

§ 298, BGB in old fashion (Wang, Chung Hui, 1907, p. 67)

If the debtor is bound to perform his part only upon counter-performance by the creditor, the creditor is in default if, though prepared to accept the performance tendered, he does not offer the required counter-performance.

มาตรา 210

ถ้าลูกหนี้จำต้องชำระหนี้ส่วนของตนต่อเมื่อเจ้าหนี้ชำระหนี้ตอบแทนด้วยไซร้ แม้ถึงว่าเจ้าหนี้จะได้เตรียมพร้อมที่จะรับชำระหนี้ตามที่ลูกหนี้ขอปฏิบัตินั้นแล้วก็ดี หากไม่เสนอที่จะกระทำการชำระหนี้ตอบแทนตามที่จะพึงต้องทำ เจ้าหนี้ก็เป็นอันได้ชื่อว่าผิดนัด

Step 7-d: มาตรา **211**

This Thai article มาตรา 211 exactly corresponds to §297 of the German code:

§ 297, BGB in old fashion (Wang, Chung Hui, 1907, p. 67)

A creditor is not in default if the debtor is not in a position to effect the performance at the time of tender, or, in the case provided for by 296, at the time fixed for the act of the creditor.

มาตรา 211

ในเวลาที่ลูกหนี้ขอปฏิบัติการชำระหนี้นั้นก็ดี หรือในเวลาที่กำหนดไว้ให้เจ้าหนี้ทำการอย่างใดอย่างหนึ่งโดยกรณีที่บัญญัติไว้ในมาตรา ๒๐๙ นั้นก็ดี ถ้าลูกหนี้มิได้อยู่ในฐานะที่จะสามารถชำระหนี้ได้ไซร้ ท่านว่าเจ้าหนี้ยังหาผิดนัดไม่

Step 7-e: มาตรา **212**

This Thai article มาตรา 212 exactly corresponds to §299 of the German code:

§ 299, BGB in old fashion (Wang, Chung Hui, 1907, p. 67)

If the time of performance is not fixed, or if the debtor is entitled to perform before the fixed time, the creditor is not in default by reason of the fact that he is temporarily prevented from accepting the tendered performance, unless the debtor has given him notice of his intended performance a reasonable time beforehand.

มาตรา 212

ถ้ามิได้กำหนดเวลาชำระหนี้ไว้ก็ดี หรือถ้าลูกหนี้มีสิทธิที่จะชำระหนี้ได้ก่อนเวลากำหนดก็ดี การที่เจ้าหนี้มีเหตุขัดข้องชั่วคราวไม่อาจรับชำระหนี้ที่เขาขอปฏิบัติแก่ตนได้นั้น หาทำให้เจ้าหนี้ตกเป็นผู้ผิดนัดไม่ เว้นแต่ลูกหนี้จะได้บอกกล่าวการชำระหนี้ไว้ล่วงหน้าโดยเวลาอันสมควร

Step 7-f: มาตรา **221**

This Thai article มาตรา 221 exactly corresponds to §301 of the German code:

§ 301, BGB in old fashion (Wang, Chung Hui, 1907, p. 67)

Upon an interest-bearing money debt the debtor does not have to pay interest during the default of the creditor.

มาตรา 221

หนี้เงินอันต้องเสียดอกเบี้ยนั้น ท่านว่าจะคิดดอกเบี้ยในระหว่างที่เจ้าหนี้ผิดนัดหาได้ไม่

[System Integrity Issue (5)]

In the part of the Thai code on “*Creditor's default*”, we could not find any apparent disturbance in its system consistency. However, we would miss somewhat clear effects or consequences of creditor's default. It would be, so to speak, an invisible system inconsistency. According to the original German

concept, the "*Creditor's default*" did not constitute any "*Non-performance*". Hence, the creditor did not bear any liability for his default as I already mentioned above. Its main effects were rather reduction of the debtor's liability (§§300 – 304 in old fashion). Among these provisions, §300 played the central role in the reduction of the debtor's liability. In cases of reciprocal contracts, moreover, §324 Paragraph (2) in old fashion provided that the creditor should bear the "*risk of loss*" during the time of his default in acceptance.

In *Phraya Manava Rajasevi's* arrangement, however, the central provision, namely §300, was eliminated, and only §§301 and 324 were adopted into the Thai code (มาตรา 221 and 372 วรรค (2)). So, we would have to ask the question whether the elimination of §300 might cause certain consistency troubles in this arrangement or not. My answer to this question would be as follows: In certain cases of obligations "*designated by species only*" (ระบุไว้แต่เพียงเป็นประเภท), maybe the debtor could not be relieved from his duty of performance, and consequently, this would lead to certain discrepancies in effects between such obligations and other sorts of obligations, especially obligations with "*specific things*" (ทรัพย์เฉพาะสิ่ง) as their subject.

The debtor of an obligation with a "*specific thing*" as its subject would be relieved from his duty of performance or compensation when this thing has been destroyed, stolen, or damaged before its delivery without any responsibility of the debtor (มาตรา 219). In case of a reciprocal contract, moreover, the creditor should bear the "*risk of loss*", and the debtor may hold his right to claim the counter-performance from the creditor (มาตรา 370 วรรค (1)). Theoretically, these consequences would not be influenced at all by the circumstance whether the creditor is in default of acceptance or not.

But, how about legal consequences if the subject of the obligation is "*designated by species only*"? There would be two situations. In the first one, the subject of the obligation would become "*specific*" (เป็นวัตถุแห่งหนี้จำเดิม) under มาตรา 195 วรรค (2) when the debtor has tendered his performance to the creditor in accordance with มาตรา 208. After the determination of the subject thing, the legal situation would be just same as in the case of an obligation with a "*specific thing*" as its subject described just above. However, this effect would be the outcome of the tender of the performance itself, but not of the creditor's default in acceptance.

On the other hand, there would be cases where the subject of the obligation would not become "*specific*" even if the debtor has already tendered his performance to the creditor. In such a situation, for example in a case where the debtor has a duty to deliver certain goods at the creditor's residence, the creditor would be in default under มาตรา 207 when the creditor refused to accept the performance upon the notice from the debtor in due time that the delivery was ready (มาตรา 208 วรรค (2)). or when the creditor answered that he would accept it but not pay the price soon (มาตรา 210). Under such circumstances, the subject of the obligation would not become "*specific*" until the prepared goods have been really delivered to the creditor's residence.[36] Now, we would encounter with the question who should bear the "*risk of non-performance*" if the prepared goods have been destroyed, stolen, or damaged before the goods have been really delivered. There is neither room for any "*objective impossibility of performance*" because the subject of the obligation have not become "*specific*" yet, nor is it any case of "*Inability of the debtor*" due to "*personal obstacles*". As a result, neither มาตรา 219 วรรค (1) nor วรรค (2) might apply to this case, and the debtor would not be relieved from his duty

36 This situation follows the description in Brox (1985), S. 174 – 175.

of performance or compensation even if he would not be responsible for such circumstances. Also in case of a reciprocal contract, the debtor would have to bear the “*risk of loss*” because มาตรา 372 วรรค (2) ประโยค 3 could not apply even though the creditor was in default of acceptance so far as the loss or damages during the creditor's default could not constitute any impossibility or, to be more accurate, “*Inability of the debtor*” in the sense of มาตรา 219 วรรค (2). Indeed, it would be quite difficult to imagine any case of obligations “*designated by species only*” to which มาตรา 372 วรรค (2) ประโยค 3 could apply.

In this way, the consequences of accidental occurrences before the delivery of the subject things would differ so substantially between obligations with “*specific things*” as their subject and obligations “*designated by species only*” that it would be quite difficult to justify these differences. As a matter of fact, *Phraya Manava Rajasevi's* arrangement has adopted this problem from the Japanese Civil Code. Even the adoption of the German provision §324 Paragraph (2) could not make any complete correction to this inconsistency issue.[37]

Compared to such an unbalanced situation in the Japanese code, the traditional German concept has provided for the issue “*creditor's default in acceptance*” with quite unified effects and consequences. During the creditor's default, the standard responsibility of the debtor under §276 in old fashion was considerably reduced; principally, he should bear the responsibility only for willfulness (intention) and gross negligence (§300 Paragraph (1)). So, even when the subject thing of the obligation was destroyed, lost, or damaged in consequence of a slight negligence of the debtor, he could be relieved from his duty of performance or compensation (§275 in old fashion) if this circumstance occurred during the creditor's default in acceptance. The German concept has prescribed the same effects and consequences also for the obligations “*designated by species only*”. Normally, the debtor of such an obligation should bear almost strict liability for non-performance; §279 in old fashion categorically had excluded the effect of the relief of the debtor in cases of the obligations “*designated by species only*”. However, §300 Paragraph (2) suspended this exclusion during the creditor's default; “the risk [of non-performance] passes to the creditor from the moment at which he is first in default by not accepting the thing tendered” (Wang, Chung Hui, 1907, p. 67). As a result, also cases of “*Inability of the debtor*” due to “*business obstacles*” could be acknowledged as genuine “*impossibility*” under §275 Paragraph (2) as far as the debtor bears no responsibility of willfulness or gross negligence.[38] In this sense, the

37 Regarding the issue “*Risk of loss*” in reciprocal contracts, *Phraya Manava Rajasevi* adopted principally the Japanese concept (Arts. 534 – 536) which was composed mainly after Art. 335, Law on Properties, Civil Code of Japan (1890). The Thai articles มาตรา 370 – 372 mostly correspond to these Japanese articles. The article มาตรา 372 วรรค (1) was composed after Art. 536 Paragraph (1) of the Japanese code. On the other hand, มาตรา 372 วรรค (2) is the combination of German article §324 Paragraph (1) and (2); namely, วรรค (2) ประโยค 1 and 2 correspond exactly to §324 Paragraph (1) while the content of วรรค (2) ประโยค 3 is identical with §324 Paragraph (2). According to the traditional German concept, §324 applied to all sorts of obligations. In the Thai arrangement, however, the same provisions stay under the limitation of วรรค (1) and may not apply to the obligations with “*specific things*” as their subject. For this reason, the problem described here is quite special to the Thai arrangement due to the combination of the heterogeneous concepts of the German and Japanese codes.

38 As already mentioned in **[Actuality Issue (4)]** in **Step 4-b**, §§275 Paragraph (2) and 279 in old fashion were repealed in the “**Modernized Law on Obligations of Germany (2001)**”. Consequently, the loss or damages of the subject things during “*Creditor’s default in acceptance*” in cases of obligations “*designated by species only*” would constitute rather “*objective impossibility*” under §275 Paragraph (1) in new fashion (Brox und Walker, 2011, S.282).

creditor's default in acceptance would overturn the differentiation between obligations "*designated by species only*" and other sorts of obligations. Under such a theoretical circumstance, §324 Paragraph (2) in old fashion could achieve unified effects and consequences of the creditor's default in acceptance for all sorts of reciprocal contracts; it provided that one party of a reciprocal contract may retain his claim for counter-performance when his performance has become impossible during the default in acceptance in consequence of a circumstance for which he is not responsible.

In the *Phraya Manava Rajasevi's* arrangement, the German provision §324 Paragraph (2) was adopted to มาตรา 372 วรรค (2) ประโยค 3. However, obligations with "*specific things*" as their subject were completely excluded from the scope of its target because of its composition after the Japanese Art. 536. Furthermore, it would be hardly applicable to the obligations "*designated by species only*" because the logical structure to suspend the differentiation between such obligations and other sorts of obligations (§§276, 279, 300) is missing in the Thai arrangement.[39]

B-8: Step 8 – Adoption of Some Articles from the "Old Text"

As mentioned above in "**A-4. Overall Strategy for Arrangement (Step 1 to 8)**", *Phraya Manava Rajasevi* adopted also certain provisions from the so-called "**Old Text**", namely "ประมวลกฎหมายแพ่งและพาณิชย์ (พ.ศ. ๒๔๖๖)", in order to show an attitude of gratitude for the long-year contribution of the French advisers. In our target of the research (มาตรา 203 to 225), มาตรา 206, 207, and 214 could be seen as such heritage of the "**Old Text**":

39 In the Japanese civil law. the "**Draft Amendment to the Civil Code (2015)**" (supra note 15) has proposed to repeal Arts. 534 and 535 and to generalize Art. 536 for all sorts of obligations. Moreover, it is planned to introduce a new provision for the effect of the creditor's default in acceptance (Art. 413-2 Paragraph (2)) which roughly corresponds to the German §324 Paragraph (2) in old fashion.

[Table 13] Adoption of the heritage of the "Old Text"

Old Text (1923)		Civil and Commercial Code of Thailand (1925)		
		มาตรา 203	Time for performance	
		มาตรา 204	Debtor's default through warning	
		มาตรา 205	No default without responsibility	
มาตรา 327	→	*มาตรา 206*	*Debtor's default in cases of unlawful acts*	(Insertion)
มาตรา 355	→	*มาตรา 207*	*Creditor's default*	(Replacement)
		มาตรา 208	Actual and verbal tender	
		มาตรา 209	Cases where no tender is required	
		มาตรา 210	No tender of counter-performance	
		มาตรา 211	Cases where creditor is not in default (1)	
		มาตรา 212	Cases where creditor is not in default (2)	
		มาตรา 213	Enforcement of performance	
มาตรา 373	→	*มาตรา 214*	*Enforcement from whole properties of debtor*	(Insertion)
		มาตรา 215	Damages due to non-performance	
		มาตรา 216	Damages in lieu of performance	
		มาตรา 217	Strict liability during default	
		มาตรา 218	Impossibility with responsibility	
		มาตรา 219	Impossibility without responsibility	
		มาตรา 220	Vicarious liability	
		มาตรา 221	No interest during creditor's default	
		มาตรา 222	Scope of damages	
		มาตรา 223	Contributory negligence	
		มาตรา 224	Statutory interest for money debts	
		มาตรา 225	Interest upon lost values	

Step 8-a: มาตรา 206

This Thai article มาตรา 206 exactly corresponds to มาตรา 327 in the "**Old Text**", which had been adopted from Section 261 of "**Draft Civil and Commercial Code, Book on Obligations (1919)**". The content of this article was based on a legal aphorism from the Roman law tradition "fur enim semper moram facere videtur"; a theft is always in default in his duty to return stolen goods to their owners:

Section 261, Draft Civil and Commercial Code, Book on Obligations (1919) [40]

A person whose obligation arose out of a wrongful act is in default from the time when such wrongful act was committed without previous demand being necessary.

มาตรา 327, ประมวลกฎหมายแพ่งและพาณิชย์ (พ.ศ. ๒๔๖๖)

บุคคลเป็นหนี้อันเกิดโดยละเมิด ชื่อว่าผิดนัดแต่เวลากระทำละเมิดเสียแล้ว ไม่พักจะต้องทวงถามก่อนเลย

มาตรา 206

ในกรณีหนี้อันเกิดแต่มูลละเมิด ลูกหนี้ได้ชื่อว่าผิดนัดมาแต่เวลาที่ทำละเมิด

40 Kingdom of Siam: Draft Civil and Commercial Code, Book on Obligations, 1919, p. 96.

Step 8-b: มาตรา **207**

Indeed, it is quite difficult to identify the origin of the article มาตรา 207. There are three possibilities; it might be §293 of the German Civil Code in old fashion as I once mentioned above in "**B-7: Step 7**", or it could be มาตรา 355 of the "**Old Text**" which was adopted from Section 289 of "**Draft Civil and Commercial Code, Book on Obligations (1919)**", or it could be even Art. 413 of the "**Revised Civil Code of Japan (1896)**". If we focus attention on its wording "ถ้าลูกหนี้ขอปฏิบัติการชำระหนี้เมื่อใด และเจ้าหนี้ไม่รับชำระหนี้", however, I would tend to recognize มาตรา 355 of the "**Old Text**" as the nearest one to the current article มาตรา 207:

Section 289, Draft Civil and Commercial Code, Book on Obligations (1919) [41]

The creditor is in default from the time when a tender of performance is made to him.

มาตรา 355, ประมวลกฎหมายแพ่งและพาณิชย์ (พ.ศ. ๒๔๖๖)

ถ้าลูกหนี้ขอปฏิบัติการชำระหนี้เมื่อใด และเจ้าหนี้ไม่รับชำระหนี้ไซร้ ท่านว่าเจ้าหนี้เป็นผิดนัดแต่นั้นไป

§ 293, BGB in old fashion (Wang, Chung Hui, 1907, p. 66)

A creditor is in default if he does not accept the performance tendered to him.

Art. 413, Revised Civil Code of Japan (de Becker, 1909, Vol. II, p. 20)

When the creditor refuses to, or cannot, accept performance of the obligation, the creditor is responsible for delay (is in mora) from the time when performance has been tendered.

มาตรา 207

ถ้าลูกหนี้ขอปฏิบัติการชำระหนี้ และเจ้าหนี้ไม่รับชำระหนี้นั้นโดยปราศจากมูลเหตุอันจะอ้างกฎหมายได้ไซร้ ท่านว่าเจ้าหนี้ตกเป็นผู้ผิดนัด

Step 8-c: มาตรา **214**

In regard with this article, there is no doubt about its origin, namely มาตรา 373 of the "**Old Text**" which had its own origin in Section 307 of "**Draft Civil and Commercial Code, Book on Obligations (1919)**":

Section 307, Draft Civil and Commercial Code, Book on Obligations (1919) [42]

Any creditor is entitled to have his obligation performed out of the whole of the property of his debtor, such property including any monies or other properties due to the debtor by third persons.

มาตรา 373, ประมวลกฎหมายแพ่งและพาณิชย์ (พ.ศ. ๒๔๖๖)

เจ้าหนี้อย่างใดๆ มีสิทธิที่จะให้ชำระหนี้ของตนจากทรัพย์สินของลูกหนี้จนสิ้นเชิง รวมทั้งเงินฤๅทรัพย์สินอื่นๆ ซึ่งบุคคลภายนอกค้างชำระแก่ลูกหนี้ด้วย

มาตรา 214

เจ้าหนี้มีสิทธิที่จะให้ชำระหนี้ของตนจากทรัพย์สินของลูกหนี้จนสิ้นเชิง รวมทั้งเงินและทรัพย์สินอื่นๆ ซึ่งบุคคลภายนอกค้างชำระแก่ลูกหนี้ด้วย

41 Ibid., p. 111.

42 Ibid., p. 117.

[Table 14] Final Arrangement and the Origin of the Thai Articles

[Gr. BGB] (1898 – 2001)	[Th. Old Text] (1923)	[Civil and Commercial Code of Thailand] (1925)		[Jp. CC] (1896)
§ 271		มาตรา 203	Time for 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	
§ 297		มาตรา 210	Cases where creditor is not in default (1)	
§ 299		มาตรา 211	Cases where creditor is not in default (2)	
§ 298		มาตรา 212	No tender of counter-performance	
		มาตรา 213	Enforcement of performance	Art. 414
	มาตรา 373	มาตรา 214	Enforcement from whole properties of debtor	
§ 286 (I)		มาตรา 215	Damages due to non-performance	Art. 415 S.1
§ 286 (II)		มาตรา 216	Damages in lieu of performance	
§ 287		มาตรา 217	Strict liability during default	
§ 280		มาตรา 218	Impossibility with responsibility	Art. 415 S.2
§ 275		มาตรา 219	Impossibility without responsibility	
§ 278		มาตรา 220	Vicarious liability	
§ 301		มาตรา 221	No interest during creditor's default	
		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	

C. Conclusion on Actuality Issues and System Integrity Issues

During the reconstruction of the arrangement procedure, we have recognized not only its actual features but also several critical issues in regard with "*System Integrity*". As the conclusion of my consideration, I would like to summarize these points and issues once again and try to identify certain heuristic points of view which would lead our further research of comparison between the current Thai code on the one side and the "**Modernized Law on Obligations of Germany (2001)**" as well as the new project for the reform of Law on Obligations in the Japanese Civil Code on the other side. At first, we have recognized following actual features in the *Phraya Manava Rajasevi's* arrangement:

[Actuality Issue (1)]

Phraya Manava Rajasevi has adopted §286 of the BGB in old fashion in the Thai article มาตรา 215 as a core provision on the issue "Remedies for non-performance". However, he replaced its first paragraph with the Japanese provision Art. 415 Sentence 1. Through this replacement, he could avoid the

theoretical difficulties in regard with “imperfect performance” or “positive breach of contract”. In this sense, we could evaluate the Thai article มาตรา 215 as an anticipatory form of the provision §280 Paragraph (1) of the BGB in new fashion.

[Actuality Issue (2)]
Besides the general provision on the issue “debtor's liability for non-performance”, namely มาตรา 215, *Phraya Manava Rajasevi* has preserved the German provision §286 Paragraph (2) in the Thai article มาตรา 216, which shows a certain advantage as compared to the Japanese Civil Code, which possesses no clear provision for “*damages in lieu of performance*”. The differentiation between damages “*besides*” and “*in lieu of*” performance in the Thai articles มาตรา 215 and 216 could be comparable with the same differentiation in the German provisions §280 and §§281 – 283 in new fashion.

[Actuality Issue (3)]
Another actuality of มาตรา 216 consists in the elimination of §286 Paragraph (2) Sentence 2 in old fashion which provided for the analogical application of the provisions on “Rescission of contract” to cases of “damages in lieu of performance”. *Phraya Manava Rajasevi* has correctly recognized the inadequacy of its wording, then decided to eliminate it from the Thai article มาตรา 216. His decision was acknowledged by the modification of the wording in §281 Paragraph (5) in new fashion.

[Actuality Issue (4)]
Phraya Manava Rajasevi has adopted the differentiation between “objective” and “subjective” impossibility in §280 Paragraph (2) in old fashion into มาตรา 219 วรรค (2). However, he probably intended to approve “subjective impossibility” (inability of the debtor for performance) only in cases of “*personal obstacles”*. Consequently, he decided not to adopt the provision §279 in old fashion which denied the application of §280 Paragraph (2) to “*business obstacles*” in cases of obligations “*designated by species only*”. This decision of *Phraya Manava Rajasevi* was acknowledged in the “**Modernized Law on Obligations of Germany (2001)**” which repealed §279 in old fashion.

These positive points of *Phraya Manava Rajasevi's* arrangement will play quite important role in the comparison between the current Thai Civil and Commercial Code and the “**Modernized Law on Obligations of Germany (2001)**”.

However, we have recognized also the following negative aspects in the *Phraya Manava Rajasevi's* arrangement, namely disturbance in “*system consistency*” or “*integrity*” through the experimental rearrangement of the German provisions in accordance with the order of the provisions in the “Revised Civil Code of Japan”:

[System Integrity Issue (1)]
Phraya Manava Rajasevi has adopted Art. 415 Sentence 1 of the Japanese code into มาตรา 215, but not its Sentence 2. He apparently believed that Art. 415 Sentence 2 regarded solely and exclusively the issue of “Impossibility of performance”. However, the primary purpose of Art. 415 Sentence 2 consisted rather in another aspect, namely the declaration of the principle of “*No liability without responsibility*”. Consequently, the Thai provision มาตรา 215 lacks any utterance to the debtor's responsibility for non-performance while มาตรา 205 and 218 clearly require debtor's responsibility for the liability of default (delay in performance) or impossibility of performance.

[System Integrity Issue (2)]
As a result of the replacement of the German provision §286 Paragraph (1) with the Japanese article Art. 415 Sentence 1, the Thai article มาตรา 215 had widened its scope of target from the simple “Debtor's default” to the “Debtor's non-performance” in general. In the next provision มาตรา 216, however, *Phraya Manava Rajasevi* exactly maintained the original German wording of §286 Paragraph (2). Its scope of target had to be limited to cases of “Debtor's default” again, and the just achieved effect of the

generalization in มาตรา 215 has been lost in มาตรา 216. It may apply, if strictly interpreted, only to cases of debtor's default (delay in performance). However, there is no reason why the once generalized applicability in มาตรา 215 must be reduced to a single type of non-performance again in มาตรา 216.

[System Integrity Issue (3)]
In the German BGB in old fashion, §286 Paragraph (1) and (2) stood in corresponding relationship to §280 Paragraph (1) and (2). Therefore, it was quite clear that §286 Paragraph (2) may apply only to cases where the consequence of delay in performance is so serious as in a case of partial impossibility of performance with a fatal consequence under §280 Paragraph (2). In the Thai code, however, มาตรา 216, composed after the German §286 Paragraph (2), is positioned before มาตรา 218 which was composed after the German §280. Moreover, §286 Paragraph (1) was replaced with Art. 415 Sentence 1 of the Japanese code. As a result, the corresponding relationship between §280 and §286 in the German code has completely vanished from the Thai code. Consequently, it remains unclear under which conditions the creditor may demand damages “*in lieu of performance*” under มาตรา 216 instead of simple d*amages* “*besides performance*” under มาตรา 215.

[System Integrity Issue (4)]
The conceptual definition of the debtor's responsibility for non-performance is missing in the current Thai code because *Phraya Manava Rajasevi* eliminated §§276, 277 and 282 in BGB in old fashion from the Thai code. However, such a modification would not have been inevitable at all. These German provisions could have been adopted in the Thai code without any serious system inconsistency. The question might be simply its location. Furthermore, if §276 would have been adopted, then there would not have been any difficulties also for the adoption of §§300 – 304.

[System Integrity Issue (5)]
As we already discussed in **[System Integrity Issue (4)],** the conceptual definition of the debtor's responsibility for non-performance was not adopted into the Thai code. This circumstance caused another difficulty in the part of “Creditor's default in acceptance”. In §300 in old fashion, the German code provided for the substantial reduction of the debtor's responsibility under §276 during the creditor's default in acceptance. However, *Phraya Manava Rajasevi* failed to adopt this provision into the Thai code probably because he had already eliminated §276 from the Thai code. Consequently, the Thai code possesses no proper provision for the effect of the “Creditor's default in acceptance”. Especially in cases where the subjects of the obligation are “*designated by species only*”, the debtor would has to bear the “risk of non-performance” or “risk of loss” also during the creditor's default so long as subjects would not become “*specific*” even though the debtor has already tendered his performance. For cases of reciprocal contracts, *Phraya Manava Rajasevi* adopted the German provision §324 Paragraph (2) in มาตรา 372 วรรค (2) ประโยค 3 as an effect of “Creditor’s default in acceptance” in cases where the subject of the obligation is something other than a “*specific thing*”. However, also this provision probably could not be applicable to cases of obligations “*designated by species only*” because the “*Inability of the debtor*” would be hardly constituted in this sort of obligations in the Thai arrangement.

We could clearly see that these comments, both in “**Actuality Issues**” and “**System Integrity Issues**”, mainly concern มาตรา 215, and 216. “*Debtor's responsibility for non-performance*” under มาตรา 215 and the conditions for demand of “*Damages in lieu of performance*” under มาตรา 216 would be the central issues in the discussion of system inconsistencies in this part of the Thai code. Moreover, the conceptional clarity would be desirable in regard of the effect of “*Creditor’s default in acceptance*” especially in cases of obligations “*designated by species only*”.

As our next step in recognition of the conceptional actuality and consistency in this field of the Thai code, we would like to look for certain hints in the new concepts of the “**Modernized Law on**

Obligations of Germany (2001)". Through our reconstruction of the arrangement of the Thai articles in this field, we have already found certain important clues to an effective and systematic comparison between the German provisions *in new fashion* and the current Thai articles, namely, the "**Actuality Issues**" as just pointed out above. These points could function as "*middle points*" for the cross linking between the Thai and German articles.

In the <Part III> of this research, firstly, I would like to summarize the main amendments to the "Remedies for non-performance" in the "**Modernized Law on Obligations of Germany (2001)**", and then I will try to recognize a new "Correspondency Structure" between the German new law and the current Thai law. I will also take several proposals for the "Reform of Law on Obligations in the Japanese Civil Code" in consideration. As a result of the comparison, we will be able to recognize certain "***Convergence***" among the Thai, German, and Japanese concepts in the field of "Remedies for non-performance". Such a result would be an important factor to evaluate the attainments and success of the adventurous arrangement by *Phraya Manava Rajasevi* correctly and fairly.

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