Thai Law and Recent Reforms in Germany and Japan in Law on Non-performance

Suggestions for Enhanced Consistency and Integrity
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< Contents >

I. INTRODUCTION

The project for the codification of the Civil and Commercial Code for the Kingdom of Siam started already in 1908. Its drafting work was carried out mainly by the French legal advisers to the Siamese government at the time. Its final draft was submitted to the government in 1919, which consisted of three books and two additional enactments.[1] This draft was strongly modeled after the French Civil Code and the Swiss Federal Code of Obligations (enacted in 1881),[2] but it contained also new concepts which were originally developed by the French advisers themselves, especially in the law on obligations.

However, the draft encountered severe criticism in its redaction. As a result, it was rearranged after the German civil law system, and then its first three books were enacted; namely Book I on General Principles and Book II on Obligations in November 1923, and Book III on Contracts in January 1925. They are called the "Old Text". The implementation of Book I and II was once postponed, and then they were replaced with the current version of Book I and II in November 1925. These codes are called the "New Text", which were compiled after the model of the Japanese Civil Code (enacted in 1896). The new codification work was carried out under the leadership of a Siamese legal officer, *Phraya Manava Rajasevi* (1890 – 1984).[3] Principally, his goal was the reception of the German Civil Code (BGB, enacted in 1896), but he followed the advice by *Sir John Simon* (1873 – 1954), and assimilated the "Japanese way" to adopt the German civil law.[4]

For this reason, the German and Japanese influence is quite dominant in the current version of Book I and II. Especially, Book II was completely rewritten after Book III of the Japanese Civil Code, and almost 100 of the totally 259 provisions were adopted from it, and another 100 were introduced form Book II of the German BGB.[5] However, the German law and Japanese law at the time showed a sharp contrast in the part on the effects of non-performance. This circumstance must have been a difficult challenge for the Thai drafter. Mainly he preferred the German provisions, at the same time, he applied a special technique of arrangement to completely reorder them in accordance with the Japanese concept of non-performance.[6] The question for us is whether this strategy was successful or not.

Soon, we will reach the 100th anniversary of the codification of the current Civil and Commercial Code. It would be just a right time to closely review the Thai concept from the

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1 Officially unpublished documents. Fortunately, its copy was identified in the "*Phya Manava Rajsevi Library*" in the Main Library of Bangkok University in Bangkok on 16 June 2013 (Signature 217 and 217.2 in the part of books in foreign languages). The documents were photographed, fully digitalized and offered to public access on the website managed by the author at: <http://openlegaltextbook.info/Centennial/>.

2 Code fédéral des obligations 1881 (Switzerland) available at : <Le Conseil fédéral, Le portail du Gouvernement suisse>.

3 About the historical background of this development, see: [a] มหาวิทยาลัยธรรมศาสตร์, *บันทึกคำสัมภาษณ์พระยามานวราชเสวี* [Thammasat University, *The transcript of the interview with Phraya Manava Rajasevi*] (Thai) (unpublished original report, 1982); [b] the same (Thai) (reprinted, Winyuchon 2014).

4 Shiori Tamura, "The Role of the Japanese Civil Code in the Codification in the Kingdom of Siam" in Yuka Kaneko (ed), *Civil Law Reforms in Post-Colonial Asia* (Springer 2019), 55–59; accessible at: <Springer Nature>

5 [a] Shiori Tamura, "The Thai Civil Law on non-performance in comparative, structural view – from past into its future" (2013) 12 Law Journal Thammasat University Vol.42 No.4 900– 905; [b] due to multiple formatting errors in the journal article, the same is also available on the website managed by the author at: <http://openlegaltextbook.info/ Resources> 2–5; Tamura, "The Role of the Japanese Civil Code" (n 4) 59–64.

6 Tamura, "The Role of the Japanese Civil Code" (n 4) 64 – 69.

viewpoint of system integrity. In this paper, I try to evaluate its conceptual achievements on the one side, at the same time, I should also identify its system integrity issues on the other side. Such inconsistency problems would be one of the main subjects for the reform and modernization of the law on obligations in Thailand in future.

Meanwhile, the major civil law systems in the world have experienced fundamental reforms and modernization including law on obligations in France, Germany, and Japan. Theoretically, these recent developments could cast question on the adequateness of the Thai concept which largely depends on the even scrapped concepts. Hence, it would be our urgent task to find out whether the recent developments have undermined the achievements of the Thai concept or rather approved them. Probably, we could be inspired by this comparative research to obtain valuable hints for possible solutions of the inconsistency problems buried in the Thai concept. This is the ultimate goal for my paper.

II. INTEGRITY ISSUES IN THE JAPANESE CONCEPT

In the first place, it would be important to correctly understand the reason why the Thai drafter at the time had to encounter a "difficult challenge" as he drafted the provisions concerning the effects of non-performance. Indeed, the German law offered detailed and precise provisions, however, it must have been almost unimaginable for the Thai drafter to directly adopt the traditional German concept for this subject because of its quite stringent theory of "Impossibility of performance". Moreover, a harsh criticism of "gaps in the law" had been mounting against this concept as soon as the BGB was put into effect.[7] Under such a circumstance, the Japanese concept must have been more familiar and acceptable for him because it rejected the German theory and maintained the standard concept of the French law. On the other hand, however, the Japanese provisions must have been simply too meager for the Thai drafter. It suffered also conceptual ambiguities and system inconsistencies. This was the difficulty which the Thai drafter faced.

In other words, it was the primary task for him to overcome the conceptual problems in the Japanese concept with the consistency and preciseness of the German provisions. Then, we face the next question; namely what were the problems in the Japanese concept? The author has in the past once reported about the historical background and the formation process of the Japanese concept concerning the effects of non-performance.[8] Its contents will be summarized as follows.

A. Position of the Japanese Concept

As is commonly known, the original Japanese law on obligations (enacted in 1890) was compiled by a French legal adviser to the Japanese government at the time, Prof. *Gustave Boissonade* (1825 – 1910), under decisive influence of the French CC (1804), and then revised by the Japanese academics of the "Codes Investigatory Commission". The revised Civil Code of Japan (enacted in 1896 and 98, put into effect in 1898) has adopted the "*Pandectists' system*" from the German civil law science in the 19th century. Its Book III on "Claims" shows also several particular features stemmed from the "Civil Code for the Kingdom of Saxony" (enacted in 1863). Roughly speaking,

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7 Hermann Staub, *Die positiven Vertragsverletzungen* (2nd edn, I. Guttentag 1913) (German) available at: <Staatsbibliothek in Berlin>.

8 Tamura, "The Thai Civil Law on non-performance" (n 5a) 905–922; (n 5b) 5–15.

the Japanese Civil Code could be located about midway between the French CC and the German BGB. Even Book III on Obligations clearly shows this ambiguous character, for instance, in the law on non-performance. Hence, it has been one of the long-standing disputes among legal academics whether the Japanese Civil Code should be really ascribed to the German law tradition or rather to the French.

Indeed, the French law and German law had contested with each other in this field. For instance, the French law acknowledges, in case the debtor fails to perform his obligation, an advantageous position to the creditor and practically allows him to have a choice between demand for specific performance and damages. In contrast, the German civil law theory in the 19th century had established the most stringent scheme with its "principle of natural fulfillment" and the monistic theory of "impossibility of performance". As a result, the creditor had no room to exercise such a choice.[9]

In the codification process of the Japanese Civil Code, its initial drafter, Prof. *Boissonade*, starting from the basic concept of the French CC, made however certain approach to the German scheme. In this manner, Arts. 381 and 382 in his Law on Properties (enacted in 1890) provided for the clear priority of enforcement of specific performance to the demand for damages.[10]

In the revision work of the first Civil Code of Japan by the "Codes Investigatory Commission", the leading drafter, Prof. *Nobushige Hozumi* (1855 – 1926), opposed the idea of Prof. *Boissonade* and aimed rather to establish a clear advantageous position for the creditor to enjoy a choice between specific performance and damages. For this purpose, he removed the German-like elements from the provisions and returned to the proper French scheme.[11]

B. Ambiguity Regarding Debtor's Default

But it was still not enough for him. Prof. *Hozumi* removed also the requirement of "Putting the debtor in default" (Arts. 336 and 384, Law on Properties), even though it was quite essential for the French scheme. Instead, he proposed a new provision which imposed the debtor's liability for non-performance simply on the arrival of the time of performance. In his consideration, it could be expected that the creditor would demand damages immediately after the arrival of time of performance without any necessity to once demand specific performance from the debtor. The proposed provision reads as follows:

> **Art. 409** (as of 26 December 1895, corresponds with the current Art. 412)
> (1) If a fixed due date is assigned to the performance of the obligation, the obligor is liable for delay from that due date arrives. […][12]

In other words, he tried to introduce even a Common law-like concept of the debtor's "default" through a "back door" so to say.[13]

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9 Tamura, "The Thai Civil Law on non-performance" (n 5a) 905–911; (n 5b) 5–9.
10 Tamura, "The Thai Civil Law on non-performance" (n 5a) 911–915; (n 5b) 9–11.
11 Tamura, "The Thai Civil Law on non-performance" (n 5a) 915–917; (n 5b) 11–12.
12 This translation is adopted from the English translation of the current Art. 412 published by the Ministry of Justice in Japan available at: <Japanese Law Translation>.
13 Tamura, "The Thai Civil Law on non-performance" (n 5a) 917–918; (n 5b) 12–13.

Originally, he had clearly declared his policy that the Common Law scheme would never be adopted.[14] It would be improper if the creditor may demand damages only, and the debtor could enjoy the choice between specific performance and damages. The creditor should have a stronger position to breach the debtor's choice. For this reason, the demand for specific performance and the action for enforcement (Art. 414, Japanese Civil Code) must have clear priority to the demand for damages. At the same time, it must also be allowed for the creditor to immediately demand damages in favor of his choice. This would be *Prof. Hozumi's* consideration behind his proposal.

Furthermore, he proposed a general clause concerning the debtor's liability for non-performance which clearly postulates the attribution of non-performance to the debtor (the debtor's responsibility) as a requisite for his liability. His proposal reads as follows:

> **Art. 409** (as of 18 January 1895, comparable to the current Art. 415)
> If the debtor fails to perform his obligation in accordance with its proper form and content, the creditor may claim compensation for damages arising therefrom, ***unless the non-performance is due to a cause which is not attributable to the debtor***.[15] [Emphasis added]

Of course, such a mixture of the diverse concepts from the Common law and the French law apparently run counter to each other and raises a doubt about a conceptual inconsistency, especially the ambiguity concerning the debtor's responsibility in case of default (delay in performance).[16]

C. Inconsistencies Regarding Responsibility

As for the requisite of responsibility, Prof. *Boissonade* had not clearly declared it in his Law on Properties. Its Art. 383 mentioned it merely for cases of impossibility of performance as follows:

> **Art. 383** (Law on Properties, Japanese Civil Code of 1890)
> (1) In cases when the obligor refuses to perform his obligation, the obligee may demand compensation for damages if he failed to claim for enforcement of specific performance, or in cases where the nature of the obligation may not permit such an enforcement. ***The same shall apply if the performance becomes impossible due to a cause which is attributable to the debtor***. [Emphasis added]

Besides, Prof. *Boissonade* had distinguished scope of compensation for damage between cases of non-performance due to "***malicious intention***" and such cases due to "***simple negligence***" of the debtor (Art. 385, Law on Properties) in a similar manner to the old Arts. 1150 and 1151 of the French CC before the reform of 2016. Consequently, we rightly assume that Prof. *Boissonade* had implicitly postulated the requisite of responsibility. In this sense, Art. 409 just cited above was not Prof. *Hozumi's* originality, but he merely stated it explicitly after the French model (the old Art. 1147, the French CC before the reform).[17]

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[14] 日本學術振興會編『法典調査會民法議事速記録』[Japan Society for the Promotion of Science (ed), *The Minutes of the Discussion in the Codes Investigatory Commission*] (Japanese) Vol.18 49–51 available at: <National Diet Library Digital Collections>.

[15] This translation is based on the English translation published by the Ministry of Justice in Japan (n 12). Emphasis added.

[16] Tamura, "The Thai Civil Law on non-performance" (n 5a) 918–919; (n 5b) 13–14.

[17] The composition of this provision itself was strongly inspired by Art. 110, Swiss Federal Code of Obligations of 1881 (n 2).

However, the situation became more complicated through the following circumstances. Firstly, the Commission did not pay due attention to the German concept and overlooked the importance to provide a proper definition of the responsibility such as § 276 of the German BGB, which expressly states that the debtor is responsible for his intention and negligence in case of non-performance.

The ambiguity regarding the contents of the responsibility in the Japanese law was further worsened through the scheme change concerning the scope of compensation for damages; Prof. *Hozumi* proposed to replace Art. 385 in the Law on Properties mentioned above with another provision which should adopt the Common law doctrine of "Remoteness of damage" established in the case "Hadley v. Baxendale" (1854).[18] It would be for the reason that damages are not punishment. The proposed provision reads as follows:

> **Art. 410** (as of 18 January 1895, comparable to the current Art. 416)
> (1) The demand for compensation for damage purports to let the obligor pay the compensation for such damages as would arise under ordinary circumstances in consequence of non-performance of the obligation.
>
> (2) As for damages which the parties have foreseen or should have foreseen from the very first, the creditor may demand compensation even for damages which arise from special circumstances.

As a result from this scheme change, there was no provision anymore which utters the words "intention" or "negligence" of the debtor in the part of law on non-performance. Suddenly, it was quite questionable whether the "attribution of non-performance" means debtor's responsibility or simply causation between non-performance and damages.

Secondly, the Commission ignored completely the issue of "impossibility of performance" which was quite essential for the German concept. In the last stage of the discussion for this part, the members of the Commission became finally aware of the fact that the word "impossibility of performance" was never uttered. In order to clearly indicate that the impossibility of performance is one ground for the debtor's liability, the Commission decided to replace the second sentence of the provision which postulated the debtor's responsibility with the sentence in Art. 383 of the Law on Properties (1890) which mentioned the case of impossibility of performance. The final proposal reads as follows:

> **Art. 414** (as of 5 April 1895, comparable to the current Art. 415)
> If the debtor fails to perform his obligation in accordance with its proper form and content, the creditor may claim compensation for the damage arising therefrom. ***The same shall apply if the performance becomes impossible due to a cause which is attributable to the debtor***.[19] [Emphasis added]

Suddenly, the provision in such a composition shows the appearance as if the "attribution of non-performance to the debtor" would be required only for cases of impossibility, but not for any other

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[18] Japan Society for the Promotion of Science (ed), *The Minutes of the Discussion in the Codes Investigatory Commission* (n 14) Vol. 18 51–78 available at: <National Diet Library Digital Collections>.

[19] This translation is based on the English translation published by the Ministry of Justice in Japan (n 12). Emphasis added.

types of non-performance. In this way, the last change to the provision let the conceptual uncertainty concerning the requisite of responsibility further worsen and caused a heavy disturbance to the conceptual integrity in the law on non-performance in Japan.[20]

D. Adoption of "Rescission of contract"

As for non-performance in cases of a reciprocal contract, the French law tradition required a formal action before the Court to rescind a contract (Art. 1184, the French CC before the reform), and Prof. *Boissonade* followed it (Art. 421, the Law on Properties of 1890). In this issue, Prof. *Hozumi* preferred the German law concept which allowed the creditor to declare his intention to rescind the contract directly to the debtor without any necessity of formal action.[21]

On the other hand, however, he cleared the impossibility-centered composition of the German concept; he rearranged the German provisions to another order which started from cases of default (delay in performance).[22] In other words, he preserved the French scheme on this point. His proposal reads as follows:

> **Art. 538** (as of 23 April 1895, corresponds with the current Art. 540)
> - It exactly corresponds with § 426 of the first Draft BGB, and is comparable to § 300 of the second Draft BGB and to ***§ 349 of BGB (1896)***.
>
> (1) If one of the parties to a contract is entitled to the right of rescission by virtue of the contract or by law, he exercises the right of rescission by declaration of intention to the other party. […]
>
> **Art. 539** (same as above, corresponds with the Art. 541 of 1898)
> - It is comparable to § 277 of the second Draft BGB and to ***§ 326 of BGB (1896)***.
> - The Commission referenced also ***Art. 122*** of the Swiss Federal Code of Obligation ***(1881)***.
>
> In cases where one of the parties to a contract does not perform his obligation, the other party can demand the performance under specifying a reasonable period of time, and he may rescind the contract if the performance is not tendered within the period.
>
> **Art. 540** (same as above, corresponds with the Art. 542 of 1898)
> - It is comparable to § 865 of the Saxony Civil Code (1863), to the § 361of the first Draft BGB, to § 278 of the second Draft BGB, and to ***§ 361 of BGB (1896)***.
> - The Commission referenced also ***Art. 123*** of the Swiss Federal Code of Obligation ***(1881)***.
>
> In cases where, due to the nature of the contract or by virtue of an intention declared by the parties to the contract, the purpose thereof cannot be achieved unless the performance is effected at a specific time or within a certain period of time, one of the parties may immediately rescind the contract without making the demand required in the preceding Article when the other party has failed to perform in time.

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20 Tamura, "The Thai Civil Law on non-performance" (n 5a) 919–921; (n 5b) 14–15.

21 §§ 361, 369, 426 – 436, the 1st Draft BGB (1888); §§ 276 – 279, 298 – 309, the 2nd Draft BGB (1894); §§ 325 – 327, 346 – 361, BGB (enacted in 1896).

22 Japan Society for the Promotion of Science (ed), *The Minutes of the Discussion in the Codes Investigatory Commission* (n 14) Vol. 25 71–129 available at: <National Diet Library Digital Collections>.

Art. 541 (same as above, corresponds with the Art. 543 of 1898)

- It is comparable to the § 369 of the first Draft BGB, to § 276 of the second Draft BGB, and to ***§ 325 of BGB (1896)***.

If the performance becomes wholly or partially impossible, the creditor may rescind the contract, unless the cause of the non-performance is not attributable to the debtor.

Moreover, he rejected the German "***either-or***" scheme between demand for damages in lieu of performance or rescission of contract (§ 369 of the first Draft; §§ 276 and 277 of the second Draft; old §§ 325 and 326 of BGB). Also on this point, Prof. *Hozumi* stayed rather in the French concept which allowed demand for damages besides rescission of contract:

Art. 543 (same as above, corresponds with the Art. 545 of 1898)

- Paragraph 1 is comparable to the § 427 of the first Draft BGB, to § 298 of the second Draft BGB, and to ***§ 346 of BGB (1896)***.
- This provision is also comparable to ***Art. 124*** of the Swiss Federal Code of Obligations ***(1881)***, though the Minutes of the Commission did not refer it.

(1) If one of the parties to the contract exercised his right of recession, each of them owes the other party a duty to restore to original state, unless this prejudices rights of a third party. […]

(3) The exercise of the right of rescission does not preclude demand of compensation for damages.

As is clear from the description above, Prof. *Hozumi* adopted the German provisions while he changed its scheme. However, its arrangement of the provisions was probably not his own invention. It is quite likely that he modeled it after the scheme of Arts. 122 to 124 in the Swiss Federal Code of Obligations (1881), which should be ascribed rather to the French law tradition.

E. Final Japanese Scheme and Arrangement Technique

In the end phase of the revision, a short provision regarding the creditor's default was introduced (the old Art. 413). However, the Japanese drafter could not determine any clear effects of the creditor's default due to the old Arts. 534 – 536; these provisions provided that the creditor should bear the risk of loss regardless as to whether he is in default or not, and further, the ground for these provisions could be seen in Art. 176 which declares that the creation and transfer of real rights shall take effect by a mere declaration of intention by the parties. So, there was no room anymore to ease the debtor's liability during the creditor's default. Above all, the Japanese drafter had inherited this concept from Art. 335 in the Law on Properties of Japan (1890).

Eventually, a quite simple concept of law on non-performance was established, which consists merely of five provisions; namely ① Art.412 (debtor's default), ② Art.413 (creditor's default), ③ Art.414 (demand for enforcement), ④ Art.415 (demand for damages), and ⑤ Art.416 (scope of damages). Principally, it is based on the French concept. At the same time, the selectivity between specific performance and damages is, probably inspired by the Common law, more clearly expressed than in the French origin. In cases of reciprocal contracts, this selective scheme is further extended through the introduction of the German concept of rescission.[23]

[23] Tamura, "The Thai Civil Law on non-performance" (n 5a) 921–923; (n 5b) 15–16.

Later in 1920s in the Kingdom of Siam, this selective scheme of remedies for non-performance developed in Japan was introduced into the Civil and Commercial Code of Thailand, Book II (enacted in November 1925). This reception of the Japanese Civil Code in Thailand resulted from historical, somewhat accidental circumstances around the Thai drafter; namely *Prince Raphi's* instruction to study the German law, and *Sir John Simon's* recommendation of the Japanese Civil Code as a model law.[24] In the drafting work of Book II, the arrangement technique developed by Prof. *Hozumi*, namely "adoption with scheme change", played an essential role, especially in its part of non-performance as described in details below (in **III.**).

Hence, it would be a legitimate question to ask what happened with the conceptual ambiguities and inconsistencies in the Japanese scheme when it was adopted into the Thai law on non-performance. Were they effectively resolved and cleared in the Thai arrangement? In the next section, therefore, we will once survey the arrangement of the provisions in the Thai law and check possible integrity issues in it.

III. THE THAI ARRANGEMENT

As mentioned above, the Thai drafter compiled Book II of the Civil and Commercial Code for the Kingdom of Siam modeled after Book III of the Japanese Civil Code (enacted in 1896). However, he did not intend to adopt the Japanese provisions on the effects of non-performance. He accepted only three provisions from the Japanese code; namely Secs. 213, 215, and 222. On the other side, 17 of the totally 23 provisions under the title "Non-performance" were adopted from Book II of the German BGB, but he rearranged them in accordance with the Japanese scheme.

Was it his original idea? Certainly, no. It is quite likely that he has learned also this technique from the Japanese Civil Code, to be more accurate, from the part on the "rescission of contract" where Prof. *Hozumi* adjusted and rearranged the provisions from the first and second Draft German BGB in accordance with the provisions in the Swiss Federal Code of Obligations (1881). It is needless to say that the Thai drafter did not have any access to the background information of the Japanese codification. The "*Minutes of the Discussion in the Codes Investigatory Commission*" were considered state secrets, and publicly disclosed since 1932.

For the Thai drafter, the main information about the Japanese law was the publications of *Joseph Ernest de Becker* (1863 – 1929), who offered comprehensive English translation of the Japanese laws and commentaries on them. In 1921, he published a detailed commentary on the Civil Code of Japan[25] as the Thai drafter has just started to struggle with the redaction, and then with the revision of the final Draft Civil and Commercial Code (1919) submitted by the French advisers at the time. The commentary of *de Becker* was attached with the "INDEX TO ARTICLES"; it was a large table of foreign law provisions relevant for each articles of the Japanese Civil Code. As for the part of the "rescission of contract" (Arts. 540 – 545), *de Becker* listed six provisions from the German BGB of 1896 (§§ 325, 326, 346, 349, 356, 361) and five provisions

[24] Thammasat University, *The transcript of the interview with Phraya Manava Rajasevi* (n 3a) 3, 41; (n 3b) 20, 101; Tamura, "The Thai Civil Law on non-performance" (n 5a) 901; (n 5b) 2; Tamura, "The Role of the Japanese Civil Code" (n 4) 57.

[25] Joseph Ernest de Becker, *The Principles and Practice of the Civil Code of Japan* (Kelly&Walsh 1921) available at: <archive.org>.

from the Swiss Law of Obligations of 1911 (Arts. 97, 107, 108, 109). This list would evoke an illusion as if the Japanese drafter had rearranged the provisions from the German BGB in accordance with the Swiss concept (see below **[Table 1]**).

Of course, it was not true, the Japanese drafter at the time of 1895 knew neither of the finished BGB of 1896 nor of the new Swiss law of 1911. Nevertheless, it was not absolutely baseless, the list reflected the real consideration of the Japanese drafter. Whether or not, it must have strongly inspired the Thai drafter and given him a good reason to make a tough attempt of rearrangement in much larger scale than in the Japanese sample.

[Table 1] Referred provisions from the German and Swiss laws in the part of "Rescission of Contract" of the Japanese Civil Code (1896)

As of 1895	As of 1896	a) Minutes Vol. 25 (1895)	b) de Becker's "Index to Articles" (1921)		BGB (1896)
Art. 538	**Art. 540**	**Gr. 1st Draft (1888) 426 *** Gr. 2nd Draft (1894) 300 **S.O. (1881) 122**	Gr. **349** S.O. (1911) **107**		Gr. 325
Art. 539	**Art. 541**	Gr. 1st Draft 436 Gr. 2nd Draft 309 *[277]* Gr. Com. (1884) 354 – 356 Gr. Bavaria Draft (1861) II. 365 Gr. Saxony Code (1863) 1436 **S.O. (1881) 122 ***	Gr. 283, 324, **326**, 354 S.O. (1911) **107**		Gr. 326
Art. 540	**Art. 542**	*[Gr. 1st Draft]* *[361(I)]* *[Gr. 2nd Draft]* *[278]* Gr. Com. 357 Gr. Bavaria Draft II. 366 Gr. Saxony Code 865 **S.O. (1881) 123 ***, 124, 234	Gr. **361**, 286(II), 326(II), 346, 362 S.O. (1911) **108**		Gr. 346
Art. 541	**Art. 543**	Gr. 1st Draft 369 Gr. 2nd Draft 276	Gr. **325**,326 S.O. (1911) 97		Gr. 349
Art. 542	**Art. 544**	Gr. 1st Draft 433 **Gr. 2nd Draft 305 *** Gr. prALR.(1794) II.11. 280, 281 Gr. Saxony Code 910, 1116	Gr. **356**		Gr. 356
Art. 543	**Art. 545**	Gr. 1st Draft 427 Gr. 2nd Draft 298 Gr. Com. 354 Gr. Bavaria Draft II. 326, 362, 368 Gr. prALR. I.11. 331 **Gr. Saxony Code 911 – 914, 1109 ***	Gr. **346** S.O. (1911) **109**		Gr. 361

a) Japan Society for the Promotion of Science (ed), *The Minutes of the Discussion in the Codes Investigatory Commission* (n 13) Vol. 25 71–114.

b) J.E. de Becker, *The Principles and Practice of the Civil Code of Japan* (n 24) 838.

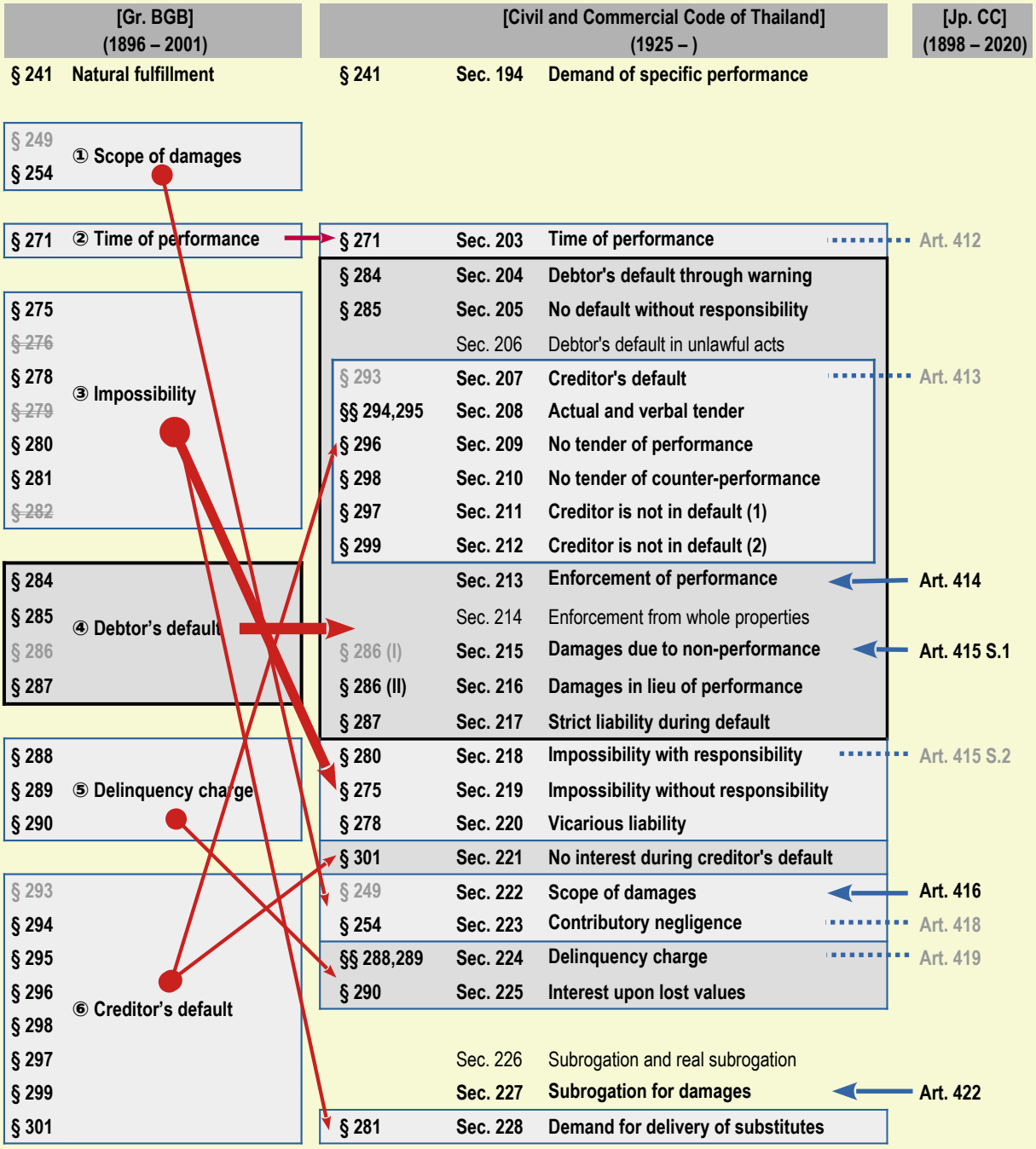
* The German or Swiss provisions closest to the Japanese draft in content.

A. Arrangement Procedure

Unfortunately, there is no detailed documents or records of the drafting process regarding Secs. 203 – 225. At first sight, we could not recognize any regularity in the way how the Thai drafter adopted the provisions from the German BGB (1896). It looks as if he quite carelessly put one after another in line. However, in comparison with the Arts. 412 – 419 from the Japanese Civil Code (1896), a mutual similarity in the subject matters emerges between the Thai and Japanese schemes. It indicates the fact that the Thai drafter used the Japanese scheme as a guideline for the arrangement of the German provisions. In this rearrangement, he treated the German provisions in six bundles; namely ① scope of damages, ② time of performance, ③ impossibility of performance, ④ debtor's default, ⑤ delinquency charge, and ⑥ creditor's default. Basically, he reordered them to the sequence of ②→ ④→ ③→ ①→ ⑤, and ⑥ was inserted into the midst of ④. In doing so, Arts. 413, 415 Sentence 2, and 416 were, replacing the German §§ 249 and 286(I), introduced from the Japanese Civil Code (1896). In the end, two additional provisions were introduced from the "Old Text".[26] After adjustment in several positions, the current arrangement was accomplished (see below **[Table 2]**).

[26] As for the detailed points of the arrangement, see: Tamura, "The Role of the Japanese Civil Code" (n 4) 64–68. The operation of the drafter is visualized in the following presentation: Shiori Tamura, "How Phraya Man arranged the German provisions" (2018) available at: <http://openlegaltextbook.info/Resources/>.

[Table 2] Final arrangement of the part "Non-performance" in the Thai Code, its origin in the German BGB and comparability to the Japanese provisions



B. Actualities and Integrity Issues in the Arrangement

In the next step of our review, we have to check whether the Thai arrangement could successfully overcome the conceptual difficulties on the side of the German law and the inconsistencies on the side of the Japanese law. In the recent development of the reform projects, the modernized German law and the reformed Japanese law have attempted to solve these problems in each system. If the Thai arrangement offers similar features to such solutions in the model laws, then these points could be considered its "***actualities***". On the other hand, we would have to confirm "***integrity issues***" if it has inherited known inconsistencies from the model laws, or if it has caused new kinds of inconsistency through its drastic rearrangement. In latter cases, we probably could seek their solutions in the reformed model laws. The result of our review will be reported step-by-step as follows.

1. Sec. 164 declares "Principle of Natural Fulfillment".

At the beginning of Book II on Obligations, the drafter decided to introduce the system-defined provision of the German concept; namely the old § 241 of BGB which clearly distinguishes itself from the Common law approach to the issue "effects of obligations". The proper goal of an obligation in legal sense should be to achieve its specific performance, not its pecuniary equivalence. The debtor owes the creditor a duty to perform his obligation properly to its purpose.

2. Sec. 203 on "Demand for performance" avoids the Ambiguity of the Japanese provision.

Accordingly, it could be logically expected that the demand for specific performance by the creditor initiates the part on the "Effects of non-performance". For this reason, the Thai drafter put the German provision § 271 regarding the time of performance (②) at the top position of this part as Sec. 203.

This provision states on what time the creditor may demand performance from the debtor. In this sense, this position under the title "***Effects of non-performance***" could be somewhat misleading because the creditor's right of demand for performance is the primary effect of the obligation itself, but not particularly effect of non-performance (in the German law, the "Effects of non-performance" begin with its § 275). The decision by the Thai drafter, however, could be justified from the following consideration.

This position exactly corresponds with the position of the old Art. 412 in the Japanese Civil Code, which suffers a conceptual ambiguity as already explained above (in **II. B.**). This problem was caused from mixture of two subjects; namely the time of performance and the debtor's default. For this reason, the Thai drafter overrode this unfortunate provision with the German § 271 on the time of performance.[27] The other subject regarding the debtor's default was moved to the next provision Sec. 204 which was adopted from the old § 284 of BGB.

In this sense, Sec. 203 plays also two roles; namely the role to declare the time when the creditor may demand performance on the one hand, and another role to provide for a requisite to put the debtor into default, which would be comparable with the role of Art. 336 in the Law on

[27] Shiori Tamura, "Basic View to Reconstruction of the Arrangement of the Articles on 'Remedies for non-performance' in the Civil and Commercial Code of Thailand (1925)" (unpublished note, 2017) 14–15 available on the website managed by the author at: <http://openlegaltextbook.info/Resources/>.

Properties of Japan (1890) or the old Art. 1139 of the French CC. For all these reasons, we could conclude that the Thai drafter used merely the position of the old Japanese Art. 412 as a starting point of the part regarding the debtor's default, but definitely rejected the Japanese provision itself to avoid its conceptual ambiguity.

3. Debtor's liability for default constitutes the core part (Secs. 204, 205, 215, 216, 217).

Next to the provision on the time of performance, the Thai drafter positioned four German provisions on the debtor's default (④ the old German §§ 284 – 287) as the core part of the Thai scheme on the debtor's liability. This position corresponds with the position of the Japanese Art. 415. However, the structure of this part has become complicated due to the following arrangements.

Firstly, additional provisions were inserted between the first two provisions (the old §§ 284, 285) and the other two (the old §§ 286, 287).[28] As a result, the four German provisions were separated into two chunks; namely Secs. 204 (from the old § 284) and 205 (from the old § 285) as the first chunk, and Secs. 216 (from the old § 286(II)) and 217 (from the old § 287) as the second chunk.

Secondly, the old § 286(I) was replaced with the old Japanese Art. 415 Sentence 1 and numbered as Sec. 215. Through this replacement, the role of Sec. 215 was completely changed; it is not merely a provision about the debtor's liability for "default" only, but it is a general clause which provides for the liability for all the possible forms of non-performance including so-called "positive breach of contract", which is just comparable to the role of the modernized German § 280(I). Consequently, the structure of the scheme was deeply changed. The impact of this change on the whole scheme has both the positive aspects (actualities) and negative ones (system integrity issues).

4. Actualities regarding the liability for non-performance are confirmed.

In comparison with the old German and Japanese schemes, the Thai concept shows in this part (Secs. 204 – 217) following positive features:

a) Actuality 1: Demand for performance is postulated (Secs. 203, 204). Firstly, Secs. 203 and 204 have overcome the conceptual ambiguity of the old Japanese Art. 412, and the requisite of the demand for performance by the creditor is clearly postulated for the liability of the debtor for non-performance. It exactly corresponds with the German and French concepts.

b) Actuality 2: Sec. 205 postulates the requisite of responsibility. At the same time, Sec. 205 postulates clearly the debtor's responsibility for default as a requisite of his liability. Also in this point, the Thai scheme has overcome the ambiguity of the old Japanese Art. 412.

c) Actuality 3: Sec. 215 provides the general clause on the debtor's liability for non-performance. In the traditional German concept, the impossibility of performance was the primary ground for the debtor's liability. The debtor's default was the second, additional ground for his liability. The Thai scheme turned over this order and put the debtor's failure of proper performance in the center of the scheme instead of the impossibility. This is an essential advantage in comparison to the old German concept. In this sense, Sec. 215 could be seen as a precedent for the modernized German § 280(I).

[28] The additional provisions are the German §§ 294 – 299 on "creditor's default" which correspond with the old Japanese Arts. 413, the old Japanese Art. 414 on "demand for compulsory performance", and Sec. 373 from the Old Text (1923). See: Tamura, "Basic View to Reconstruction" (n 27) 16, 25–32.

d) Actuality 4: Sec. 216 provides the demand for damages in lieu of performance. Sec. 216 clearly mentions the demand for "damages ***in lieu of performance***". The origin of this provision was the old German § 286. Its first paragraph provided for the demand for "damages ***besides performance***" in cases of the debtor's default while the second paragraph provided the conditions for the demand for "damages ***in lieu of performance***" in cases where the default (delay in performance) completely undermined the purpose of the obligation ("fundamental non-performance"). The first paragraph was replaced with the old Japanese Art. 415 Sentence 1 as described above. Only the second paragraph of the old German § 286 remained and numbered as Sec. 216.

In comparison to the old Japanese scheme which did not clearly distinguish these two types of damages, Sec. 216 shows an important advantage because this distinction plays an important role in the reformed law on obligations in Germany and Japan.

Also, in comparison to the old German concept, Sec. 216 shows a small advantage; the original old German provision § 286 had its second sentence which stated that the provisions concerning the right of rescission should apply "*mutatis mutandis*". The Thai drafter deleted this sentence from Sec. 216, and it was a well-considered decision. Indeed, this sentence was quite misleading; needless to say, the damages in lieu of performance consists in so-called "expectation interest" while the rescission of contract aims "restoration of the original state" and allows demand for "reliance interest" only. The real purpose of this second sentence was to indicate the creditor's duty to return the already effected performance to the debtor. In the reformed German law, the corresponding sentence has been accordingly improved (the modernized German § 281(V)).

Though, Sec. 216 suffers another conceptual problem (see below **III. B. 5. f)**).

5. Integrity issues regarding the liability for non-performance are also identified.

Through the rearrangement and scheme change, however, certain inconsistency occurred at several positions.

a) Integrity issue 1: The definition of the responsibility is missing. Sec. 205 postulates the responsibility as a requisite for the debtor's liability. However, its clear definition is missing. In the German concept both in the old and new scheme, § 276 provides that the debtor is responsible for his intention or negligence. The Thai drafter eliminated this provision from his scheme, probably because the Japanese Civil Code does not have any comparable provision to the German § 276. As a result, there remains only a suggestion about the contents of the debtor's responsibility in Sec. 217 which provides for the heavier responsibility during the debtor's default.

This problem became worsened through the circumstance that the old Japanese Art. 416 was adopted as Sec. 222 to determine the scope of damages, which is based on the Common law doctrine of "remoteness of damage" (see above **II. C.**). It raised an uncertainty similar to the problem in the Japanese concept; suddenly, it is quite questionable whether the responsibility or "fault" of the debtor means "*blamableness*" of his conduct (subjective approach) or simply "*causation*" (objective approach). [29]

[29] The German concept takes also an objective approach to determine the scope of damage (§ 249). In the German law however, the clear distinction between the "contributive" causation between a conduct and losses and the "attributive" causation between a conduct and an actor applies also to contractual cases. In the latter aspect, the

The elimination of § 276 had also two by-effects. Firstly, the Thai drafter had adopted the old German § 287 concerning the vicarious liability as Sec. 220. However, the German provision had the second sentence that excluded the application of the old German § 276(II). Of course, the Thai drafter had to change it to another provision with a similar content; namely Sec. 373 which was modeled after Art. 100(I) in the Swiss Law on Obligations (enacted in 1911). This adjustment made the purpose of the provision somewhat uncertain.

Secondly, the Thai drafter was prevented from adoption of the old German § 300(I) which aims to ease the debtor's responsibility during the creditor's default and limit it to intention and gross negligence. It was impossible to adopt this provision without any definition of his standard responsibility in § 276. In the end, the Thai arrangement has no clear provision about effects of the creditor's default. Above all, this problem has been inherited from the old Japanese concept (see above **II. E.**).

For this reason, it would be desirable to introduce the German § 276 next to Sec. 205 which is the first provision which mentions the issue of "responsibility" (see **V. B. 3.**).

b) Integrity issue 2: The burden of proof is not clearly regulated. The subject "debtor's responsibility" has also another integrity issue in respect of the burden of proof. In the traditional German scheme, this problem was solved in two different ways in the part of "the impossibility of performance" and in the part of "the debtor's default".

In cases of impossibility, the debtor could be released from his obligation to perform if he is not responsible for the circumstance which caused the impossibility (the old § 275) while he is liable for damage if he is responsible for such circumstance (the old § 280). However, the composition of the old §§ 275 and 280 did not offer any logical possibility to answer the question which party bears the burden of proof regarding responsibility. For this reason, the old § 282 explicitly provided that the debtor always bears the burden of proof for his non-responsibility. In other words, this provision implicitly laid down the presumption of the debtor's responsibility in case of impossibility.

For cases of the debtor's default, the traditional German scheme applied another method; the debtor was *automatically in default (liable for delay)* if he did not perform after the warning given by the creditor (the old § 284 (I)). However, the debtor could defend himself against the liability insofar as the delay in performance resulted from a circumstance for which he was not responsible (the old § 285). In such a way, the old § 284 implied the presumption of the debtor's responsibility in case of default while the old § 285 provided the debtor's burden of proof for his non-responsibility.

The old German concept was based on an impossibility-centered theory of liability so that the case of impossibility was treated at first. The Thai arrangement reverted this order in accordance with the French-Japanese scheme and treats the case of the debtor's default at first. Accordingly, the principle of the presumption of the debtor's responsibility and his burden of proof for non-responsibility is already declared in the part of the debtor's default (Secs. 204 and 205). As for the case of impossibility, however, the Thai drafter adopted the old German §§ 275 and 280 as Secs.

German law, of course, employs the subjective approach.

218 and 219, but omitted the old German § 282 from his arrangement.[30] As result, the arrangement could evoke an appearance as if the principle of the burden of proof established in the Secs. 204 and 205 would not apply to cases of impossibility.

Under these circumstances, it would be more consequent and reasonable if all the fundamental principles regarding the liability of the debtor for non-performance would be declared together in the part of the debtor's "default". For this reason, it would be desirable to introduce the old German § 282 together with the definition of the debtor's responsibility (the old German § 276) next to the current Sec. 205 (see **V. B. 3.**).

There is another complication in regard to Secs. 218 and 219; the Thai drafter had changed the order of provisions as he adopted the old German§§ 275 and 280. On the one side, this change caused a small integrity issue in regard to the condition of subsequent impossibility. On the other side, however, this arrangement offers an opportunity to solve the problem about the burden of proof. These issues are discussed in details below (see **III. B. 6.**).

c) Integrity issue 3: Sec. 217 is unfortunately positioned. Sec. 217 is modeled after the old German § 287 which provided for the heavier responsibility of the debtor during his default. This provision was located at the current position because Sec. 215 was initially the provision on the debtor's liability for default (the old § 286).

However, Sec. 215 is now a general clause regarding the debtor's liability for all the possible forms of non-performance. Under this circumstance, it would be not suitable to put the current Sec. 217 (a provision concerning exclusively the situation during the debtor's default) into a position behind Sec. 215. For this reason, it would be also desirable to move Sec. 217 just next to the definition of the responsibility for default (see **V. B. 4.**).

d) Integrity issue 4: Sec. 220 is unfortunately positioned. Sec. 220 is modeled after the old German § 278 which provided for the vicarious liability of the debtor. In the traditional German scheme, this provision was located in the part of "impossibility of performance" due to its impossibility-centered theory of liability. In the Thai arrangement, it has been sent deeply backward together with the provisions on the impossibility of performance.

However, the content of this provision itself is regarding the debtor's vicarious liability in all the possible forms of non-performance. For this reason, it would be also desirable and reasonable to move Sec. 220 to the last position of the general principles regarding the debtor's liability (see **V. B. 5.**).

e) Integrity issue 5: The requisite of responsibility is missing in Sec. 215. Sec. 215 was originally the old German § 286(I), then the Thai drafter replaced it with the old Japanese Art. 415. At the moment, the drafter deleted its Sentence 2 which provided that the same "shall apply if the performance becomes impossible due to a cause which is attributable to the debtor" (see above **II. C.**). It is quite likely that the Thai drafter recognized this sentence as a provision on "impossibility of performance" and eliminated it because he intended to adopt the German provisions (the old §§ 275, 278, 280) for this subject.

[30] Also the modernized German repealed the old § 282. Instead, it has improved the composition of § 280(I) so that it is now logically clear that the debtor bears the burden of proof.

In the old Japanese concept, however, Sentence 2 was not a simple provision for "impossibility of performance", it had also another task to postulate the "responsibility for non-performance" as a requisite for the debtor's liability (see above **II. C.**). After the elimination of the Sentence 2, this requisite completely disappeared from Sec. 215. The logical consequence would be that this requisite is valid in cases of default (under Sec. 205) and impossibility (under Secs. 218) but not in other forms of non-performance, for instance, imperfect performance or "positive breach of contract". However, there would be no clear ground for such a differentiation.

In order to resolve this inconsistency, it would be desirable to introduce a second sentence to Sec. 215 which postulates the debtor's responsibility as requisite for his liability in a similar way to the Japanese reformed Art. 415(I) (see **V. B. 9.**).

f) Integrity issue 6: Sec. 216 on the demand for damages in lieu of performance is not generalized. As described above in **III. B. 4. d) Actuality 4**, Sec. 216 provides the conditions for the demand for "damages ***in lieu of performance***". Unfortunately, it suffers an inconsistency. This problem was caused mainly because the Thai drafter exactly maintained the original wordings of the old German § 286(II) without adapting to a new arrangement even though he had already replaced its forgoing provision § 286(I) with the old Japanese Art. 415 Sentence 1.

After this replacement, Sec. 215 has widened its scope of target from simple "debtor's default" to "debtor's non-performance" in all possible forms. Accordingly, the drafter would have had no reason to narrow the scope of target of Sec. 216 to "debtor's default" back again. In this context, we would miss a provision which entitles the creditor to demand "damages ***in lieu of performance***" not only in cases of "default", but also in cases of "partial performance", "partial impossibility", "imperfect performance", or all the other forms of "positive breach of contract". The wordings in Sec. 216 "If ***by reason of default*** …" should be replaced with a wordings "If ***by reason of non-performance*** …", and all the possible cases of "fundamental non-performance" should be covered by this provision. For a possible improvement of Sec. 216, the new scheme of §§ 281 – 283 in the modernized German law would offer a suitable model for the Thai law (see **V. B. 10.**).

6. The internal structure of the provisions on the debtor's liability for impossibility of performance (Secs. 218 – 220) was modified.

Next to the provision on the debtor's "default", the Thai drafter positioned three German provisions on the "***impossibility of performance***" (③ the old German §§ 275, 278, 280). This position corresponds with the position of the Japanese Art. 415 Sentence 2. On the other hand, however, other provisions in the old German scheme, especially §§ 276, 279, and 282, were eliminated from different reasons. Furthermore, the Thai drafter changed the order of the adopted three provisions.

In the original old German concept of law non-performance, the creditor may demand only specific performance from the debtor insofar as it is possible for the latter. Upon such a demand by the creditor, the debtor may try defend himself only with an argument that the performance would be impossible for him. In cases where the cause of the impossibility is not attributable to the debtor, he is released immediately from his obligation. Otherwise, he should pay damages in lieu of performance. According to the order of the argumentation steps ("released" otherwise "liable"), the old German scheme for non-performance started with a provision to release the debtor from his obligation (the old § 275). Then, the old §§ 276 – 279 followed and set up the basic principles about

the debtor's responsibility. Thereafter, § 280 provided the debtor's liability for cases of impossibility attributable to him, and then additional provisions followed (the old §§ 281, 282).

In the Thai arrangement, however, the forgoing provisions already provided the general clause of the debtor's liability and the demand for damages (Secs. 215 – 217). The German order of the provisions was apparently unsuitable for this arrangement. For this reason, § 280 was moved to the top position as Sec. 218 before § 275 (as Sec 219). Other provisions were eliminated except § 278 regarding vicarious liability (as Sec. 220) and § 281 regarding demand for delivery of substitutes (moved to the "Part II. Subrogation" as Sec. 228).

As for the change of the order of the provisions old German §§ 275 and 280, it caused a small integrity issue, but it offers also an opportunity to improvement as mentioned above (see **III. B. 5. b)**). The old German concept had principally distinguished between "initial" and "subsequent" impossibility, and the targets of the old §§ 275 and 280 were cases of "subsequent" impossibility only. For this reason, the old § 275 had the requirement of "*a circumstance […] occurring after the creation of the obligation*". It was logically quite clear that this requirement applied also to the old § 280. So, the old § 280 did not mention it again. As the Thai drafter changed the order of these two German provisions, he would have had to move the requirement of "subsequent" impossibility from Sec. 219 (modeled after the old § 275) to Sec. 218 (modeled after the old § 280). However, he did not do it. As result, the current arrangement could evoke an appearance as if Sec. 218 might apply to both types of "initial" and "subsequent" impossibility while Sec. 219 applies to "subsequent" impossibility only. Of course, it would be wrong.

On the other side, this change of the order of these two provisions offers an opportunity to solve the question of the burden of proof; just in a same way as Secs. 204 (modeled after the old German § 284) and 205 (modeled after the old German § 285) in cases of default, Sec. 218 could declare the principle of presumption of the debtor's responsibility while Sec. 219 could prescribe the debtor's burden of proof for his non-responsibility in cases of impossibility. Perhaps, it could be a genuine reason of the change of the order. For this purpose, however, the Thai drafter would have had to remove the expression "*in consequence for which the debtor is responsible (เพราะพฤติการณ์อันใดอันหนึ่งซึ่งลูกหนี้ต้องรับผิดชอบ)*" from Sec. 218. In any case, the optimal composition of these two provisions would read as follows:

มาตรา ๒๑๘

ถ้าการชำระหนี้กลายเป็นพ้นวิสัยจะทำได้เพราะพฤติการณ์อันใดอันหนึ่ง~~ซึ่งลูกหนี้ต้องรับผิดชอบ~~ [ซึ่งเกิดขึ้นภายหลังที่ได้ก่อหนี้] ไซร้ ท่านว่าลูกหนี้จะต้องใช้ค่าสินไหมทดแทนให้แก่เจ้าหนี้เพื่อค่าเสียหายอย่างใดๆ อันเกิดแต่การไม่ชำระหนี้นั้น

ในกรณีที่การชำระหนี้กลายเป็นพ้นวิสัยแต่เพียงบางส่วน ถ้าหากว่าส่วนที่ยังเป็นวิสัยจะทำได้นั้นจะเป็นอันไร้ประโยชน์แก่เจ้าหนี้แล้ว เจ้าหนี้จะไม่ยอมรับชำระหนี้ส่วนที่ยังเป็นวิสัยจะทำได้นั้น แล้วและเรียกค่าสินไหมทดแทนเพื่อการไม่ชำระหนี้เสียทั้งหมดทีเดียวก็ได้

มาตรา ๒๑๙

ถ้าการชำระหนี้กลายเป็นพ้นวิสัยเพราะพฤติการณ์อันใดอันหนึ่ง~~ซึ่งเกิดขึ้นภายหลังที่ได้ก่อหนี้ และ~~ซึ่งลูกหนี้ไม่ต้องรับผิดชอบนั้นไซร้ ท่านว่าลูกหนี้เป็นอันหลุดพ้นจากการชำระหนี้นั้น

ถ้า~~ภายหลังที่ได้ก่อหนี้ขึ้นแล้วนั้น~~ ลูกหนี้กลายเป็นคนไม่สามารถจะชำระหนี้ได้ไซร้ ท่านให้ถือเสมือนว่าเป็นพฤติการณ์ที่ทำให้การชำระหนี้ตกเป็นอันพ้นวิสัยฉะนั้น

The additional part [ซึ่งเกิดขึ้นภายหลังที่ได้ก่อหนี้] in Sec. 218 could be removed if the distinction between "initial" and "subsequent" impossibility should be abolished just like in the modernized German concept (see below **IV. A. 2.**).

7. Actualities and Integrity issues are identified regarding the impossibility of performance.

These circumstances regarding the elimination of the provisions and the change of the order of the adopted provisions yield additional actualities and integrity issues.

As already mentioned above in the **III. B. 5. a) Integrity Issue 1** and **b) Integrity Issue 2**, the elimination of the old §§ 276 (definition of responsibility) and 282 (burden of proof) has caused the uncertainty about the contents of the responsibility. Also, the adoption of § 278 (vicarious liability) in this part as Sec. 220 was unsuitable to the Thai arrangement as already discussed in the **III. B. 5. d) Integrity Issue 4.** Besides these integrity issues, the Thai arrangement in this part shows following positive aspects and an additional integrity issue.

a) Actuality 5: Sec. 218 provides the impossibility as a ground for damages in lieu of performance. The Thai drafter positioned the German provisions concerning the impossibility of performance just next to the provisions about the debtor's default simply in accordance with the position of the old Japanese Art. 415 Sentence 2.

From almost accidental circumstances, the Thai arrangement had already adopted the old German § 286(II) as Sec. 216. In this context, Secs. 216 and 218 gain a quite important meaning which is missing in the old Japanese Art. 415; namely as provisions which entitle the creditor to demand for "damages ***in lieu of performance***" as remedy for "fundamental non-performance". Sec. 216 could be reformed to a general provision for this type of remedy, and Sec. 218 could provide one of the main grounds for this remedy. In this sense, this part of the Thai arrangement could be compared to the modernized German §§ 281 – 283 (see below **V. B. 10.** and **12.**).

b) Actuality 6: The provision regarding Inability of the debtor (§ 279) was eliminated. The positive aspect could be found also in the elimination of the old § 279 which excluded the effects of the "inability" of the debtor under the old § 275(II) in cases of obligations with subject matters "designated by species only". In the modernized German law, this provision was repealed together with the old § 275(II) for the grounds that the traditional distinction between "objective" and "subjective" impossibility of performance should be abolished together with the distinction between "initial" and "subsequent" impossibility (see below **IV. A. 2.**).

According to the traditional German concept, the impossibility of performance is called "objective" in cases where nobody could perform the obligation while it was called "subjective" when simply the debtor could not perform in his/her specific person. The latter case was also called "inability of the debtor". However, this concept suffered theoretical difficulties. This issue had a following historical background.

In its original state of the concept, the inability of the debtor was never acknowledged as a "genuine case of impossibility". Only in cases where the subject matter of an obligation is "***specific***", a case of "inability of the debtor" could have legal effects of "impossibility" when the debtor has lost his "factual disposition" over the subject matter (for instance, through theft or

robbery) or he has been deprived of his legal title on the same.[31] For this reason, § 237(II) of the first Draft BGB (1888)[32] acknowledged the legal effects of impossibility also in cases of inability of the debtor if the obligation obliged him to deliver a specific thing, provided that he has no responsibility for the cause of his inability.

However, § 235 of the second Draft BGB (1892)[33] completely overturned the logical construction, and its main sentence stated that the inability of the debtor would be equivalent to the impossibility. Then, its second sentence excluded from this legal effect all the cases of obligation with subject matters "***designated by species only***", even if the debtor has no responsibility for the cause of the inability. The main sentence was the origin of the old § 275(II) while the second sentence was separately formulated as § 279.

As a result of this transformation, it has become quite uncertain in what point the impossibility of performance and the inability of the debtor are common; namely, only in the effect of release from the duty of performance ("the creditor may not demand performance") or rather in the effect of discharge from the liability ("the creditor may not demand damages")?

Due to such a conceptual ambiguity, the reformed German law on obligations ceases to distinguish between impossibility and inability. According to the modernized § 275(I), the both cases have only the effect to release the debtor from the duty to perform, but nothing to do with the question of the liability. Consequently, the distinction between "*specific*" things or things "*designated by species only*" becomes irrelevant to the effect of the modernized § 275(I). For this reason, § 279 was repealed.

The Thai drafter had eliminated this provision from another reason. Apparently, he understood the "inability of the debtor" in a quite narrow sense, and considered under it only cases of personal obstacles which prevent the debtor from performing his duty (diseases, injuries etc.).[34] In other words, he completely excluded other cases where the debtor owes a duty to deliver things. Consequently, he had no need to adopt § 279 at all. Eventually, the Thai arrangement and the reformed German concept reached to a similar consequence.[35]

c) Integrity Issue 7: The functions of the impossibility of performance (Secs. 218, 219) must be modified in accordance with the arrangement. In the old German concept, the impossibility of performance fulfilled double functions as just discussed above; namely, the impossibility as a ground to release the debtor from the duty of performance and as the primary ground to impose the liability for non-performance upon the debtor. The old § 275 which was the model for Sec. 219 carried out the first function, and the old § 280 the second function. § 275 was

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31 Friedrich Mommsen, *Unmöglichkeit der Leistung in ihrem Einfluß auf obligatorische Verhältnisse* (Schwetschke 1853) (German) 6–7, 27–45 available at: <Google Books>.

32 Entwurf eines Bürgerlichen Gesetzbuches für das Deutsche Reich (Erste Lesung) 1888 (Germany) available at: <Google Books>.

33 Entwurf eines Bürgerlichen Gesetzbuchs für das Deutsche Reich (Zweite Lesung) 1892 (Germany) available at: <Google Books>.

34 พระยามานวราชเสวี "อุทาหรณ์สำหรับประมวลกฎหมายแพ่งและพาณิชย์ บรรพ ๑ – ๒ (ฉบับกรมร่างกฎหมาย ๒๔๖๘)" [Phraya Manava Rajasevi, *Commentary on Civil and Commercial Code, Book I - II*] in *เนื่องในโอกาสครบรอบ ๑๐๐ปี พระยามานวราชเสวี* (๑๘ กันยายน ๒๕๓๓) (Thai) 75.

35 Mommsen acknowledged cases of "personal obstacles" rather as objective and "genuine" impossibility. See: Mommsen, *Unmöglichkeit der Leistung in ihrem Einfluß auf obligatorische Verhältnisse* (n 31) (German) 65.

positioned at the top of the provisions regarding the effects of non-performance just for this first function.

In the reformed German concept, the first function has been maintained while the second one was abandoned. Therefore, the modernized § 275 still stays at the top position with its essentially widened contents while the new § 280 has been completely rewritten and now provides the "breach of duty" as the primary ground for the liability of the debtor. The function of the impossibility is reduced to one of the grounds for "damages in lieu of performance" (the modernized § 283).

The Thai arrangement of the old German provisions, however, made these two functions of the impossibility somewhat uncertain. Firstly, Sec. 219 does not stay at the top of the provisions on the effects of non-performance. It would be desirable if a provision for this function would stay prior to Sec. 213 (Enforcement of performance) in order to clearly declare that the creditor may not demand performance from the debtor in cases of impossibility regardless as to whether he is responsible for it or not (see below **V. B. 2.**). The reformed Japanese law on obligations chose the position next to Art. 412 on time for performance (the reformed Art. 412-2(I); see below **IV. B. 2.**).

As for the second function of the impossibility as ground for the debtor's liability, the Thai arrangement has adopted both of the German and Japanese provisions (Secs. 215 and 218). Theoretically, the Thai arrangement has no need to maintain a special provision regarding impossibility as another ground for the liability of the debtor besides Art. 215. In this sense, Sec. 218 could be reformed as a special provision which provides a ground for "damages in lieu of performance" just like the modernized German § 283 (see below **V. B. 12.**).

The reformed Japanese law took also a similar way; the reformed Art. 415(I) states the impossibility of performance as one type of non-performance, and Art. 415(II) declares it as a ground for demand for "damages in lieu of performance" (see below **IV. B. 5.**).

8. No serious obstacles are identified in the part on the scope of damages and the delinquency charge (Arts. 222 – 225).

In accordance with the Japanese scheme (Arts. 416, 418, 419), the Thai drafter positioned the old German provisions on scope of damages next to the part on the impossibility of performance; namely ① the old §§ 249 (scope of damages) and 254 (contributory negligence), ⑤ §§ 288 (default interest) and 289 (prohibition of compound interest), then additionally § 290 (interest on compensation for value). These were the origin of Secs. 222 – 225. At the moment, however, the German § 249 was replaced with the old Japanese Art. 416. This German provision states a quite heavy principle of "natural restitution" or "full-compensation" according to the "equivalence theory" (conditio sine qua non) because it should apply also to tortuous cases. The Thai drafter preferred the moderate Japanese provision which has its origin in the Common law (see above **II. C.**).

The Thai arrangement in these parts shows no serious system integrity issue, though Sec. 223 regarding the "contributory negligence" suffers a small terminological inadequacy. Its origin was the old German § 254. As already mentioned in regard to § 249, the provisions concerning the compensation for damages should apply not only to non-performance in contractual cases, but also to tortious cases. Therefore, the party who is entitled to demand for damages is called "injured party" instead of "creditor". The Thai drafter exactly maintained this original wording also in the

Thai arrangement ("ฝ่ายผู้เสียหาย" (*fay phu siyahai*) means "injured party") even though this provision was moved to the part concerning the effects of non-performance only. For this reason, Sec. 223 shows a slightly different style than other articles in this part of the Thai law. In this context, however, the description as "creditor" would be more suitable. Otherwise, it would be worthy of consideration to delete the wording "*mutatis mutandis* (โดยอนุโลม)" in Sec. 442.

9. The part on the creditor's default has certain structural problems.

In the German concept, the provisions considering the "creditor's default" are clearly separated from the part of the non-performance and positioned after it. However, the Thai drafter put them to the position which exactly corresponds to the position of the Japanese Art. 413; namely between the provisions on the debtor's default (Secs. 204, 205) and the provision on the demand for damages (Art. 215). As a result, six German provisions (⑥) were inserted in the midmost of the provisions concerning the debtor's default. At the same time, the old Japanese Art. 414 (demand for enforcement of specific performance) was also inserted just before Sec. 215 on the demand for damages.

For a fact, this arrangement did not cause any system inconsistency to the whole logical structure of the provisions on the debtor's liability, but the logical connection between the provisions on the debtor's responsibility for default (Secs. 204, 205) and the creditor's demand for enforcement (Sec. 213) was once cut off by the provisions on the creditor's default. Theoretically, it would cause no inconsistency if the part on the creditor's default would be moved to the position after the part of the debtor's liability just faithfully to the original German concept.

Besides this logical disturbance, another weakness could be pointed out as follows.

a) Integrity issue 8: Consequences of the creditor's default are missing. The old Japanese scheme of non-performance had only a quite simple provision about the creditor's default, and it did not provide any clear consequence from the creditor's default. Mainly, it was a result of the old Arts. 534 – 536 which stated that the creditor should bear the risk of loss in cases of reciprocal contracts with specific subject matters (see above **II. E.**).

Unfortunately, the Thai drafter adopted this provision as Sec. 370. As a result, it was not possible for the Thai drafter to adopt the German provisions regarding the effect of the creditor's default; namely §§ 300 and 324(II). The original German concept is to describe as follows:

Firstly, in cases of obligation with specific subject matters, the creditor must bear the risk of loss under the old § 275 (i.e., he may not demand performance from the debtor), and during his default, the debtor's liability shall be further eased under § 300(I) (i.e., he is responsible only for his intention and gross negligence). On the other hand, in cases of subject matters designated by species only, the debtor must bear the risk of loss (i.e., the creditor may demand performance from him). However, during the creditor's default, the creditor shall bear the risk of loss under § 300(II) (i.e., the creditor may not demand performance from the debtor) like in cases of specific subject matters.

In cases of reciprocal contract with specific subject matters, the debtor must bear the risk of loss under the old § 323 (i.e., each party loses the right to demand performance from the other party). However, during the creditor's default, he must bear the responsibility for the loss under old § 324(II) (i.e., the debtor may demand counter-performance from him under the old § 324(I)). In

cases of reciprocal contract with subject matters designated by species only, the debtor must bear the risk of loss (i.e., the creditor may demand performance from him). However, during the creditor's default, the creditor shall bear the risk of loss under § 300(II) (i.e., the creditor may not demand performance from the debtor).

Indeed, in regard to cases of obligation or reciprocal contract with ***specific subject matters***, it was not possible for the Thai drafter to adopt the German §§ 300(II) and the old 324(II) so long as Sec. 370 exists. Furthermore, the Thai drafter refrained also from adoption of § 300(I) which reduces the debtor's liability during the creditor's default to his intention and gross negligence, probably due to the lack of definition of a standard responsibility of the debtor.

Eventually, there remained only Sec. 221 (modeled after the old German § 301) as a small consequence of the creditor's default (no interest on delinquency charges). However, this is not the fault of the Thai drafter, he inherited this problem simply from the old Japanese scheme.

Apparently, he was aware of this error, therefore, he tried to correct it at least in cases of reciprocal contracts with ***subject matters designated by species only***, and adopted the old German § 324(II) into Sec. 372(II) Sentence 3, which provides the passage of risk of loss to the creditor during his default in cases of reciprocal contract with undetermined subject matters.[36] However, there is certain doubt of its conceptual consistency in two points.

At first, it is only one part of the original German concept described above. Moreover, the old § 324(II) was intended to apply to cases of specific subject matters. However, the Thai drafter concepted its application to cases of undetermined subject matters instead of adopting § 300(II) which was the provision for this purpose in the original German concept. In this manner, the original logical structure was severely deformed.

Secondly, the applicability of this provision would be questionable; it is quite difficult to imagine to what cases it could really apply because undetermined subject matters would have been already specified under Sec. 195(II) at the moment where the creditor has been put in default through the tender of the performance.

Indeed, it would be the best way to replace Secs. 370 – 372 with a general provision which lets the debtor bear the risk of loss, and provide clearly the consequences of the creditor's default just in a similar manner to the reformed Japanese Arts. 413, 413-2(II), 536, and 543 (see below **IV. B. 3.**, **V. B. 6.** and **7.**). The modernized German law has maintained the traditional stance (the reformed §§ 275, 280(I), 300, 323, 326).

Also, it should be noted that Secs. 370 – 372 cause another difficulty regarding "rescission of contract" in Sec. 389 modeled after the Japanese old Art. 543 (cf. below **IV. B. 6.**).

10. Additional Provisions were adopted from the Old Text.

Probably, at the last moment of the arrangement, several provisions were added from the Old Text, i.e., the first version of the Civil and Commercial Code (enacted in 1923); namely Secs. 206

[36] Sec. 372 has a complicated structure; Sec. 372(I) was composed after the old Japanese Art. 536(I). On the other hand, Sec. 372(II) Sentence 1 and 2 were modeled after the old German § 324(I) while its Sentence 3 is identical with the old § 324(II).

(default in tortious cases) and 214 (enforcement from whole properties of the debtor). Moreover, the composition of Sec. 207 was improved after the corresponding provision in the Old Text.

However, it is open to question if Secs. 206 and 214 are really necessary and appropriate in the Civil and Commercial Code. Sec. 206 is based on the Roman law aphorism "fur enim semper moram facere videtur (a thief is always in default)". Today, nobody would doubt the point that a wrongdoer is liable from the time where he commits the unlawful act. As for Sec. 214, its subject is rather an issue of legal policy, and it would be appropriate to relegate this issue in the procedural law. These two positions could be rather utilized for the purpose to improve the Thai arrangement.

The discussion in **III. B.** could be summarized in two tables (see below [**Table 3]** and **[Table 4]**). Theoretically, we could classify integrity issues listed in **Table 4.** into two groups according to their origin; namely problems ***inherited from the model laws*** and problems ***arisen from unfortunate arrangement***. The integrity issues **2)** – **5)** belong to the arrangement-concerned group, and the issue **8)** is inherited from the Japanese law. The issue **1)** is an inheritance in regard to the Japanese law, but also an arrangement-concerned problem in regard to the German law. The issues **6)** and **7)** were, originally for the Thai drafter, no integrity issues at all, but increasingly spotlighted due to the recent discussion about "fundamental non-performance" and "impossibility" in Germany and Japan. For the solution of the first group, we could seek important suggestions in development and reforms in the model laws. As for the second group, we could obtain suitable techniques for improvement of the arrangement from comparative studies of the original and reformed model laws.

[Table 3] Actualities and references in the German and Japanese laws

	Subjects	In comparison to ~
1.	Demand for performance (Secs. 203, 204)	Old Japanese Art. 412
2.	Responsibility for non-performance (Sec. 205)	Old Japanese Art. 412
3.	General clause on the debtor's liability (Sec. 215)	Old German §§ 280, 286
4.	Damages in lieu of performance (Sec. 216)	Old Japanese Art. 415
5.	Impossibility as a ground for damages in lieu of performance (Sec. 218)	Old Japanese Art. 415
6.	Elimination of the provision on the inability of the debtor	Old German § 279

[Table 4] Integrity Issues and references in the German and Japanese laws

	Subjects	In comparison to ~
1.	Definition of the responsibility is missing	German § 276
2.	Uncertainty concerning the burden of proof	Old German § 282
3.	Unfortunate position of Sec. 217 (heavy liability during the debtor's default)	Old German § 287
4.	Unfortunate position of Sec. 220 (vicarious liability)	Old German § 278
5.	Requisite of responsibility missing in Sec. 215	New Japanese Art. 415
6.	Damages in lieu of performance (Sec. 216)	New German §§ 281 – 283
7.	Functions of the impossibility of performance (Secs. 218, 219)	New German §§ 275, 283, 311a New Japanese Art. 412-2, 415
8.	Consequences of the creditor's default are missing	New German §§ 300, 323, 324 New Japanese Arts. 413, 413-2

Above all, the next task for us would be to examine whether these achievements of the Thai arrangement could be positively evaluated or rather undermined from the viewpoint of the recent reform projects in the model laws. At the same time, we will try to obtain possible suggestions for any strategy to solve the integrity issues which we have just identified in the Thai arrangement.

IV. RECENT REFORMS OF LAW ON OBLIGATIONS

In 1 January 2002, the modernized German Law of Obligations came into effect and got off to a good start of a new era of civil law.[37] France followed Germany; in 1 October 2016, the reformed French Law of Contract was put into force.[38]

It means, the two dominant civil law systems in the 19th to 20th centuries have summed up their 100 to 200 years experiences in the legal practices and compiled them into a refreshed concept of contract law for the 21th century. Especially, the "overhaul of the law on non-performance" was one of the central issues in these comprehensive reforms. As a result, the contrasting characteristics between the French and German concepts thereof have been essentially modified. The distance between the two major civil laws seems to be reduced. At first in this section, we will try to clarify the reformed points in the German law, which have a high degree of relevance for our main subject.

A. Scheme Change in the German Law on Non-performance

The impossibility-centered theory of liability, together with the stringent principle of "natural fulfillment", constituted the distinguishing feature of the German law on obligations. However, this point became the target of a harsh criticism of "gaps in the law" soon after the implementation of the BGB. In his critical paper of 1902, *Hermann Staub* (1856 – 1904) made a complaint that BGB offered only § 286 for the debtor's liability due to omission of a proper conduct ("default"), but no appropriate provisions for many other various cases where the debtor breaches his duty rather through his active conducts, namely through a defective performance or other kinds of conducts which he would have to forbear. He called such cases "***Positive breach of claim or contract***".[39]

Staub stressed the need to establish a general principle of the debtor's liability for breach of duty which entitles the creditor to the demand for damages or rescission of the contract. He examined possible solutions; namely § 276 (definition of responsibility), §§280 and 325 (impossibility), or §§ 286 and 326 (default). He himself proposed a solution with an analogy from §§ 286 and 326. He strictly rejected a solution with the impossibility theory and gave a sharp warning that such a solution would be a misuse of the wording and cause a fateful confusion.

His criticism was then widely accepted. In the court practices, however, the debtor's liability for "positive breach of contract" was often reasoned with "customary laws", and the academic theories, faithfully to the German tradition, preferred to argue these cases as "partial impossibility" under §§280 and 325 and to find the ground for its liability in § 276.[40] This fateful development

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37 Das Bürgerliche Gesetzbuch (Germany); its official English translation is available at: <Gesetze im Internet>.

38 Code civil (France); the official English translation of its Law of Contract (2016) is available at: <Légifrance>.

39 Staub, *Die positiven Vertragsverletzungen* (n 7) (German) 5.

40 For example, see: Volker Emmerich, *Das Recht der Leistungsstörungen* (3rd edn, C.H. Beck 1991) (German) 13–14, 216–218. He argues that there would be no "gaps in the law" if the meaning of "performance" and "impossibility" would be interpreted wider enough. It means following points; in cases of "positive breach of contract", all the subsequent acts by the debtor to repair defects or to cure non-conformities should be understood as a genuine part

made the German concept about the effects of non-performance almost incomprehensible and useless for legal academics and lawyers in other countries. The German civil law itself suffered enough under this unfortunate legacy for a hundred years. Hence, the recent modernization of the law on obligations in Germany pursued, first of all, a departure from the impossibility-centered theory of the 19th century.

1. Contents of duty in obligation are extended.

The new § 241 (duty of performance) has obtained the second paragraph which provides that each party owes other party the duty to take account of rights and interests. If the debtor breaches this secondary or appended duty of care, and betrays the trustful relationship between the parties, it may constitute a ground for certain cases of "positive breach of contract", regardless as to whether the main duty of performance is properly effected or not.

2. Impossibility of performance is not a ground for the liability.

The old § 275 had provided that the impossibility or inability might release the debtor not only from his duty of performance, but also discharge him from his liability insofar as he is not responsible for its cause. The latter question is completely removed from the new § 275, which provides rather the "exclusion of the creditor's demand for performance" in cases of impossibility, inability, personal obstacles, and other equivalent circumstances.

Such a clear limit on the creditor's right to demand performance, however, does not affect the question of the debtor's liability and the creditor's right to demand damages under the new §§ 280, 283 – 285, 311 a, and 326. In this regard, the impossibility maintains its role merely as a ground for "damages in lieu of performance" (see below **IV. A. 4. c)**).

The traditional dichotomies between "initial" or "subsequent", and "objective" or "subjective" impossibility have lost their meaning and were abolished. Consequently, § 279 concerning the inability was repealed (see above **III. B. 7. b)**).

3. Breach of duty is now the ground for liability instead of impossibility.

The old German concept had two provisions for two different grounds for liability; namely § 280 for impossibility and § 286 for default. The reformed law unified them and declares the "***breach of duty***" to be a single ground for liability. In other words, the old § 280 was repealed, and the old § 286(I) was generalized to cover not only cases of default, but also all the other cases of "*Leistungsstörungen* (means 'disturbances in performance')".[41] In this aspect, that proposal of *Hermann Staub* has been officially acknowledged. Moreover, it should cover also the "breach of duty of care" under the reformed § 241(II). Hence, the general ground for liability is called "*breach of duty*", but not "*non-performance*".

The new § 280(I) generally entitles the creditor to demand for damages caused by any "breach of duty" independently from the question of demand for performance. The both demands

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of "performance" (extended concept of performance). If such acts have been unsuccessful, then unrepairable defects or non-conformities ("can not be repaired") could be seen as "partial impossibility" (extended concept of impossibility). In this way, all the problems of "positive breach of contract" should be covered by the impossibility theory. Such a discussion was already known to *Staub*, and he sharply criticized it (see *Die positiven Vertragsverletzungen* (n 7) 8–9).

41 This designation is now preferred to the traditional name of "non-performance" among German academics to include also cases of "positive breach of contract".

do not stay in any "***either-or***" relationship anymore. § 280(II) states that the additional requirements for damages due to "default" shall be specified in § 286.

In the traditional, impossibility-centered theory of liability, the dichotomy between "performance or damages" had dominated the discussion about the rights of the creditor. In contrast, the reformed concept widely removed this dichotomous scheme. The new § 280(III) limits it to special cases where the new law entitles the creditor to the demand for "damages in lieu of performance" under additional conditions specified in §§ 281, 282, or 283.

4. Conditions for the demand for damages in lieu of performance are clearly specified.

As uttered just above, the new concept distinguishes between the basic liability for "damages besides performance" under § 280(I) and the special cases for "damages in lieu of performance" under § 280(III). The latter could be seen as a generalized form of the old § 286(II).

The new concept classifies the special cases in three categories, namely;

a) § 281 provides additional conditions for damages in lieu of performance in cases of *default, imperfect performance, or partial performance*.

In accordance with the "extended concept of performance" (see above **IV. A.** (n 40)), the procedure of the ***demand of performance*** described in §§ 281 and 323 covers also the procedure of the ***demand of cure*** in cases of imperfect performance or "positive breach of contract". As for the latter demand, detailed provisions are introduced in the parts of "Sale" and "Hire of work" (§§ 437(I), 439, 634(I), 635).

Consequently, the traditional provisions on the warranty of seller and constructor have been repealed, and their liability is now regulated under the general provisions on non-performance (§§ 437(II)(III), 634(II)(III)).

This German solution would be logically more consistent than the Japanese way in its reform of 2017, which has introduced comparable provisions in the parts of "Sale" and "Hire of work" (the new Arts. 562, 636) and repealed the special warranty of seller and constructor, too, but without uttering the demand for cure in the general provisions on non-performance (in the new Art. 415(II), see below **IV. B. 5.** and **6.**).

b) § 282 provides additional conditions for damages in lieu of performance in cases of *breach of duty of care* under § 241(II).

c) § 283 provides additional conditions for the same in cases where *the demand for performance is excluded* according to the extent of impossibility, inability, personal obstacles, or other equivalent circumstances under § 275. Eventually, the effect of the impossibility on the debtor's liability (in the old § 280) survives only in this provision.

As alternatives for compensation of "expectation interest", the creditor may also demand compensation for "futile expenses" under § 284 or delivery of the reimbursement under § 285.

5. Rescission of contract is generally allowed for any type of disturbance in performance."

In parallel to the new §§ 281, 282, and 283, the new §§ 323 to 326 entitle one party to a reciprocal contract to rescission of contract in *all the forms of "disturbance in performance"* unless he himself is responsible for the disturbance or he is in default in acceptance (the new § 323(VI)).

In the traditional German concept, the old § 325 in cases of impossibility and the old § 326 in cases of default entitled one party to the choice between demand for damages (in lieu of performance) or rescission of the contract. In the cases of impossibility, the responsibility of the other party (the debtor of the performance in question) was required.

The new concept has removed this requirement of responsibility and widened the scope of the old § 326 to all the forms of disturbance in performance as follows:

a) § 323 provides conditions for rescission in cases of *default, imperfect performance, or partial performance*.

b) § 324 provides conditions for the same in cases of *breach of duty of care* under § 241(II).

c) § 326(V) allows one party to rescind the contract also in cases of *exclusion of the duty to perform* under § 275 (impossibility, inability, personal obstacles, or other equivalent circumstances on the side of the other party) regardless as to whether the latter is responsible for the circumstance or not.

Such a drastic extension of the scope of rescission was possible because the issue of rescission has been clearly cut off from the question of liability; in cases where any substantial disturbance occurs in the performance on the side of one party, another party may always have a chance to rescind the contract unless the latter party itself is responsible for such disturbance, or the disturbance occurs during the latter party's default (creditor's default) without responsibility on the side of the debtor (the new § 323(VI)). In return, the new § 325 clearly declares that the rescission of the contract never excludes the demand for damages under the new § 280. In this manner, the inflexible dichotomy (either-or scheme) between demand for damages or rescission of contract in the old §§ 325 and 326 was dissolved.

6. Logical structure of the scheme is internally twisted.

In whole, the reformed new concept maintains the principle of "natural fulfillment" and the demand for specific performance as primary effect of obligations. Generally speaking, the legal academics in Germany show tendency to emphasis the continuous aspects between the old and new laws.[42] On the other hand, however, the discontinuity between the both is undeniable. Above all, the impossibility of performance is not any primary ground for liability. Instead of the old, traditional dichotomies between "performance or damages" and "damages or rescission", a wide range of selection and combination of diverse remedies are offered for choice of the creditor.

In comparison to the traditional scheme, the logical structure between provisions on impossibility and default (and other types of disturbances) has been overturned. As a result of this

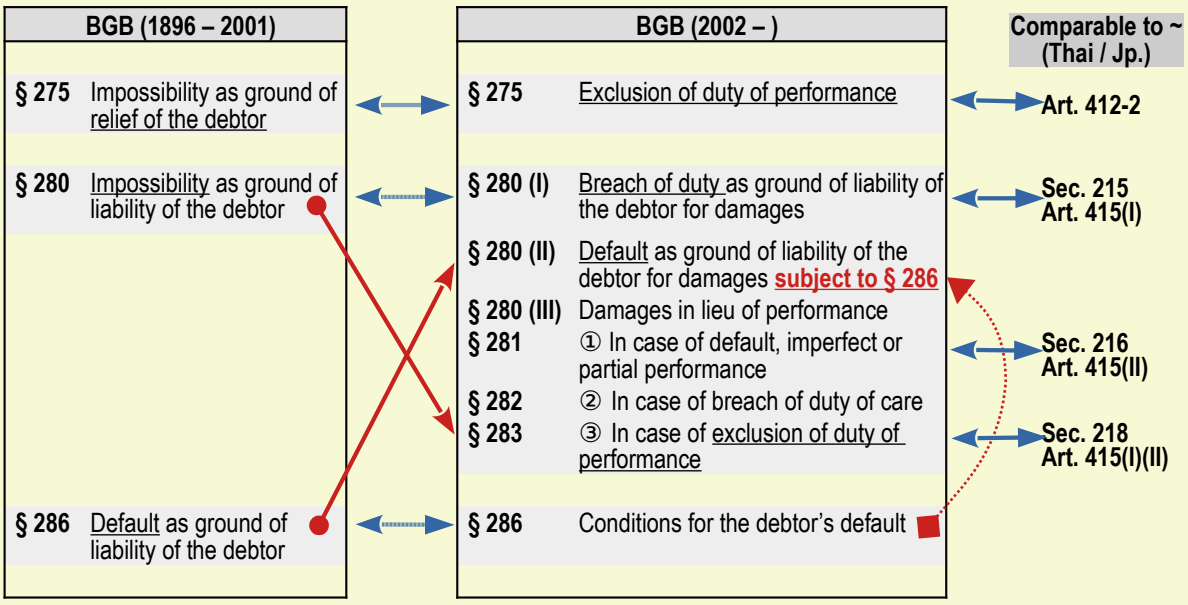
[42] For example, Egon Lorenz (ed), *Karlsruher Forum 2005: Schuldrechtsmodernisierung – Erfahrungen seit dem 1. Januar 2002* (Versicherungswirtschaft 2006) (German) 23.

scheme change, the core part of the reformed German concept has ***converged*** with the Thai scheme of Secs. 215, 216, and 218 (see below **[Table 5]**).

According to this result of the comparison, we could conclude that the recent development of the German law on obligations has confirmed the actuality and adequacy of the Thai arrangement. Furthermore, this confirmation could be a ground for an attempt to resolve the integrity issues modeled after the new German scheme.

Before we proceed to such an attempt, we would like to review also the achievements of the reform project in Japan.

[Table 5] Internally twisted structure of the modernized German scheme and comparability to the Thai and the reformed Japanese provisions



B. Reform as a system maintenance in the Japanese law

In October 2006, the Ministry of Justice in Japan started also a project for a "fundamental reform of the Law of Obligations" and established the "Japanese Civil Code (Law on Obligations) Reform Commission".[43] In March 2009, the Commission presented an interim report with comprehensive proposals.[44] In parallel to the governmental project, there are also unofficial activities among lawyers and legal scholars pursuing to develop own reform proposals from the viewpoint of the ordinary citizens. In October 2009, a group of voluntary contributors from citizens, lawyers and academics published a counter-proposal for the civil code reform.[45] Such a confrontation between the diverse concepts sparked a storm of heated controversy nationwide.

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[43] Japanese Civil Code (Law of Obligations) Reform Commission, "Mission Statement" (7 October 2007) available at: <https://www.shojihomu.or.jp/>.

[44] 民法(債権法)改正検討委員会編『債権法改正の基本方針』[Civil Code (Law on Obligations) Reform Commission (ed), *Basic Plan for the Reform of Law on Obligations* (Shoji Homu 2009)] (Japanese).

[45] 民法改正研究会編『民法改正国民・法曹・学界有志案』[Society for Research on Civil Code Reform (ed), *A Trial Proposal for Civil Code Reform Presented by Voluntary Contributors from Citizens, Lawyers, and Academics* (Nippon Hyoron Sha 2009)] (Japanese).

In February 2013, the Legislative Council of the Ministry of Justice announced the "Interim Outline for the Reform of the Law on Obligations" with a drastically reduced extent compared to the original plan of 2009.[46] On 31 March 2015, the final bill was submitted to the Diet and passed into law on 26 May 2017. After the get-acquainted period of almost 3 years, the reformed Law on Obligations was put into effect on 1 April 2020.[47]

In the initial discussion in the Commission, certain changes to the overall structure of the Civil Code were proposed aiming to a possible "departure from the German Pandectists' system".[48] However, this ambition has been abandoned already in the "Interim Outline", probably due to the vehement criticism especially from the practicing lawyers. The final reform bill was rather a bundle of diverse small amendments to the existing concepts.

As for the effects of non-performance, the basic scheme has been maintained. There was no scheme change except a slight change in the wordings regarding the requisite of "responsibility" or "accountability" of the debtor for non-performance. Certain leading members of the Commission put forward an academic doctrine which shows the legal ground of contractual binding in the agreement between parties itself and sharply rejects any external ground for contractual liability[49]. Consequently, it was against this doctrine to define the responsibility of the debtor as "intentional or negligent breach of duty of care as well as equivalent breach of the bona fide principle", which was a commonly accepted understanding among the Japanese legal academics. The main points of the reform in this field are summarized as follows.

1. Ambiguity of Art. 412 was not cleared (Art. 412).

The wordings and composition of Art. 412 concerning the time of performance and the debtor's liability for default has not experienced any profound changes. There remain ambiguities about questions whether the demand for performance is a condition for the debtor's default or not, and whether the debtor's responsibility or accountability is required also for default or not.

2. Art. 412-2 clearly declared the effects of impossibility of performance.

The eagerly awaited provision about the effects of the impossibility of performance has eventually introduced next to the provision about the debtor's default. The new Art. 412-2(I) states that the impossibility puts an end to the demand for performance. Theoretically, this new provision could imply a legal role of the demand for performance in the forgoing provision. Similarly to the new German § 275, the matter of impossibility has no concern with the question of liability except as a ground for "damages in lieu of performance" (see below **IV. B. 5.**).

Instead, the new Art. 412-2(II) clearly declares that the initial impossibility of a contractual obligation does not discharge the debtor from the liability under Art. 415. It corresponds exactly with the German § 311 a (see above **IV. A. 2.**).

By the way, the German distinction between "objective impossibility" of performance and "inability of the debtor" to perform his obligation was not accepted among the academics in Japan.

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46 法務省法制審議会『民法(債権関係)の改正に関する中間試案』[Legislative Council of the Ministry of Justice in Japan, *Interim Outline for the Reform of the Law on Obligations* (2013)] (Japanese).

47 Civil Code (Japan); its official English translation is available: See (n 12).

48 加藤雅信著『民法（債権法）改正－－民法典はどこにいくのか』[Masanobu Kato, *A Looming Question on the Destination of the Reform of Law on Obligations* (Nippon Hyoron Sha 2011)] (Japanese) 212–243.

49 We could call this theory "the self-contained doctrine of liability".

Under this circumstance, it could be presumed that cases of inability of the debtor will be also covered by Art. 412-2.

3. Arts. 413 and 413-2 clearly provide the effects of the creditor's default.

Another eagerly awaited provisions about the effects of the creditor's default have been also introduced. Firstly, the new Art. 413(I) eases the debtor's duty of care during the creditor's default in a similar way to the German § 300(I), and Art. 413(II) lets the creditor bear the increase of the expense for performance.

Moreover, the newly introduced Art. 413-2 provides that each party shall bear the risk of loss for the impossibility of performance arisen during his default if neither of them is responsible for the cause of the impossibility. Then, the old Art. 543 has been repealed so that the creditor may rescind the contract even if the debtor is not accountable for the cause of impossibility of his obligation (i.e., the debtor must bear the risk of loss), and the new Art. 543 provides that the creditor may not rescind the contract if he is accountable for the cause of the impossibility of performance (i.e., the creditor must bear the risk of loss).

At the same time, the old Arts. 534 – 536 which had let the creditor bear the risk of loss have been eventually repealed, and now the new Art. 536 provides that the debtor shall bear the risk of loss. In other words, the Japanese law has arrived at a similar conclusion to the German law in its §§ 300(II), new 323(VI), and new § 326(II).

4. Art. 415(I) formulates the debtor's responsibility in a different style.

The new Art. 415(I) has been brought back to its initial style of the formulation proposed by Professor *Hozumi* at the time of January 1895 (see above **I. A. 2.**). Its new Sentence 1 provides now the debtor's liability for damages in cases of *failure of a proper performance* and in cases of *impossibility of performance*. At the same time, the new Sentence 2 generally requires the debtor's responsibility or "accountability" for the cause of non-performance.

This requisite of the responsibility or accountability, however, has a new formulation; it states that the debtor shall be discharged from the liability for his non-performance if it arose due to a circumstance for which the debtor may not be held accountable "***in consideration of the ground of his obligation, especially contracts***, as well as in light of the common sense in trade relations". In the sight of the leading members of the Commission, the ground of the debtor's accountability is identical with the ground of his obligation itself (see above **IV. B.** (n 49)). If so, the content of the accountability would be quite individual to each case, and it would be unnecessary to give any general definition of its content. Above all, the question is left open in what meaning this new formulation will be accepted in court practice.

5. Art. 415(II) separately provides damages in lieu of performance.

The newly added paragraph Art. 415(II) clearly provides that the creditor is entitled to the demand for "damages ***in lieu of performance***" under special conditions; namely ① impossibility of performance, ② clear denial of performance, and ③ rescission or entitlement to rescission.[50]

[50] "Rescission of contract" as the third condition for "damages in lieu of performance" may be doubtful of a tautology because the rescission itself is one of the diverse effects of non-performance. Moreover, it is needless to say that the impossibility or denial of performance justifies the demand for "expectation interest" while the rescission allows the demand for "reliance interest" only.

This provision is comparable to the reformed German provisions §§ 281 – 283, though the latter contains also differentiated regulations for other diverse cases; namely default, imperfect performance, partial performance, breach of duty of care, or further particular circumstances. The reformed German § 281 covers also the procedure of "*demand for cure*" according to the "extended concept of performance". The Japanese new Art. 415, however, does not include this issue (see above **IV. A. 4. a)**).

6. Arts. 541 – 543 on rescission have been newly formulated.

In parallel to the introduction of Art. 415(II), the provisions concerning the rescission of contract have been also reformed as already described (see above **IV. B. 3.**). The new Art. 541 for cases of the debtor's default (now called "rescission after demand for performance") largely maintains the old formulation while the completely reformed Art. 542 (now called "rescission without demand for performance") covers not only cases of legal business to a fixed date (the old Art. 542) and impossibility of performance (the old Art. 543), but also cases of the denial of performance and other "hopeless" circumstances.

According to the new concept, the creditor shall be allowed to rescind contract even in cases where the debtor is not accountable for the cause of non-performance. In this manner, the new concept of rescission has widened the variety of remedies for the creditor. At the same time, the new Art. 543 excludes the creditor's right of rescission in cases where the creditor himself is accountable for the circumstance which would have entitled him to rescission of contract under the new Arts. 541 or 542. In doing so, the room for the effect of the creditor's default is secured.

As already mentioned above (see **IV. B. 5.**), the new Art. 415(II) on damages in lieu of performance is comparable to the reformed German provisions §§ 281 – 283. In a similar sense, these new Arts. 541 – 543 on the rescission of contract are comparable to the modernized German provisions §§ 323 – 326 (see above **IV. A. 5.**), though the latter contains also differentiated regulations for other diverse cases like imperfect performance, partial performance, or breach of duty of care, and the new § 323 covers also the procedure of "*demand for cure*".

In the issue on rescission, again, the new Art. 541 does not integrate the procedure of cure into it.

7. Demand for cure, seller's or constructor's warranty

As for the demand for cure, the reformed Japanese law has introduced new provisions Arts. 562 and 636 concerning the right of the buyer or party ordering a work to demand for cure or repair from the seller or constructor in cases of non-conformities. At the same time, the old Arts. 560 – 567 and 634 – 640 on the seller's or constructor's warranty have been repealed. This new Japanese concept is also comparable to the concept in the modernized German §§ 437(I), 439, 634(I), and 635 (see above **IV. A. 4. a)**).

These subjects, however, would exceed the scope of this paper.

V. SUGGESTIONS FOR AN ENHANCED INTEGRITY

A. Convergence among Three Concepts

In the first section of this paper, we traced the drafting process of the law on non-performance in Japan, and recognized that the Code Investigatory Commission rejected the German concept based on its impossibility theory. The Civil Code of Japan in this part consistently remained in the French tradition. However, the Japanese scheme suffered conceptual ambiguities concerning the debtor's default and his responsibility mainly due to the attempt to introduce certain Common law concepts into the French approach (**II. B. and C.**). On the other hand, the Japanese drafter adopted the German concept on rescission of contract, but with the scheme change (**II. D.**).

When the Thai drafter undertook the revision of the Civil and Commercial Code, Book II, he must have been aware of the conceptual problems in the Japanese law on the effects of non-performance. He replaced almost whole provisions of the Japanese law with the comparable ones from the German BGB while he tried to maintain the French-Japanese scheme itself (**III. A.**). In other words, it was an attempt to overcome the conceptual ambiguities in the Japanese law, and at the same time, it intended to correct also the inherent problems of the German concept. This Thai rearrangement largely succeeded. Indeed, we could identify its "actualities" compared with the old German scheme. However, we recognized that it also suffered several hidden integrity issues (**III. B.**). As a whole, the Thai scheme has been differentiated from both of the original German and Japanese schemes ("***divergence***" of three laws).

Meanwhile, the modernized German law on obligations presented the ultimate solutions to these conceptual difficulties which had their roots mainly in the impossibility-centered theory of liability. The reformed German scheme has carefully preserved the sequential order of the traditional provisions. As a result, the continuity between the old and new concepts rather sharply stands out against the sophisticated reconsideration of the contents. However, its internally twisted logical structure indicates the fundamental scheme change (**IV. A.**). In fact, the dominance of the impossibility theory has been removed by a rather classical faithfulness-based concept of liability regarding "positive breach of contract", which grants the creditor more room for his choice between diverse remedies for disturbances in performance. The "divergence" between the German concept and the Thai arrangement has been markedly reduced.

Also, the end result of the reform project in Japan shows remarkable assimilation to the modernized German concept even if the Japanese Reform Commission itself had steadily pursued to purge the German influence from the Japanese Civil Code. Among seven subjects listed in **IV. B.**, the assimilation could be recognized in section **2)** impossibility, **3)** creditor's default, **5)** damages in lieu of performance, **6)** rescission of contract, and **7)** demand for cure as well as seller's or constructor's warranty. Even in section **4)** debtor's accountability or responsibility, its traditional role in the Civil law tradition has been rather approved than undermined.

Hence, these three concepts and arrangements have been ***converging*** with each other. These circumstances could offer a good reason for an attempt to seek appropriate techniques in the German and Japanese reforms for solution of the integrity issues in the current Thai arrangement. We will try its first step at the last.

B. Proposals for the improvement of the system integrity issues

In the part "**III. THAI ARRANGEMENT**" of this paper, we have identified eight integrity issues in the Thai arrangement Secs. 203 – 225. In the analysis there, I have already indicated possible solutions of these points obtained from the comparison with the reformed German and Japanese laws. These suggestions could be now presented in more systematic manner as follows.

1. **Sec. 194 could be extended with the appended duty of care.**

The modernized German § 241(II) obliges each party in an obligation to take care of other party to clarify the ground for liability in certain types of "positive breach of contract". It backs obligations with an ethical principle of faithfulness. If requested for certain grounds, also Sec. 194 could be expanded in a same way to meet legal needs in a rapidly changing society, though it is not any obligatory correction of system inconsistency, but an optional amendment.

2. **Sec. 219 (release from duty to perform) may be moved to the position next to Sec. 203 (demand for performance).**

The impossibility of performance or inability of the debtor to perform is not any genuine ground for his liability, but a ground for his release from the duty to perform and put a limit to the creditor's right to demand performance. Hence, its optimal position would be directly next to Sec. 203 and prior to the provisions on the debtor's liability, which start with Sec. 204 (debtor's default). So, it would be between Secs. 203 and 204.

The modernized German § 275 and the Japanese Art. 412-2 offer samples for a new provision. It would provide simply that any impossibility of performance releases the debtor from his duty to perform. The distinction between initial and subsequent impossibility as well as the condition of "no responsibility" should be removed. This applies also to the second paragraph about the inability of the debtor. The vocabulary "***inability***" itself in the current Sec. 219(II) would cause no troubles so long as it is clearly cut off from the question of liability except as a ground for damages in lieu of performance (see below **V. B. 12.**).

3. **A new provision for the definition of the responsibility may be introduced at the position next to Sec. 205 (the debtor's responsibility for default).**

A new provision for the definition of the responsibility in obligations may be introduced soon after its first utterance in Sec. 205, provided that the Thai law would adopt similar stance to the German notion of faithfulness-based liability.

A provision modeled after the German § 276 would cause no consistency problems with the existing provisions with German origin. Moreover, such a provision would make it possible to introduce further new provisions regarding the effects of the creditor's default (see below **V. B. 6.**).

Optionally, a new paragraph could be added modeled after the old German § 282, which stated that the debtor would bear the burden of proof if his responsibility for the non-performance is disputable.

4. **Sec. 217 (heavier responsibility during default) may be moved to the position next to the definition of the responsibility.**

Sec. 217 provides that the debtor bears heavier responsibility during his default. Accordingly, its desirable position would be next to the provisions about the debtor's standard responsibility for

default. In the reformed Japanese law, Art. 413-2(I) plays a comparable role, though, it provides simply the passage of risk to the debtor only.

5. **Sec. 220 (vicarious liability) may be moved to the position close to the definition of the responsibility.**

The model for Sec. 220 was the German § 278, which stays closely together with the definition of the standard responsibility in § 276. For this reason, it could take the position next to the definition of responsibility together with Sec. 217.

These three provisions; namely definition of responsibility, the heavier responsibility during default, and the vicarious liability might stay directly after the provision about the debtor's default simply because Secs. 204 and 205 are just the trigger of the discussion on the debtor's responsibility in general. Needless to say, they are general principles of liability in obligations, and apply not only to "default" in a narrow sense, but to all the types of disturbances in performance.

6. **A new provision for easing of the debtor's responsibility could be introduced after the provisions concerning the creditor's default (Secs. 206 – 212).**

The current Thai arrangement has no clear provisions about effects of the creditor's default except Sec.221. However, similarly to the heavier responsibility during the debtor's default, the creditor's default would be a general ground for easing of the debtor's responsibility. For this reason, a new provision modeled after the German § 300(I) or the reformed Japanese Art. 413 could be introduced next to Sec. 212.

7. **A new provision for passage of risk could be introduced at a position after the provisions concerning the creditor's default (Secs. 206 – 212).**

The second effect of the creditor's default would be the passage of risk to the creditor. Besides a provision about easing of responsibility, a new provision modeled after the German § 300(II) or the Japanese Art. 413-2(II) for the second effect could be introduced to the position after Sec. 212. Of course, it would be possible only under the condition that Secs. 370 – 372 would be replaced with a general provision which provides for the burden of the risk of loss on the side of the debtor.

8. **Sec. 221 (no interest on delinquency charge) may be moved to a position after the provisions concerning the creditor's default (Secs. 206 – 212).**

Sec. 221 provides a small effect of the creditor's default; namely the release of the debtor from the burden of interest in cases of monetary debts. The Thai drafter had put it at an unfortunate position next to Sec. 220 concerning the vicarious liability. It would be more reasonable to bring it to the original position in the part of the creditor's default.

9. **Sec. 215 (demand for damages) may be complemented with the requisite of responsibility.**

Sec. 215 has been modeled after the old Japanese Art. 415 Sentence 1. The second sentence of the Japanese provision postulated the requisite of responsibility for cases of impossibility. This requisite is missing in Sec. 215 because the second sentence was eliminated from the Thai provision. Meanwhile, the reformed Japanese Art. 415(I) postulates this requisite for all the types of disturbance in performance. Accordingly, it would be recommended to solve this integrity issue after the model of the reformed Japanese Art. 415(I) or the modernized German § 280(I).

As for the case where a reformed Sec. 215 would be modeled after the Japanese Art. 415(I), there would be no necessity to accept the self-contained doctrine of liability which the Japanese Commission had proposed (see above **IV. B. 4.**).

10. Sec. 216 (damages in lieu of performance) may be widened in its scope.

The current Sec. 216 entitles the creditor to demand for damages in lieu of performance only in cases of the debtor's default. However, there are many other cases which would justify such a demand. For this reason, A reformed Sec. 216 could be modeled after the Japanese Art. 415(II) or the modernized German § 281. Modeling after the German provision would be more comprehensive and consistent (see above **IV. A. 4. a)** and **IV. B. 5.**).

It should be noted again that the modernized German § 281 has integrated ***the procedure of cure*** into it. The possibility to model a reformed Sec. 216 after the new German § 281 would offer also an opportunity to integrate this subject into the general principles on non-performance in the Thai arrangement.

11. A new provision for cases of breach of duty of care may be introduced at the current position of Sec. 217.

After the current Sec. 217 has been moved to the position next to the definition of the responsibility, a new Sec. 217 could be introduced after the model of the modernized German § 282 which entitles the creditor to demand for damages in lieu of performance in the second category of cases; namely the breach of duty of care under § 241(II). Of course, it would be possible and reasonable only under the condition that Sec. 194 would be extended after the model of the § 241(II).

12. Sec. 218 (liability for impossibility) may be newly formulated.

According to the Thai arrangement, Sec. 218 about the impossibility of performance had no need any more to provide another ground for the debtor's liability because Sec. 215 may cover all the types of disturbance in performance. The only role of the Sec. 218 would be to provide a condition which entitles the creditor to demand for damages in lieu of performance.

Also in the modernized German concept, the provision about the impossibility (the new § 283) has been modified to the third category of cases where the creditor may demand damages in lieu of performance. Accordingly, Sec. 218 could be modified now after the model of the modernized German § 283.

However, contrary to the German new § 283, Sec. 218 in the Thai arrangement should not mention the requirement of the debtor's responsibility for the special construction to imply the principle of the burden of proof . Accordingly, the expression "*in consequence for which the debtor is responsible (เพราะพฤติการณ์อันใดอันหนึ่งซึ่งลูกหนี้ต้องรับผิดชอบ)*" may be removed from Sec. 218 (see above **III. B. 6.**).

Moreover, there is a problem of the expression "*a circumstance […] occurring after the creation of the obligation (พฤติการณ์อันใดอันหนึ่งซึ่งเกิดขึ้นภายหลังที่ได้ก่อหนี้)*" in Sec. 219; it would be better uttered in Sec. 218 (see above **III. B. 6.**), provided that the distinction between initial and subsequent impossibility should be maintained. Otherwise, this expression in Sec. 219 may be removed.

In any case, it would be recommended to clearly utter the "inability" of the debtor to perform besides the "impossibility" also in Sec. 218 (for instance "*if the performance becomes impossible or the debtor becomes unable to perform (ถ้าการชำระหนี้กลายเป็นพ้นวิสัย หรือลูกหนี้กลายเป็นคนไม่สามารถจะชำระหนี้ได้)*"), provided that Sec. 219(II) should be maintained further (see above **V. B. 2**.).

13. Sec. 219 (release from duty to perform) may be newly formulated.

Sec. 219 in the Thai arrangement has adopted the role of the old German § 275; namely to provide "impossibility" as a ground to release the debtor from his duty of performance. In this respect, the provision has nothing to do with the question of the debtor's liability. Consequently, the new German § 275 does not have the traditional expression "*in consequence for which the debtor is not responsible (เพราะพฤติการณ์อันใดอันหนึ่ง […] ซึ่งลูกหนี้ไม่ต้องรับผิดชอบ)*" any more.

Also in the Thai arrangement, Sec. 219 should be moved to the position next to Sec. 203 for the role to provide the impossibility as a ground of the release of the debtor from his duty to perform as already discussed (see above **V. B. 2.**).

However, Sec. 219 still has another role in the construction for the principle of the debtor's burden of proof for his non-responsibility (see above **III. B. 5. b)**). For this reason, the same provision must stay at this position with the traditional expression about the debtor's non-responsibility. In any case, the expression "*a circumstance […] occurring after the creation of the obligation (พฤติการณ์อันใดอันหนึ่งซึ่งเกิดขึ้นภายหลังที่ได้ก่อหนี้)*" should be removed as just discussed (see above **V. B. 12.**). In this respect, Sec. 219(II) would play a new role; namely the function to provide the debtor's burden of proof for his non-responsibility for his inability to perform.

All the suggestions are summarized below in **[Table 6]**.

[Table 6] Suggestions for the enhanced consistency and integrity

Civil and Commercial Code (1925 –)		(Operations)		(Suggestions)
Sec. 194	Demand of specific performance	**+ (added)**	**Sec. 194(II)**	● Duty of care of other party ● Based on **Gr. § 214(II)**
Sec. 203	Time of performance			
		→ (moved in)	**Sec. 203/1**	● Release of the debtor from his duty to perform ● From **Sec. 219 (a)** ● Based on **Gr. § 275** or **Jp. Art. 412-2**
Sec. 204	Debtor's default through warning			
Sec. 205	No default without responsibility			
~~**Sec. 206**~~	~~Debtor's default in unlawful acts~~	**– (repealed)** **+ (added)**	**Sec. 206**	● Definition of responsibility ● Based on **§ 276**
		+ (added)	**Sec. 206/1**	● Burden of proof in regard to responsibility ● Based on the **Gr. *old* § 282**
		→ (moved in)	**Sec. 206/2**	● Strict liability during default ● From **Sec. 217** ● Based on **Gr. § 287** or **Jp. Art. 413-2(I)**
		→ (moved in)	**Sec. 206/3**	● Vicarious liability ● From **Sec. 220** ● Based on **Gr. § 278**
Sec. 207	Creditor's default			
Sec. 208	Actual and verbal tender			
Sec. 209	No tender of performance			
Sec. 210	No tender of counter-performance			
Sec. 211	Creditor is not in default (1)			
Sec. 212	Creditor is not in default (2)			
		+ (added)	**Sec. 212/1**	● Easing of liability during creditor's default ● Based on **Gr. § 300(I)** or **Jp. Art. 413**
		+ (added)	**Sec. 212/2**	● Passage of risk during creditor's default ● Based on **Gr. § 300(II)** or **Jp. Art. 413-2(II)**
		→ (moved in)	**Sec. 212/3**	● No interest during creditor's default ● From **Sec. 221** ● Based on **Gr. § 301**
Sec. 213	Enforcement of performance			
~~**Sec. 214**~~	~~Enforcement from whole properties~~	**– (repealed)**		
Sec. 215	Damages due to non-performance	**# (improved)**	**Sec. 215(I)**	● Debtor's liability under responsibility ● Based on **Gr. § 280(I)** or **Jp. Art. 415(I)**
Sec. 216	Damages in lieu of performance	**# (improved)**	**Sec. 216**	● Damages in lieu of performance (1) ● Default, imperfect or partial performance ● Based on **Gr. § 281** or **Jp. Art. 415(II)**
~~**Sec. 217**~~	~~Heavy liability during default~~	**(moved out) →** **+ (added)**	**Sec. 217**	● Damages in lieu of performance (2) ● Breach of duty of care ● Based on **Gr. § 282**
Sec. 218	Impossibility with responsibility	**# (improved)**	**Sec. 218**	● Damages in lieu of performance (3) ● Impossibility, inability, etc. ● Based on **Gr. § 283**
~~**Sec. 219**~~	~~Impossibility without responsibility (a)~~	**(moved out) →**		● Release of the debtor from his duty to perform
Sec. 219	Impossibility without responsibility (b)	**# (improved)**	**Sec. 219**	● New function in regard to the burden of proof
~~**Sec. 220**~~	~~Vicarious liability~~	**(moved out) →**		
~~**Sec. 221**~~	~~No interest during creditor's default~~	**(moved out) →**		
Sec. 222	Scope of damages			
Sec. 223	Contributory negligence			
Sec. 224	Delinquency charge			
Sec. 225	Interest upon lost values			

VI. CONCLUSION

The results from this research confirmed that the recent reforms of the law on obligations in Germany and Japan have approved the Thai arrangement in the part of effects of non-performance. The German, Thai, and Japanese concepts have moved closer together, even though there could be certain differences in their considerations behind the development.

In this sense, the enhancement suggestions above in **V. B.** do not conceive any substantial changes to the existing schemes, but aim only to improve its logical consistency and system integrity. In other words, these proposals do not directly intend to offer practical solution to actual difficulties or controversies in legal practices. However, these considerations could, so I hope, offer certain logical backbone for particular reform discussions aimed at modernization and international harmonization of the Thai law on obligations in near future.[51]

As for further subjects, especially "rescission of contract" and "warranty of seller or constructor", a separate contribution would be necessary.

[51] Recently, an actual comparative study of PACL and the Thai law has listed 26 subjects to comparison (Korrasut Khopuangklang, Final Report for Research on "Comparative Study of the Provisions of Non-performance under the Principle of Asian Contract Law (PACL) and Thai Law" (2019) 4 – 50; available at: <https://www.law.tu.ac.th/>. Several important subjects among them could be well covered by the discussion above in **IV.** and **V.**, especially "fundamental non-performance", "non-conformity", "cumulative remedies", "cure after due time", and "termination". Hopefully, my study from the historical perspective could give certain impulses to actual discussions toward modernization and international harmonization of the Thai law.