

| German Civil Code (1896) | Revised Civil Code of Japan (1896) | Civil and Commercial Code (1925) |
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| | Article 534. — (1st paragraph) When a bilateral contract has for its object the creation or transfer of a real right in a specific thing, if such thing has been lost or damaged by a cause not attributable to the debtor, such loss or damage falls on the creditor. | มาตรา ๓๗๐ — (1st paragraph) ถ้าสัญญาต่างตอบแทนมีวัตถุที่ประสงค์เป็นการก่อให้เกิดหรือโอนทรัพย์สินในทรัพย์สินเฉพาะสิ่ง และทรัพย์สินนั้นสูญหรือเสียหายไปด้วยเหตุอย่างใดอย่างหนึ่งอันจะโทษลูกหนี้มิได้ไซ้ ท่านว่าการสูญหรือเสียหายนั้นตกเป็นพับแก่เจ้าหนี้ |
| | (2nd paragraph) With regard to a contract relating to a non-specific thing, the provision of the preceding Paragraph apply from the moment when the thing become specific in accordance with the provisions of Paragraph 2, Art. 401. | (2nd paragraph) ถ้าไม่ใช่ทรัพย์สินเฉพาะสิ่ง ท่านให้ใช้บทบัญญัติที่กล่าวมาในวรรคก่อนนี้บังคับแต่เวลาที่ทรัพย์สินนั้น กลายเป็นทรัพย์สินเฉพาะสิ่งตามบทบัญญัติแห่งมาตรา ๑๙๕ วรรค ๒ นั้นไป |
| | Article 535. — (1st paragraph) The provisions of the preceding Article do not apply if the thing which is the object of a bilateral contract subject to a condition precedent has been lost while the condition is pending. [...] | มาตรา ๓๗๑ — (1st paragraph) บทบัญญัติที่กล่าวมาในมาตราก่อนนั้น ท่านมิให้ใช้บังคับถ้าเป็นสัญญาต่างตอบแทนมีเงื่อนไขบังคับก่อน และทรัพย์สินเป็นวัตถุแห่งสัญญานั้นสูญหรือทำลายลงในระหว่างที่เงื่อนไขยังไม่สำเร็จ [...] |
| § 323. — (1st paragraph) If the performance due from one party under a mutual contract becomes impossible in consequence of a circumstance for which neither he nor the other party is responsible, he loses the claim to counter-performance; in case of partial impossibility the counter-performance is diminished in conformity with 472, 473. [...] | Article 536. — (1st paragraph) In cases other than those provided in the preceding two Articles, if performance of an obligation has become impossible owing to a cause imputable to neither of the parties concerned, the debtor has no right to receive the counter-performance. | มาตรา ๓๗๒ — (1st paragraph) นอกจากกรณีดังกล่าวไว้ในสองมาตราก่อน ถ้าการชำระหนี้ตกเป็นพ้นวิสัยเพราะเหตุอย่างใดอย่างหนึ่งอันจะโทษฝ่ายหนึ่งฝ่ายใดก็มิได้ไซ้ ท่านว่าลูกหนี้หามีสิทธิจะรับชำระหนี้ตอบแทนไม่ |
| § 324. — (1st paragraph) (1st sentence) If the performance due from one party under a mutual contract becomes impossible in consequence of a circumstance for which the other party is responsible, he retains his claim for counter-performance. | (2nd paragraph) (1st sentence) If performance has become impossible owing to a cause imputable to the creditor, the debtor does not lose his right to receive the counter-performance; | (2nd paragraph) (1st sentence) ถ้าการชำระหนี้ตกเป็นพ้นวิสัยเพราะเหตุอย่างใดอย่างหนึ่งอันจะโทษเจ้าหนี้ได้ ลูกหนี้ก็หาเสียสิทธิที่จะรับชำระหนี้ตอบแทนไม่ |
| (2nd sentence) He must, however, deduct what he saves in consequence of release from the performance, or what he acquires or maliciously omits to acquire by a different application of his faculties. | (2nd sentence) but if he has received any benefit by being freed from his obligation, such benefit must be returned to the creditor. | (2nd sentence) แต่ว่าลูกหนี้ได้อะไรไว้เพราะการปลดหนี้ก็ดี หรือใช้คุณวุฒิความสามารถของตนเป็นประการอื่นเป็นเหตุให้ได้อะไรมา หรือแกล้งละเลยเสียไม่ชวนขายเอาอะไรที่สามารถจะทำได้ก็ดี มากน้อยเท่าไร จะต้องเอามาหักกับจำนวนอันตนจะได้รับชำระหนี้ตอบแทน |
| (2nd paragraph) The same rule applies if the performance due from one party becomes impossible, in consequence of a circumstance for which he is not responsible, at the time when the other party is in default of acceptance. | | (3rd sentence) วิธีเดียวกันนี้ท่านให้ใช้ตลอดถึงกรณีที่มีการชำระหนี้ฝ่ายหนึ่งยังค้างชำระอยู่นั้นตกเป็นพ้นวิสัยเพราะพฤติการณ์อันใดอันหนึ่งซึ่งฝ่ายนั้นมิต้องรับผิดชอบในเวลาเมื่ออีกฝ่ายหนึ่งผิดนัดไม่รับชำระหนี้ |

The question of the “burden of risk”

In cases where the subject matter of a bilateral contract is lost or damages in consequence of a circumstance for which neither of the parties has responsibility, oen of them must bear the burden of such loss or damages. This is the question of “burden of risk”. The French law *decided for the creditor (buyer)* because its concept of real rights is based on the principle that the creation and transfer of real rights shall be carried out with mere declaration of such intention. In particular, the ownership of the object of a sale contrat shall be transferred from the sellar to the buyer at the time of contract. Accordingly, the buyer is already the owner of the object of the sale contract at the timepoint where it is lost or damaged. This is the reason for the French decision (Art. 1138, French Civil Code).

On the other hand, the German law developed its “Abstraction” principle; accoridng to it, a contract may oblige the both parties to create or transfer a real right, however, another “judicial act” must be performed by the parties for such effects in real rights. Under this special German concept, the “burden of risk” shall be *beared by the sellar (debtor)* solong as a judicial act specially for “transfer of ownership” has not been done yet (§ 323, German Civil Code).

The drafters of the Japanese Civil Code rejected to adopt the German “Abstraction” principle. Accordingly, they adopted the French principle for the “burden of risk” for cases of “sprcific things” (Art. 534). However, they preserved the German principle for cases of “*things determined in species only*” (Art. 536).

พระยามานวราชเสวี had to decide between the German § 323 and the Japanese Art. 534 and decided for the latter. But what was a reason for his decision? One possible reason would be his expectation that the Law on Real Rights (บรรพ ๔) would be enacted according to the Draft prepared by the French advisers, and he knew exactly that the French advisers were loyal to the French tradition (see มาตรา 458). For this reason, he had to decide for the Japanese Art. 534. Otherwise, serious conflicts could occur between the German principle of “burden of risk” and the French concept of real rights. At the same time, however, he tried to adopt the German § 324 in its full range; he added the 2nd paragraph of the German § 324 to the Japanese Art. 536 (see the 3rd sentence of the 2nd paragraph of มาตรา 372). This addition would have aimed to clearly define the effect of the “*creditor’s default*” in cases of “*things determined in species only*”.