Availability of the latest Update of my “Personal Proposal”

for the Reform of the Law on Obligations; Secs. 194 – 389

It is my great pleasure to announce the availability of an overhauled and improved version of my “Personal Proposal” for a possible reform of the Thai law on Obligations in the near future, the initial version of which was published on 19 June 2023 on this website.

Besides correction of many misexpressions and improvement of wordings, the new version includes the following two main changes in the basic principles:

[A] Defense of Triviality of Non-performance

[a] Original German Provisions

In the initial version of my proposal, there were two provisions which mentioned this issue; namely § 286/1 Par.2 No.3 and § 326/1 Par.2 No.3 (มาตรา 216 วรรค 2 ข้อ 3 and มาตรา 388 วรรค 2 ข้อ 3 in the Thai translation). These provisions were adopted from the modernized German Civil Code; namely § 281 Par.1 Sentence 3 and § 323 Par.5 as follows:

> **§ 281, German BGB of 2001**
> (1) To the extent that the obligor does not render performance when it is due or does not render performance as owed, the obligee may, subject to the prerequisites set out in section 280 (1), demand damages in lieu of performance, if the obligee has set a reasonable time limit for the obligor for performance or cure and this has expired without result. If the obligor has performed only in part, then the obligee may demand damages in lieu of complete performance only if they have no interest in the part performance. If the obligor has not rendered performance as owed, then the obligee may not demand damages in lieu of performance if the breach of duty is trivial.
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> **§ 323, German BGB of 2001**
> (5) If the obligor has performed in part, the obligee may revoke the whole contract only if the obligee has no interest in part performance. If the obligor has not performed as contractually agreed, the obligee may not revoke the contract if the breach of duty is trivial.

According to their paragraph composition, the creditor is principally entitled to damages in lieu of performance if the debtor has not effected his obligations properly. However, the debtor has still an opportunity to defend himself against the creditor’s demand if he can show that the non-performance is quite trivial. The debtor bears the burden of proof.

[b] Adoption in the Initial Personal Proposal

Their adoption in the initial version of the Personal Proposal reads as follows:

§ 286/1 (มาตรา 216)
(2) After the expiration of the period, the creditor is also entitled to demand compensation for non-performance of the entire obligation if:

1. the performance is not effected at all;
2. in case of non-performance in part, the creditor has no interest in the partial performance; or
3. in case the performance is not effected as owed, the cure is not successfully effected, unless the non-performance is trivial.

§ 326/1 (มาตรา 388)
After the expiration of the period, he is also entitled to rescind the entire contract if:

1. the performance is not effected at all;
2. in case of non-performance in part, the other party has no interest in the partial performance of the contract; or
3. in case the performance is not effected in conformity to the contract, the cure is not successfully effected, unless the non-performance is trivial.

The problem of such concepts is the coverage limitation of the defense of triviality. The debtor may exercise this defense only in cases of imperfect or improper performance. Principally, it would be fairer if this opportunity of defense could be allowed to the debtor in any types of non-performance or disturbance in performance.

[c] Japanese and French Samples

The reformed Japanese Civil Code of 2017 has also introduced a similar provision in Art. 541 as follows:

Art. 541, Japanese Civil Code of 2017
If one of the parties does not perform that party's obligation, and the other party demands performance of that obligation, specifying a reasonable period of time, but no performance is completed during that period, the other party may cancel the contract; provided, however, that this does not apply if the non-performance of the obligations upon the passage of the period is minor in light of the contract and common sense trading practices.

Similarly to the German concept in its § 323 (5), it is the debtor's defense against the creditor's declaration of rescission of contract. The debtor bears the burden of proof. However, the Japanese Code does not mention this defense in the next provision Art. 542 for cases of impossibility of performance and even in the provisions on the creditor's demand of compensation for damages in lieu of performance. The reason for such a coverage limitation of the defense is not clear.

On the other side, the reformed French Civil Code of 2016 developed a different concept and mentions "seriousness of non-performance" in the following provisions:

CODE CIVIL TITLE III THE SOURCES OF OBLIGATIONS
CHAPTER IV THE EFFECTS OF CONTRACTS
SECTION V Contractual Non-performance
Sub-section 1 Defence of Non-performance

Art. 1219
A party may refuse to perform his obligation, even where it is enforceable, if the other party does not perform his own and if this non-performance is sufficiently serious.

Art. 1220
A party may suspend the performance of his obligation as soon as it becomes evident that his contracting partner will not perform his obligation when it becomes due and that the consequences of this non-performance are sufficiently serious for him. Notice of this suspension must be given as quickly as possible.

Sub-section 4 Termination

Art. 1224
Termination results either from the application of a termination clause, or, where the non-performance is sufficiently serious, from notice by the creditor to the debtor or from a judicial decision.

Art. 1226
(4) The debtor may at any time bring proceedings to challenge such a termination. The creditor must then establish the seriousness of the non-performance.

Apparently, the issue of "seriousness of non-performance" in French law is not the matter of the debtor's defense, but one of the requirements for the creditor's entitlement to refusal of counter-performance and to the termination (rescission) of contract. Accordingly, it is the creditor who bears the burden of proof. However, the French concept does not have any coverage limitation in regard with types of non-performance. In other words, "seriousness of non-performance" is one of the general requirements for the creditor's entitlement to the remedies for non-performance.

[d] Extended Concept in the Latest Version of Personal Proposal

In consideration of the points mentioned above, the latest version of my Personal Proposal eased the coverage limitation of the debtor's defense of triviality. Principally, the debtor may always exercise his defense of triviality of non-performance regardless of how he breached his duty of performance (delayed, partial or imperfect performance as well as "impossibility" of performance etc.) against the creditor's demand of damages in lieu of performance and declaration of rescission. Under this principle, the latest version proposes the following provisions:

§ 286/1 (มาตรา 216)
(1) If the debtor is in delay in respect of the performance due from him, has not fulfilled his obligation in part or as owed, the creditor may allot him a fixed reasonable period for performance or cure. After the expiration of the period he is also entitled to demand compensation for damages in lieu of performance insofar as the performance owed to him has not been effected in conformity to the true content and intent of the obligation.

(2) After the expiration of the period, the creditor is also entitled to demand compensation for damages of the entire obligation if the performance is not effected at

all. The same rule applies:

1. in case of non-performance in part, if the creditor has no interest in the partial performance; or
2. in case the performance is not effected as owed, the cure is not successfully effected.

However, the rule shall not apply if the non-performance is trivial.

(4) If the creditor will have no interest in the performance in consequence of the delay in performance, non-performance in part, or the performance which is not effected as owed, he may give a warning to the debtor in advance with the declaration that he will refuse such a performance or cure. He may, by refusing the performance or cure, also demand compensation for damages in lieu of the entire obligation without the fixing of a period being necessary if the performance owed to him has not been effected at all or effected but not in conformity to the true content and intent of the obligation; unless the non-performance is trivial. If the creditor refuses merely to accept the cure, then he may claim compensation for damages insofar as the performance owed to him has not been effected in conformity to the true content and intent of the obligation.

§ 286/2 (มาตรา 217)

(1) Insofar as the debtor is released from the duty of performance or cure due from him according to the provisions of § 275 in consequence of a circumstance occurring after the creation of obligation, the creditor is also entitled to demand compensation for damages in lieu of performance.

(2) The creditor may also demand compensation for damages in lieu of the entire obligation if the debtor is wholly released from the duty of performance according to the provisions of § 275. The same rule applies:

1. in case of release from the duty of performance under § 275 in part, if the creditor has no interest in the partial performance; or
2. in case the performance is not effected as owed, if the debtor is wholly released from the duty of cure according to the provisions of § 275.

However, the rule shall not apply if the non-performance is trivial.

§ 326/1 (มาตรา 388)

(1) If, in the case of a reciprocal contract, one party is in delay in respect of the performance due from him or has not fulfilled his obligation in part or in conformity to the contract, the other party may allot him a fixed reasonable period for performing his part or cure. After the expiration of the period he is also entitled to rescind the contract insofar as the performance owed to him has not been effected in conformity to the true content and intent of the contract.

(2) After the expiration of the period, he is also entitled to rescind the entire contract if the performance is not effected at all. The same rule applies if:

1. in case of non-performance in part, if the other party has no interest in the partial performance of the contract; or
2. in case the performance is not effected in conformity to the contract, the cure is not successfully effected.

However, the rule shall not apply if the non-performance is trivial.

(4) If, in consequence of the delay in performance, non-performance in part, the performance which is not effected in conformity to the contract, the performance of the contract will be of no use to the other party, such other party may give a warning to that party in advance with the declaration that he will refuse such a performance or

cure. He may, by refusing the performance or cure, also rescind the entire contract without the fixing of a period being necessary if the performance owed to him has not been effected at all or effected but not in conformity to the true content and intent of the contract; unless the non-performance is trivial. If the other party refuses merely to accept the cure, then he may also rescind the contract insofar as the performance owed to him has not been effected in conformity to the true content and intent of the contract.

§ 326/2 (มาตรา 389)

(1) Insofar as one party to a reciprocal contract is released from the duty of performance or cure due from him according to the provisions of § 275 in consequence of a circumstance, the other party may rescind the contract regardless of whether the circumstance occurred after the creation of contractual obligation or not.

(2) The other party is also entitled to rescind the entire contract if that party is wholly released from the duty of performance according to the provisions of § 275. The same rule applies:

1. in case of release from the duty of performance under § 275 in part, if the other party has no interest in the partial performance; or
2. in case the performance due from one party is not effected in conformity to the contract, if that party is wholly released from the duty of cure according to the provisions of § 275.

However, the rule shall not apply if the non-performance is trivial.

[e] Debtor's Defense against Creditor's Refusal of Counter-Performance

As mentioned above, Art. 1219 in the reformed French Civil Code obliges one party to a reciprocal contract to prove that the other party's non-performance is serious enough to his refusal of counter-performance. Theoretically, it would be quite possible to adopt the French concept into มาตรา 369 as follows:

มาตรา 369

A party to a reciprocal contract may refuse to perform his obligation until the other party performs or tenders performance of his obligation. But this does not apply if the other party's obligation is not yet due or if the non-performance of the other party, even though his obligation is already due, is trivial.

However, it is not clear enough whether such an amendment is really necessary or not. So, the latest version of my Personal Proposal does not include it yet.

[B] Burden of Proof in case of Default in Acceptance of Performance

The Civil and Commercial Code of 1925 had already adopted the traditional German Provision § 324 Par.2 into มาตรา 372 as its วรรค 2 ประโยค 3 while the German § 300 was not adopted.

The initial version of my Personal Proposal aimed to solve this inconsequency and proposed to repeal the current มาตรา 370 and to adopt the German § 300 as § 285/5 (มาตรา 212/1). In regard to มาตรา 372 วรรค 2 ประโยค 3, the initial version of my Personal Proposal had preserved the original German concept of § 324 Par.2, according to which the debtor

shall bear the burden of proof to show that *he is not responsible for the circumstance* in consequence of which the performance became impossible.

On the other hand, however, the Proposal has changed the content of the burden of proof under § 324 Par.1 which the debtor shall bear for the purpose to retain his entitlement to the counter-performance. In the original German concept, the debtor shall prove that the creditor is responsible for the circumstance in consequence of which the performance became impossible. Accordingly, the debtor would have to show that the creditor conducted intentionally or negligently and made the performance impossible. However, the matter in such a case is not the creditor's liability for compensation of damages, but simply the retainment of the entitlement to the counter-performance. In this sense, the burden of proof of responsibility is too heavy and unfair for the debtor. It would be just enough if the debtor may prove *the factual causality between the creditor's conduct and the impossibility of performance*.

As a result of this change, the initial version of my Personal Proposal contained an issue of inconsistency in its provisions § 324 (มาตรา 371) and § 326 (มาตรา 387):

> **§ 324 (มาตรา 371)**
> (1) Insofar as one party to a reciprocal contract is released from duty of the performance due from him under § 275 in consequence of a circumstance which the other party caused, he retains his claim for the counter-performance. He must, however, deduct what he saves in consequence of release from the performance, or what he acquires or maliciously omits to acquire by an alternative application of his faculties.
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> (2) The same rule applies if one party is released from duty of the performance under § 275 in consequence of a circumstance for which he is not responsible, at the time when the other party is in default of acceptance.
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> **§ 326 (มาตรา 387)**
> (3) The rescission of the contract is excluded insofar as the other party caused the circumstance which would entitle him to rescission of the contract. The same rule applies if one party is released from duty of the performance under § 275 in consequence of a circumstance for which he is not responsible, at the time when the other party is in default of acceptance.

The latest version of my Personal Proposal therefore removed this inconsistency by way of change of the content of the burden of proof in case of the creditor's default in acceptance of performance. Firstly, not the debtor but *the creditor should bear the burden of proof* in order to deny the debtor's entitlement to counter-performance because the obstacle in performance resulted from his default in acceptance of performance. Secondly, the target of the proof may be *the factual causality* between any conduct of the debtor and the obstacle of performance (impossibility etc.) because the matter of the issue is not any liability for compensation of damages. According to this consideration, the latest version proposes the following provisions:

> **§ 324 (มาตรา 371)**
> (1) Insofar as one party to a reciprocal contract is released from the duty of performance or cure due from him according to the provisions of § 275 in consequence of a circumstance which the other party caused, he retains his claim for the counter-

performance. He must, however, deduct what he saves in consequence of release from the performance, or what he acquires or maliciously omits to acquire by an alternative application of his faculties.

(2) The same rule applies if one party is released from the duty of performance according to the provisions of § 275 in consequence of a circumstance at the time when the other party is in default of acceptance, unless the party who owes the performance caused the circumstance by himself.

§ 326 (มาตรา 387)

(3) The rescission of the contract is excluded insofar as the other party caused the circumstance in consequence of which:

1. the performance or cure owed to him has not been effected at all or effected but not in conformity to the true content and intent of the contract; or
2. the party who owes the performance or cure is released from the duty according to the provisions of § 275.

§ 326/2 (มาตรา 389)

(3) Besides under the condition provided for in § 326 (3), the rescission of the contract is also excluded if:

1. one party is released from the duty of performance according to the provisions of § 275 in consequence of a circumstance at the time when the other party is in default of acceptance; unless the party who owes that performance caused the circumstance by himself or;
2. the other party demands delivery of the substitute received or assignment of the claim for compensation according to the provisions of § 275/1.

Meanwhile, the latest version refrains from using the sentence style of so-called “irrealis” (for instance; “the circumstance *which would entitle him to rescission of the contract*”) because it cannot be translated into the Thai language well enough. For this reason, the composition of § 326 Par.3 in the latest version has become a little complicated.

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