Items to be discussed for the Civil Code (law of obligations) reform

Part I. Demand for performance

1. General discussion

When the obligor does not perform an obligation, the current Civil Code grants the obligee (1) to demand performance, (2) to claim damages, and (3) to cancel the contract. Among these options, what kind of points should we consider in deliberating the item (1) of the demand for performance?

As to this point, the current Civil Code provides only Article 414 which stipulates enforcement of performance. Thus, several problems are pointed out such as the letter of the law is insufficient to state basic rights granted to the obligee (*see,* the following discussion). Namely, it is pointed that it is desirable to have a clear provision stating the basic legal relationship about claims such as the obligee can demand performance of the obligor and the obligee can demand subsequent completion of performance when the obligor has made an incomplete performance. Including these issues, to which point should we pay attention in considering overall review of the provision regarding the item (1)?

2. Demand for performance (enforcement) (CC Art.414)

As a regulation concerning a demand (enforcement) for performance, the current Civil Code only provides the provision on enforcement of performance (CC Art.414) which states the obligee may request the enforcement of specific performance from the court.

As to this point, the problem is pointed out that it is unclear from the letter of the law that the obligee has the basic power concerning the claim such as being able to demand voluntary performance of the obligor. In addition, there is a view that Article 414 of the Civil Code provides the procedure to enforce an obligation and does not state that the obligee has the power to request enforcement from the court as a substantive power of the obligee. Like this, there are different views on how to interpret Article 414 from the point of functional share between substantive laws and procedural laws and the meaning of this provision is not necessarily clear.

Therefore, there is a view that it is desirable to stipulate provisions concerning a demand for performance (enforcement) which is the most basic power granted to the obligee.

(Related issues)

1 Specific method of stipulation (treatment of Article 414(1))

As a method to provide the above-mentioned power of the obligee, there are following

proposals in relating to whether Article 414(1) should be treated as a procedural provision or a substantive provision.

[Proposal A] Article 414 (1) should be deleted, and the provision that the obligee is able to demand performance of the obligation from the obligor should be stipulated.

[Proposal B] In addition to stipulating the provision that the obligee is able to demand performance of the obligation from the obligor, Article 414 (1) should be basically maintained.

2 Treatment of Article 414 (2) and (3)

As to the nature of Article 414 (2) and (3), there are different views whether these paragraphs are procedural provisions or substantive provisions. For example, following proposals are possible as to treatment of Article 414 (2) and (3).

[Proposal A] Both are unnecessary.

[Proposal B] While Article 414 (2) is unnecessary, Article 414 (3) should be maintained.

[Proposal C] Both should be maintained.

3. Right to demand subsequent completion of performance

When the obligor has made an incomplete performance, it is generally accepted that the obligee has the right to demand subsequent completion of performance such as the right to demand compensation in lieu or the right to demand repair (the right to demand perfect performance, and the right to demand complementary performance). However, the current Civil Code does not have any provision clearly stating these rights.

Accordingly, there is a view that it is desirable to clearly stipulate in a provision that there is a right to demand subsequent completion of performance.

4. Limitation of the right to demand performance

When performance of a duty is “impossible” including cases where performance of a duty is physically impossible such as through loss of the subject matter, the obligee cannot demand performance of the duty from the obligor. (According to traditional understanding, the duty is extinguished unless the obligor is responsible to the impossibility.) However, the current Civil Code does not stipulate any specific provision on this issue. It is one of the most basic rules in law of obligations that there is certain limitation in demanding performance of a duty. Thus, there is a view that it is desirable to clarify such limitation and specific grounds for limitation by stipulation.

(Related issues)

1 Specific grounds to limit the right to demand performance

While case laws include legal impossibility and social impossibility as well as physical impossibility in “impossibility” under the current Civil Code, how should we consider

specific grounds to limit the right to demand performance based on these case laws?

2 Standard to decide limitation of the right to demand performance

The following views are possible as to the standard to decide limitation of the right to demand performance as a point of view for setting concrete grounds to limit the right to demand performance.

[Proposal A] The standard should be "upon social convention," which comes outside the contract.

[Proposal B] The standard should be "based on the purpose of the contract," which comes from the contract.

3 The grounds to limit the right to demand subsequent completion of performance

The following views are possible with regard to a provision on the grounds to limit the right to demand subsequent completion of performance.

[Proposal A] The grounds should be same as the ground to limit the right to demand performance.

[Proposal B] The grounds should be originally stipulated as to the right to demand subsequent completion of performance such as by stipulating as a ground for limitation that it requires excessive costs of repair as to the right to demand repair of defects.

Part II. Damages caused by non-performance of an obligation

1. General discussion

What kind of points should we consider with regard to the provisions of damages caused by non-performance of an obligation? The current Civil Code provides the following provisions: Damages due to default (Article 415); Scope of damages (Article 416); Method of compensation for damages (Article 417); Comparative negligence (Article 418); Special provisions for monetary debt (Article 419); Liquidated damages (Articles 420 and 421); and Subrogation for damages (Article 422). However, some problems are pointed out as to these provisions, as discussed below. Taking account of these problems, what kind of points should we consider in reviewing the whole provisions regarding damages caused by non-performance of an obligation?

2. Materialization and clarification of "If an obligor fails to perform consistent with the purpose of its obligation" (CC Art.415)

While the current Civil Code simply provides "If an obligor fails to perform consistent with the purpose of its obligation" as a requirement to claim damages due to non-performance of an obligation, the case law and theories have developed discussions on interpretation for the concrete prerequisites.

Damages due to default is not only the matter which is the center of the theoretical system of the law of obligation from the viewpoint of academic theory but also one of the issues which are most frequently discussed as a matter of practice. Therefore, it

may be necessary to stipulate a provision which provides the prerequisites discussed in both practice and theories in concrete and clearly as much as possible.

(1) Required mode of non-performance to claim compensation due to impossibility of performance (the latter part of CC Art.415)

The latter part of the Civil Code Article 415 provides that damages are available "in cases it has become impossible to perform due to reasons attributable to the obligor." As to this point, the case law grants damages not only in cases of physical impossibility such as non-existence or loss of the subject of an obligation but also in some cases of legal impossibility such as, while performance is physically possible, the other purchaser under double transfer of a property has completed registration on the transferred property right. There is a view that it is desirable to clarify such case law theory by stipulation.

(2) Procedural requisites of damages against the obligor in delay of performance

The current Civil Code does not have any provision with regard to the prerequisite to claim compensation against an obligee in delay of performance. As to this point, there is a discussion whether cancellation of the contract is necessary or not in case law and theories. For example, the following proposals are possible. In materializing and clarifying procedural requirement to claim damages due to default, how should we consider this point?

[Proposal A] Cancellation of the contract is necessary.

[Proposal B] Cancellation of the contract is not necessary (it is enough if the obligor demands performance within a reasonable period and such period has lapsed.)

(3) Prerequisites of delay of performance for an obligation with unspecified due date

While Article 412 of the Civil Code provides prerequisites accruing the responsibility of delay of performance, Article 412 (2) provides as to delay of performance for an obligation with unspecified due date (the due date which certainly exists but not clearly specified) that "the obligor shall be responsible for the delay on and after the time when he/she becomes aware of the arrival of such time limit." As to this point, there is a generally accepted view that the obligor is responsible for the delay, even if the obligor does not aware of the arrival of the time limit, if the obligee sends a notice on the arrival of the due date to the obligor and the notice has reached to the obligor.

(4) Refusal of performance

The current Civil Code does not have any specific provision with regard to the responsibility of non-performance of an obligation when the obligor determinately and eventually refuses performance of an obligation (refusal of performance). As to this

point, there are practical benefits to grant responsibility of default due to refusal of performance in cases such as the obligor refuses performance before the due date or the due dates for both parties are different under a bilateral contract and the obligor with the latter due date refuses performance. Accordingly, there is a view that it is desirable to stipulate a provision for the cases the obligor manifests his or her intent to refuse performance of an obligation determinately and eventually before the due date as one condition to form the right to compensatory damages.

(5) Damages due to delay and impossibility of subsequent completion of performance

While it is understood that the prerequisites for damages due to delay and impossibility of subsequent completion of performance are pursuant to the prerequisites of damages due to delay and impossibility of performance (Article 415), there is no provision which clearly states that effect. Should we consider having any provision stipulating the prerequisite for damages due to delay or impossibility of subsequent completion of performance?

(6) Treatment of the former part of Article 415

The former part of the Civil Code Article 415 provides a comprehensive prerequisite, "If an obligor fails to perform consistent with the purpose of its obligation," as a prerequisite for damages due to default and regulates all forms of default. In materializing and clarifying the prerequisites based on individual form of default, having such a comprehensive provision in addition has a practical benefit to prevent from occurrence of a situation that no provision is applicable to a form of default in managing individual and concrete default matters. Therefore, it is possible to advance deliberation toward maintaining such a comprehensive provision.

3. About "reasons attributable to the obligor" (CC Art. 415)

(1) Scope of application of "reasons attributable to the obligor"

While it seems that Article 415 of the Civil Code literally requires "reasons attributable to the obligor" as a prerequisite only for impossibility of performance, the case law requires this not only for impossibility of performance but also other general non-performance of an obligation other than monetary debt. Accordingly, it is possible to advance deliberation toward clarifying this by stipulation.

(2) Meaning and the way of stipulation of "reasons attributable to the obligor"

The meaning of "reasons attributable to the obligor" (Article 415) is not necessarily clear from the language of the article. Therefore, there is a debate in theory whether the ground to impose responsibility of damages due to non-performance of an obligation comes from the principle of negligence liability. There is a view that the

language of the provision should be reconsidered because it is not desirable that the meaning of a provision stipulating one of the most basic rules on law of obligations is unclear.

(3) Treatment of impossibility of performance due to reasons not attributable to the obligor after delay of performance due to reasons attributable to the obligor

There is a view that it is desirable to clarify through stipulation the case law theory (Decision of the Great Court of Cassation on October 29, 1906, Minroku vol.12, p.914) that, when impossibility of performance due to reasons not attributable to the obligor occurs after delay of performance due to reasons attributable to the obligor, a claim of compensatory damages is granted only when there is a causal relationship between the delay of the performance and impossibility of performance.

4. Scope of damages (CC Art.416)

(1) Way of stipulation on the scope of damages

Article 416 of the Civil Code has the language such as “damages which would ordinarily arise” and “damages which arise from any special circumstances”, which the meaning is not necessarily unambiguous. Accordingly, there are various interpretations as to the meaning of these phrases that cannot be read from the language of the article. For example, while the article does not literally state “reasonableness,” some case decisions interpret the article as if it provides the theory of legally sufficient cause. There is another view which criticizes such interpretation, which is also regarded as one strongly-accepted theory. Based on this situation, how should we consider the way of stipulating a provision on the scope of damages?

(2) Actor and time of foreseeing (CC Art.416 (2))

While Article 416(2) regulates the scope of damages based on foreseeability, it states just “party” as to the actor of foreseeing and does not state the time of foreseeing. Accordingly, there is a problem that who’s foreseeability at what time the article means to regulate.

As to this point, the case law and theory are opposing each other with regard to the ground to impose liability of damages due to non-performance of an obligation. Therefore, there is a view that it is desirable to clarify the actor and time of foreseeing by stipulation in order to secure legal stability by clarifying the rule to determine the scope of damages.

For example, the following proposals are possible as to the actor and time of foreseeing.

[Proposal A] The obligor foresaw at the time of non-performance of an obligation.

[Proposal B] Both parties foresaw at the time of forming the contract.

[Proposal C-1] In addition to Proposal B, special circumstances (damage) the obligor foresaw or was able to foresee after forming the contract should be included in the scope of damages.
[Proposal C-2] In addition to Proposal B, among special circumstances (damage) the obligor foresaw or was able to foresee after forming the contract, what the obligor did not take reasonable measure to avoid such damage should be included in the scope of damages.
[Proposal D] The obligor foresaw at the time of forming the contract. But it is possible even taking this proposal to have a view to consider foreseeability after forming the contract such as Proposal C-1 or C-2.
(Related issues)
1 Object of foreseeing
While Article 416(2) states "circumstances" as the object of foreseeing, many views which stress distribution of risk (damage) at the time of forming the contract consider that the object of foreseeing should be "damage."
2 Necessity of specific provisions governing the case of non-performance of an obligation with intention or gross negligence
The following proposals are possible taking account of the specialty of the scope of damages in case of the obligor's non-performance with intent or gross negligence.
[Proposal A] If there is intent or gross negligence for non-performance of an obligation, all damage should be compensated.
[Proposal B] If there is intent for non-performance of an obligation, all damage should be compensated.
[Proposal C] Even if there is intent or gross negligence for non-performance of an obligation, exceptional provision is unnecessary because general rules on the scope of damages can properly deal with it.

(3) Necessity to have the standard time to calculate the amount of damages (principle provision)

When the damage should be compensated, even if the scope of the damage is determined, there is a possibility that the concrete amount of the damage increase or decrease with time. For example, in case of a sales contract of a used car, when the car is completely destroyed owing to negligence of the seller and the buyer claims compensatory damages for the value of the used car, the time price of the car may jump fivefold from the time of forming the contract because the car is no longer available. Therefore, the standard time to calculate the amount of damages becomes an issue.

The current Civil Code does not have any provision on the standard time to calculate the amount of damages. Therefore, case law has decided the time for

calculation based on concrete cases, recognizing this issue as the issue of the scope of damages under Article 416. As a result, while some believes that the established case law has formed as to compensatory damages due to impossibility of performance, it is difficult to read from the current Civil Code articles as the case law theories explain. In addition, there are various different court decisions as to compensatory damages due to cancellation.

Accordingly, there is a view that it is desirable to stipulate a provision on the time standard of calculating the amount of damages based on these case laws from the aspect of securing transparency of the rules exterminating the amount of damages.

(4) Calculation rules for the amount of damages in case of inflation of prices after non-performance

It is considered that the following case law is established as to the rules calculating the amount of damages for compensatory damages in case that the price of the subject matter is inflated after non-performance of an obligation to transfer a thing (Supreme Court Decision, November 16, 1962, Minshu vol.16, no.11, p.2280; Supreme Court Decision, April 20, 1972, Minshu vol.26, no.3, p.520).

① When there are special circumstances that the price of the subject matter is inflating and the obligor made the obligation impossible, and if the obligor knew or should have known that special circumstances, the inflated price should be the standard.

② When the price of the subject matter once inflated and later dropped, in order to claim damages with the inflated price, it is necessary that it have been expected that the claimant would certainly obtain the interest of the inflated price through resell or other method at the time of inflation.

There is a view that it is desirable to put these rules in the statutory form because it is difficult to read them from the current law.

(5) Calculation rules for the amount of damages in case where a party to whom an obligation should have been performed has a transactional relationship with a third party

There are following case laws as to the rules calculating the amount of damages when a party to whom an obligation should have been performed has a transactional relationship with a third party. All of them found, with regard to a sales contract, the amount of damages with the standard of the price for transaction between the buyer and the third party when the seller did not perform the duty to deliver the subject matter.

① When the buyer formed a resale contract with a third party, if the sales contract was cancelled due to default of the seller, the general damage is the interests of

resale as a general rule (Decision of the Great Court of Cassation on March 30, 1921, Minroku vol.27, p.603; Supreme Court Decision on December 8, 1961, Minshu vol.15, No.11, p.2706).

② When the buyer paid damages to the other party of the resale contract, that damages is the general damages (Decision of the Great Court of Cassation on November 28, 1905, Minroku vol.11, p.1607)

③ When the buyer purchases the subject matter for the purpose of own use, if the buyer cancelled the original sales contract and by necessity purchased a substitute from the third party, the amount of difference between the price under the original sales contract and the price of the substitute is the general damages (Judgment of the Great Court of Cassation on November 14, 1918, Minroku vol.24, p.2169).

It is difficult to read these rules from the text of the current Civil Code. Therefore, there is a view that it is desirable to stipulate a provision stating that, when a party to whom an obligation should have been performed had a transactional relationship with a third party, the sales price under the contract with the third party becomes the amount of damages.

(Related issues)

1 When the amount or the time of transaction with the third party is unreasonable

When the amount under the transaction with the third party is unreasonably expensive or the time of transaction is unreasonable, there is a view that, from the point of achieving fairness among parties, the damages should be the amount of transaction under reasonable amount of transaction or reasonable time of transaction.

2 The price of the subject matter dropped after non-performance of an obligation and the substitute transaction occurred at that time

If a provision is prescribed based on above proposal, when the price of the subject matter dropped after non-performance of an obligation and the substitute transaction occurred with that dropped price, the amount of damages will be calculated with the amount of substitute transaction at the time of the price dropped. However, there is a view that the risk of price drop should be bore by the obligor who failed to perform the obligation.

5. Comparative negligence (CC Art.418)

(1) Conditions

The case law and the theory understand on comparative negligence that the amount of damages is reduced based on the provision of comparative negligence not only ①when the obligee was negligent in occurrence of non-performance of an obligation by the obligor, but also ②when the obligee was negligent in occurrence of the damage and ③when the obligee was negligent in expansion of the damage. However, it is difficult t read that the obligee's negligence is considered under the

conditions of ② and ③ from the text of Article 418 stating “the obligee is negligent regarding the failure of performance of the obligation.” In addition, considering the context that Article 418 is applicable to the conditions of ② and ③, it is pointed out that “negligence” under Article 418 is used in a different way from “negligence” under Article 709 (damages in torts). It may be undesirable to employ the basic term, “negligence,” for different meanings in the same Code.

Accordingly, there is a view that it is desirable to reform the conditions of comparative negligence to the effect that when occurrence and expansion of damages had been able to be prevented if the obligee had taken reasonable measures.

(Related issues)

Necessity of a provision on the claim to the prevention cost regarding occurrence and expansion of damage

There is a view that it is desirable to have a provision on the claim to the prevention cost regarding occurrence and expansion of damage.

(2) Effects

As to the effects of comparative negligence, Article 418 provides that, if the obligee is negligent, it must be necessarily considered and not only reduction of damages but also exemption of liability are possible (mandatory reduction or exemption).

Unbalance is pointed out because comparative negligence in torts (Article 722(2)), which is similarly based on the principle of fairness and the principle of faith and trust, reduces damages only with discretionary basis. There are also some criticisms such that “mandatory” consideration of the obligee’s negligence makes the operation rigid, and that it is unnecessary to exempt liability through the obligee’s negligence under the current law which requires “reasons attributable to the obligor” for non-performance of an obligation in general. Accordingly, there is a view that it is desirable to change the effects of Article 418 from mandatory reduction or exemption to discretionary reduction.

6. Profit and loss set-offs

In court practice, if the obligee obtains any interests through non-performance of an obligation, that amount of the interests will be indisputably reduced from the damages to be compensated (profit and loss set-offs). However, there is no provision stating this issue.

Accordingly, there is a view that it is desirable to stipulate a provision on profit and loss set-offs.

7. Special provisions for monetary debt (CC Art.419)

(1) Special provisions on conditions: exemption due to force majeure

Article 419 (3) denies exemption due to force majeure. However, it is criticized that there are some occasions where such exemption is appropriate as to monetary debt such as when the obligor suffers from a disastrous earthquake. Accordingly, there is a view that it is desirable to delete Article 419 (3) which denies force majeure exemption and admit a possibility of granting exemption through general rules of default to the obligor of monetary debt.

(2) Special provisions on effects: compensation of damages exceeding interest rate

Article 419 (1) provides that the amount of damages for non-performance of a monetary obligation is determined with reference to statutory interest rate or agreed interest rate. The case law denies compensation of damages exceeding these interest rates (Supreme Court Decision, October 11, 1973, Hanji vol.723, p.44). As to this point, it is criticized that it is unreasonable to deny compensation of damages exceeding interest rate without exception because there are possible cases that the amount of damages largely exceed interest rate. Accordingly, there is a view that it is desirable to allow compensation of damages exceeding interest rate for non-performance of monetary debt.

Part III. Cancellation of contracts

1. General discussion

What kind of points should we consider in deliberating provisions on cancellation of contracts? The current Civil Code stipulates the following provisions regarding cancellation of contracts: Exercise of right to cancel (Article 540); Right to cancel for delayed performance (Article 541); Right to cancel where the time is of the essence (Article 542); Right to cancel for impossibility of performance (Article 543); Indivisible nature of right to cancel (Article 544); Effect of cancellation (Article 545); Cancellation of contract and simultaneous performance (Article 546); Extinguishment of right to cancel by demand (Article 547); and Extinguishment of right to cancel by acts of holder of right to cancel (Article 548). There are some problems as discussed below as to these provisions.

2. Arrangement of requirements for forms of non-performance of an obligation as a ground of cancellation (CC Art.541-543)

With regard to the conditions on the modes of non-performance in cancellation due to non-performance of an obligation, the current Civil Code provides cancellation after making demand notice “where one of the parties does not perform his/her obligations” in Article 541, cancellation without demand notice in delayed performance where time is of the essence in Article 542, and cancellation without demand notice “if

performance has become impossible, in whole or in part" in Article 543. Traditional theory understands that Article 541 is the provision for delayed performance and Article 543 is the provision for impossibility of performance.

However, it is pointed out that the contents of these provisions and the traditional theory do not necessarily provide sufficient norm. For example, while Articles 541 and 543 do not limit the content of obligation which comes to default, the case law shows interpretation which is not necessarily consistent with the language of provisions such as denying cancellation due to violation of incidental duties. In addition, the current Civil Code does not have any provision governing cancellation due to non-performance of subsequent completion and this issue is completely left to interpretation. Further, it is unclear whether cancellation due to refusal of performance before the due date is possible from the language of the current Code and this point is also left to interpretation.

Like this, the contents of provision regarding the conditions on the modes of non-performance for cancellation due to default under the current Civil Code are not necessarily sufficient considering the inconsistency between the case law theory and the language of provisions and lack of provisions for certain occasions stated above. Based on these circumstances, it may be appropriate to advance deliberation toward clarifying conditions on the modes of non-performance for cancellation due to default.

(1) Necessity to limit "where one of the parties does not perform his or her obligations" in Article 541

Article 541 of the current Civil Code provides that parties may cancel a contract after making demand notice "where one of the parties does not perform his or her obligations". The traditional theory understands that this provision is primarily the provision about delayed performance even though this provision does not stipulate any limitation on the contents of "obligations" not performed. However, the case law denies the effect of cancellation when the violated duty is an incidental duty. Like this, the situation is that the language of Article 541 and treatment in court practice are not necessarily consistent.

Accordingly, there is a view that it is desirable to establish the conditions which properly regulate the occasions where cancellation is admissible under this provision (such as by "material non-performance (violation of obligations)") as well as fixing the inconsistency between the language and practice.

(Related issues)

Meaning of the condition of demand notice (Article 541)

While Article 541 requires making demand notice as a condition for cancellation, if any limitation is imposed on the scope of non-performance of obligations as a condition for cancellation based on the above-stated view, the problem is pointed out whether the condition

of demand notice is still necessary in addition to such limitation.

(2) Necessity to limit “if performance has become impossible, in whole or in part” in Article 543

As to cancellation due to impossibility of performance, Article 543 of the current Civil Code provides that cancellation is available without demand notice “if performance has become impossible, in whole or in part.” There is no limitation in Article 543 on the scope of impossibility that makes cancellation available as to partial impossibility of performance. Therefore, from the language of the provision, it is possible to read that a small partial impossibility allows cancellation of the whole contract. Therefore, many theories understand that cancellation of the whole contract is admissible only when the purpose of the contract cannot be achieved with the performance of the rest part. However, it is not easy to read such interpretation from the language of the provision.

Accordingly, there is a view that it is desirable to establish the conditions which properly regulate the occasions where cancellation is admissible under this provision (such as by “material non-performance (violation of obligations)”).

(3) Cancellation due to incomplete performance

There is no general provision regulating the relationship between incomplete performance and cancellation in the current Civil Code. Thus, the traditional theory understands that the regulation of delayed performance should be referred where subsequent completion is possible and the regulation of impossible performance should be referred where subsequent completion is impossible, taking that Articles 431 and 542 are the provisions for cancellation due to delayed performance and Article 543 is the provision for cancellation due to impossibility of performance.

Accordingly, in clarifying the conditions on the modes of non-performance for cancellation due to default, there is a view that it is desirable to clarify provisions in the direction of maintaining the policy to treat incomplete performance by above-stated applications of the regulations governing delayed performance and impossibility of performance.

(4) Refusal of performance

The current Civil Code does not have any specific provision with regard to the responsibility of non-performance of an obligation when the obligor determinately and eventually refuses performance of an obligation (refusal of performance). As to this point, there are practical benefits to grant responsibility of default due to refusal of performance in cases such as the obligor refuses performance before the due date or the due dates for both parties are different under a bilateral contract and the obligor

with the latter due date refuses performance. Accordingly, there is a view that it is desirable to stipulate the case the obligor manifests his or her intent to refuse performance of an obligation determinately and eventually before the due date as one condition to form the right to compensatory damages. (See, Part II, 2 (2) as to the conditions for compensatory damages)

(5) Necessity of a comprehensive provision for cancellation due to non-performance of an obligation

Article 541 provides a comprehensive prerequisite, “in cases where one of the parties does not perform his/her obligation” as a prerequisite on the modes of non-performance for cancellation due to default, and regulates all forms of default except impossibility of performance under Article 543. In clarifying the prerequisites for cancellation, having such a comprehensive provision has a practical benefit to prevent from occurrence of a situation that no provision is applicable to a form of default in managing individual and concrete default matters.

Therefore, it is possible to advance deliberation in the direction of maintaining such a comprehensive provision in clarifying the prerequisites for cancellation due to non-performance of an obligation.

3. Necessity of “due to reasons not attributable to the obligor” (CC Art.543)

With regard to cancellation due to non-performance of an obligation, the current Civil Code allows exemption “due to reasons not attributable to the obligor” (provision of Article 543). As to this point, the traditional theory understands “due to reasons not attributable to the obligor” as non-existence of intent, negligence, or any other equivalent ground based on the principle of faith and trust from the aspect of the principle of negligence liability, and such prerequisite is applied to not only impossibility of performance but also all forms of cancellation due to default.

However, as to this stance, some makes the following criticisms. First, cancellation is not a sanction against the obligor who failed to perform but a system pursuing to release the other party from the binding effect of the contract. Thus, existence of the reasons attributable to the obligor should not be the prerequisite for cancellation. In fact, the reasons attributable to the obligor do not perform significant function in deciding admissibility of cancellation under the case law. In addition, it is pointed out that the theory of rejecting such reasons like this is internationally supported from the viewpoint of comparative law.

Accordingly, the following proposals are possible as to necessity of reasons attributable to the obligor for cancellation due to default.

[Proposal A] Such reasons are necessary.

[Proposal B] Such reasons are not necessary.

4. Effects of cancellation based on non-performance of an obligation (CC Art.545)

(1) Treatment of the right to demand performance through cancellation

Case law and theories under the current Civil Code recognize as basic effects of cancellation of a contract ①both parties to the contract become unable to demand performance to the other party, and ②both parties owe the duty to restore the other party to his or her original position.

While the paragraph 1 of the Civil Code Article 545 stipulates the effect ②, there is no provision stipulating the effect ① under the current law. Thus, it is unclear how the right to demand performance of the both parties is treated under the text of the law. Accordingly, there is a view that it is desirable to have a provision stipulating that both parties become unable to demand performance to the other party upon cancellation of a contract.

(Related issues)

Situation of discussion on legal character of the effect of cancellation

As to legal character of the effect of cancellation, there are opposing theories. In legislation, one possible view is to take either view and clarify it through letter of the law. On the other hand, another possible view is that, taking that theoretical debate is merely an issue of theoretical explanation and both theories are united in granting above stated ① and ② as basic effects of cancellation of a contract, it is unnecessary to clarify which theory is adopted through legislation.

(2) Scope of the duty of restoration through cancellation (Art. 545 (2))

Article 545(2) of the current Civil Code provides that when a party returns any monies to the other party upon cancellation, interest must accrue from the time of the receipt of those monies. However, case law and the theory take this as mere illustration and understand that any fruit or benefit through use should be returned as to other objective other than money. (Decision of the Great Court of Cassation, May 11, 1936, Minshu vol.15, p.808)

As to this point, some argues that it is inappropriate to show uniform standard only for the specific situation, namely, interest for the duty to return money, because an appropriate scope of the duty of restoration should be decided individually and materially as a matter of clearing the contract considering various conditions such as the content of performance actually made, the character of the subject matter, the mode of non-performance caused cancellation, the content of agreement on the fruits or the benefit through use in the contract which was cancelled. From this point, there is a view that Article 545 (2) of the Civil Code should be deleted and the scope of the duty of restoration should be left to interpretation of the contract.

(3) When the subject matter of restoration is lost or damaged

There is no specific provision under the current law as to what kind of duty the both parties to cancellation owe if the subject matter which should be restored upon cancellation is lost or damaged. While it is possible that the subject matter is lost or damaged before the duty of deliberation is performed, it is also possible that the subject matter is lost or damaged before the duty of restoration is performed after the duty to deliver the subject matter was performed. Therefore, there is a view that a provision should be stipulated as to the latter case in order to secure legal stability.

For example, the following proposals are possible as to concrete contents of the provision.

[Proposal A] Applying Article 536 analogically, in principle the duty of restoration is extinguished depending on the degree of loss or damage and, corresponding to this, the duty to refund the benefit in return is also extinguished as well.

[Proposal B] Denying analogical application of Article 536 by breaking up the relationship between the treatment of the duty of restoring the subject matter and the treatment of the duty of refunding the benefit in return, the duty of restoring the subject matter remains as a duty to return the value depending on the degree of loss or damage and the duty to refund the benefit in return also remains as before.

[Proposal B-1] Adopting [Proposal B], the cap is imposed on the value to be returned as a substitute of the duty of restoring the subject matter to the limit of the value of the duty of refunding the benefit in return.

(Related issues)

1 Scope of application of this proposal

There is a view that the scope of application of this proposal should be limited to “contracts for transferring a property right.” This view intends that the owner should always owe the risk of losing the subject matter as to the contract not intending transfer of a property right such as a lease contract.

2 Treatment of cases where the subject matter of the duty of restoration is lost or damaged due to reasons attributable to the obligee

The case law shows that the obligor does not owe the duty of returning the price in lieu of returning the subject matter when the subject matter of the duty of restoration is lost or damaged due to reasons attributable to the obligee. (Supreme Court Decision, February 13, 1976, Minshu vol.30-1, p.1) If [Proposal B] or [Proposal B-1] is adopted, the duty of restoration remains as a duty of returning the value even in such case, which is a different conclusion from the case law. Therefore, there is a view that a provision should be established taking account of the case law theory.

5. Extinguishment of the right to cancellation by acts of the right holder (CC Art.548)

Article 548 of the Civil Code provides that the right to cancellation is extinguished even when the right holder has converted the subject matter into any other kind of thing by processing or alteration without knowing the existence of such right. Some argues that the current law is unreasonable because the person who receives the subject matter through performance of a contract is originally able to process or alter the subject matter as its own property. Accordingly, there is a view that the situation where the right to cancellation is extinguished through processing or alteration should be properly limited.

6. Cancellation of multiple contracts

There is a view that a provision on cancellation of the whole multiple contracts based on non-performance of one contract should be stipulated based on the case law which granted cancellation of the whole multiple contracts due to non-performance of one contract among them as to multiple contracts between the same parties. (Supreme Court Decision, November 12, 1996, Minshu vol.50-10, p.2673)

Part IV. Assumption of risk (CC Art.534-536)

1. General discussion

To what kind of points should we pay attention as to the provision on assumption of risk? While the current Civil Code provides “Obligees to Assume Risk” (Art.534), “Assumption of Risk in Bilateral Contract with Condition Precedent” (Art.535), and “Obligors’ Assumption of Risk” (Art. 536), some problems are pointed out as stated below as to those provisions. What kind of points should we consider in reviewing overall provisions on assumption of risk?

2. Limitation of the scope of application of the Obligee Principle (CC Art.534)

The current Civil Code provides that, in cases where the purpose of a bilateral contract is the creation or transfer of real rights regarding specified things, if the things have been lost or damaged due to reasons not attributable to the obligor, such loss or damage shall fall on the obligee (Art.534 (1)). Namely, the obligee remains to owe his or her obligation in return even when a part or all of performance of his or her claim is impossible. (Obligee Principle)

As to this Obligee Principle, it is strongly criticized that it is fair in essence to impose the risk on the value in case of loss or damage of the subject matter to the person who was actually able to take any measure to avoid such loss or damage. Thus, the majority of academic theories support the view that the scope of application

of Article 534 should be limited. For example, the following proposals are possible.
[Proposal A] The scope of applying the Obligor Principle should be limited to the time after the possibility to control the subject matter is transferred.
[Proposal B] Article 534 should be abolished and whether performance of the obligation of which the subject matter was lost or damaged is concluded or not at that time should be practically decided.
[Proposal C] The current law should be maintained.

3. The relationship between cancellation based on non-performance of an obligation and assumption of risk

As to the treatment of the obligation of the other party in case the obligation of one party becomes impossible in bilateral contract, the current Civil Code states that the provision of cancellation due to non-performance of an obligation applies in case there is any reason attributable to the obligor as to impossibility of performance, and the provision of assumption of risk applies in case where there is no such reason.

Thus, there is an issue that, if the reason attributable to the obligor is excluded from the prerequisites of cancellation through non-performance (*See,* Part.III, 3), the scope of application for cancellation through non-performance and the scope of application for assumption of risk overlap with each other.

There is a view that both systems can exist in parallel. However, there is a criticism against this view that there is little meaning to have both systems in parallel because both aim to realize release from the obligation in return. Among such criticism, there are several different stances. One is that the system of assumption of risk should be abolished and single cancellation system is desirable because entrusting release from the obligation in return to parties' will makes the time of withdrawal from the contract clear and contributes to promote foreseeability, and further, the obligee should have the option of whether to maintain the interest accruing from the contractual relationship when the obligee actually has the interest in maintaining the contractual relationship such as when the obligee has an interest in performing the duty in return or the claim of compensation as to the claim which becomes impossible. On the other hand, there is another view that single system of assumption of risk is desirable because it is circuity to always demand manifestation of intent for cancellation in case of impossibility of performance. Considering these issues, how should we consider the relationship between the system of cancellation and the system of assumption of risk?

(Related issues)

1 Treatment of Article 536 (2)

There is a view that the contents regulated in Article 536 (2) of the current Civil Code

should be maintained.

2 Treatment of Article 535

If the stance to abolish assumption of risk ([Proposal A]) is adopted, it is easy to conclude that Article 535 should be abolished as well. However, if the stance to maintain assumption of risk ([Proposal B] through [Proposal D]) is adopted, a problem arises as to whether the regulation under Article 535 should be reviewed.

3 The relationship between the doctrine to abolish assumption of risk and the system to extinguish the right to cancellation upon demand notice (Article 547)

When the system of assumption of risk is abolished and the single-cancellation model ([Proposal A]) is adopted, there is a view that Article 547 should not be applied to cases where application of the Obligee Principle is appropriate under the current law.

Part V. Delay in acceptance (CC Art.413)

1. General discussion

To what kind of points should we pay attention in considering the provision concerning delay in acceptance? The current Civil Code provides Article 413 only in relating to delay in acceptance. Accordingly, as mention below, the effects of delay in acceptance are abstract and unclear, and thus it is pointed out that they should be materialized and clarified. Including this point, to what kind of points should we pay attention in considering overall review of the provision regarding delay in acceptance?

2. Materialization and clarification of effects

The current Civil Code merely provides “the relevant obligee shall be responsible for the delay” as to the effect of delay in acceptance and “the relevant obligor shall be relieved from any and all responsibilities which may arise from the nonperformance of the obligation” as to the effect of tender of performances which will be the premise for delay in acceptance. However, it is difficult to interpret from these provisions concrete effects of delay in performance based on tender of performances which are undisputedly recognized by both case law and doctrines without disputes (for example, extinction of the right of defense of simultaneous performances, mitigation of the duty of care in case of delivery of a specific thing, making an increased cost as the obligee’s expense, transfer of a risk in case of loss of the subject matter).

Accordingly, there is a view that these effects should be clearly stated in the Civil Code provisions.

3. Appropriateness of a claim for damages and cancellation

Article 413 of the current Civil Code only provides “the relevant obligee shall be responsible for the delay” as to the effect of acceptance in delay. Therefore, it is unclear from the provision as a content of “responsibility of delay” whether the obligor

has the rights to damages and cancellation, and if these rights are granted, whether these rights are always granted. Accordingly, there is a view that it is desirable to clearly state in the provision whether the rights to damages and cancellation are granted as an effect of delay in acceptance. For example, the following the following views are possible.

[Proposal A] A provision of the rights to damages and cancellation should not be stipulated valuing the point that the obligee does not have the duty of acceptance in principle because it has merely a right but does not owe a duty.

[Proposal B] Recognizing an occasion where the obligee owes the duty of acceptance based on an agreement or the principle of faith and trust, it is desirable to stipulate a provision stating that the rights to damages and cancellation accrues in cases where the obligee breaches the duty of acceptance in this sense.

(Related issues)

Compulsory acceptance based on an agreement

There is a view that if the obligee agreed to accept performance with regard to a contract, the obligor may compel acceptance on the obligee.

Part VI. Other new provisions

1. Right of subsequent completion

When the obligor fails to perform the obligation, the obligee can achieve the original economic purpose of the contract through cancelling the contract and having alternative transaction because the obligee has the right to cancel the contract. However, there is no specific provision to ensure the interest of the obligor to secure counter-performance through performing the obligation. Thus, it is pointed out that this may cause imbalance to adjust interests between parties.

Accordingly, there is a view that the right of subsequent completion of the obligor (the right that performance or subsequent performance of the obligor who has hailed to perform the obligation takes precedence over the right to damages which is granted to the obligee and the effect of the right to damages is suspended) should be established from the view to ensure the interest of the obligor to secure counter-performance through performing the obligation.

(Related issues)

1 Scope of application

If the right of subsequent completion is granted to the obligor, the following views are possible, for example, as to its scope of application.

[Proposal A] The right of subsequent completion should be granted without considering the form of non-performance.

[Proposal B] The right of subsequent completion should be granted only when the performance of the obligor was incomplete.

2 Specific requirements

How do we consider the specific requirements to grant the right of subsequent completion?

3 Relationship with the right of cancellation

In general, there is an issue on which should be prioritized in between the right of subsequent completion and the right of cancellation. While it may be propose to decide this point based on the issue of how to set the requirements to establish the right to subsequent completion and the right of cancellation, how do we consider this?

2. Liability of an obligor when non-performance of the obligation occurred owing to an action of a third party

The current Civil Code does not have any provision as to the liability of the obligor when non-performance of the obligation occurred through an action of a third party that the obligor used in order to perform the obligation.

As to this point, while current case law and academic theory agree on the conclusion that there is an occasion where the liability of the obligor should be recognized, there is no consensus on the point that in which occasion such liability should be imposed.

Accordingly, there is a view that a provision concerning the liability of the obligor under such situation should be established. How should we consider this issue? Assuming that a provision should be established, the following proposals are possible as to the occasion where the liability of the obligor is recognized.

[Proposal A] The types of the third party should be classified and the requirements should be stipulated according to each type.

[Proposal B] It is unnecessary to establish requirements based on classification and the liability of the obligor should be decided by examining how much responsibility of the third party was included in the contents of the obligor's obligation.

3. Right to demand compensation in lieu

While the current Civil Code does not have any provision concerning the right to demand compensation in lieu (the right which the obligee can demand to the obligor for the transfer of the compensation in lieu when the obligor obtains a benefit that are regarded as compensation in lieu of the subject matter of performance through the same cause of impossibility of performance), the case law grants this right (Supreme Court Decision, Dec.23, 1966, Minshu, vol.20, No10, 2211) and the commonly accepted academic theory also takes the same stance. Accordingly, there is a view that the provision on the right to demand compensation in lieu should be established. How should we consider this idea?

(Related issues)

Scope of application

For example, the following proposals are possible as to the scope to grant the right to demand compensation in lieu.

[Proposal A] The right to demand compensation in lieu should be widely granted when the obligor receives any benefit.

[Proposal B] The right to demand compensation in lieu should be granted only when there is no other method for the obligor to be compensated such as the right to claim compensation of damages.

[Proposal C] The right to demand compensation in lieu should be granted only when the contract is bilateral contract and there is no other method for the obligor to be compensated such as the right to claim compensation of damages.