

ABSTRACT

The principle of the debt payment impossibility is a significant legal principle. It can result in the debtor being freed from debt payment according to section 219 of the Civil and Commercial Code or result in the debtor being obliged to pay compensation for a default on debt payment for which the debtor owe responsibility according to section 218. This thesis is conducted to study the characteristics of the impossibility and the legal effects when the debt payment is impossible by the Thai legal system comparing with the civil law system; i.e. the German law and the French law and with the common law i.e.; the English law. The study focuses especially on the German law which has been the model of the principle of the debt payment impossibility of Thai legal system. The study found that, since there had been an amendment to the German law on the principle of this issue in 2002 B.C., there are certain concepts and principles which are beneficial and can be used as guidelines on the amendments of the provisions of the Thai law.

The study of both the characteristics and the legal effects which prescribe the statutory right of the parties found that, there were issues which the research had to study and find the solutions as follows:

1. In the economic impossibility, if there is an accident or a barrier that makes the debtor default on debt payment, still, it is not absolutely impossible for the debtor to pay. However; if the debtor is forced to pay the debt, he or she will have to spend too much expense in order to pay such debt comparing to the benefit the creditor will gain from the payment. If that is the case, shall this be presumed impossibility or not? The result of the study shows that this is counted as one of the impossibility. According to section 219 of the Thai Civil and Commercial Code, this case can be regarded as impossibility by means of construing the term “impossibility” to include the meaning of economic impossibility. Anyway; to make clear of the provisions for the benefit of using law, the following phrase should be added to the 2nd paragraph of section 219: “Once the debt has been incurred, the debtor isn’t obliged to pay the debt

in the case that: (1) When considering the subject of the obligation and the bona fides, it is expressly found that there is the disproportion of the expense which will occur during the debt payment to the benefit that the creditor will gain.”

2. There is also a need to find out that for which purpose the impossibility which is purely personal to the debtor was provided by the 2nd paragraph of section 219. The research found that section 219 has been prescribed to accept that the subjective impossibility is another characteristic of impossibility. This provision has been prescribed in accordance with the former 2nd paragraph of section 275 of the German Civil and Commercial Code. However, the former 2nd paragraph of section 275 of the German Civil and Commercial Code has been amended to section 275(3) by expanding the boundary of the subjective impossibility to give the debtor the right to refuse to pay the debt which is contrary to the moral duty. It could be seen that this is an application of law which is just to the debtor who will no longer be obliged to the debt that may be contrary to the moral duty. When reviewing the 2nd paragraph of section 219 of the Thai Civil and Commercial Code, the provision limits its boundary to the impossibility only which depends on the debtor's ability to pay the debt while the impossibility concerning the moral duty is excluded. But it is possible to expand the construction of the provision to cover the issue to be just to the debtor. And to make it clear when applying the law, there should be an amendment to the 2nd paragraph of section 219 by adding the following phrase: “(2) When the debt payment is purely personal and after considering the creditor's benefit there is no reasonable ground to claim for performance of the debt”

3. There's a problem of injustice when the provision prescribes that any juristic acts of which objective is impossible shall be void. This is because it debars one party from claiming for damages when the impossibility is caused by the other party's fault. It is found from the study that the juristic act with impossible objective shall not be deemed void. On the other hand, such juristic act should be applicable to resolve the injustice so that each party will be able to prove the fault and the damage to the other. It is suggested that there be an amendment to section 150 by removing the phrase

“impossible” so that the general principle that the debtor will be liable for the compensation if he or she is at fault can be applicable. Once the amendment to the section is made, the right of the parties to claim for compensation, when the payment of debt is impossible whether before entering into or during the contract, will be established. As a result, it is recommended that there be an amendment to the first paragraph of section 218 as follow: “...the provision shall be applicable whether the impossibility occurs before entering into or during the contract...” However, the new principle shall not be applied to the contract of which objective is to transfer the ownership of specific property because it is governed by the transfer-of-risk provision which, if such amendment is applicable with, will be unfair to the parties. Thus, it is essential that there be an additional amendment to the 1st paragraph of section 370 by adding the following phrase: “The provision shall not be applied if such lost or damage occurs before entering into or during the contract.”

4. In the case that the payment of debt is wholly impossible due to the debtor’s fault; if the creditor has paid the cost in preparation for the debt payment of the debtor or for the preservation of the property which is the subject of the debt, does the creditor has the right to claim for damages? The study found that the German law provides an alternative for the creditor to claim for damages resulted from such case according to section 284. According to Thai law, the debtor has the right to claim for such expenses provided by the 1st paragraph of section 218 in corroboration of section 222. However; to ensure the right of the creditor, there should be an amendment to section 218 by adding the 2nd paragraph as follow; “ In the case that the creditor chooses not to claim for compensation from the debtor for the default of debt payment, should that be the case, the creditor has the right to claim for the cost which the creditor has paid for fruitless expenses or for the cost paid for the preservation of property which is the subject of the debt.”

5. When the debt payment is impossible for a reciprocal agreement but neither of the party is at fault, the debtor has no right to claim for the debt repayment according to the 1st paragraph of section 372. The issue occurs when the debtor has

already performed the debt payment and induces a question of how to claim for the payment back. Section 372 doesn't provide any means of restitution. Moreover, it cannot be claimed for such restitution when there is the rescission of the contract because section 387-389 cannot be applied to such issue. The Supreme Court has two different opinions regarding this issue. The first one is the restitution by means of the undue enrichment principle according to the 2nd paragraph of section 406 (the Supreme Court judgments (Dika) no. 265/2510 and no. 358/2522). The other opinion is to retribute by means of the 1st paragraph of section 372 (the Supreme Court judgments (Dika) no. 2313/2523, no. 282/2525, and no. 2526/2543). The author agrees with the 2nd opinion which seems more just than the other. However; there's still the question that what will be the outcome if it is impossible to retribute. The author thinks that it should be construed by adapting the restitution concept provided by the 1st paragraph of section 176. In addition to make clear of the provision, it is recommended that there be an amendment to the 1st paragraph of section 372 by adding the following phrase: "...if the debt payment has been performed, such payment shall be restituted. And if it is impossible for such restitution, there shall be compensation for it."

6. The problem resulted from section 372 may also occur when the debt payment becomes partly impossible but neither of the parties is at fault. If the creditor is to choose to accept the performance, how he or she can exercise one's right because the provision doesn't provide the result of this issue. The problem can be resolved by the construction to fill the gap of the contract using bona fide principle according to section 368, that is, the other party shall partly repay the debt accordingly and proportionately to what he or she gets paid. To make sure that the provision is clear enough, it is essential that there be an amendment to the 1st paragraph of section 372 as follow: "...should the performance is partly become impossible but the creditor still wants to receive the possible part which is still beneficial, the amount of the repayment shall be decreased in proportion to the amount that the debtor has paid."